YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1956

Volume I

Summary records of the eighth session

23 April–4 July 1956

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NOTE TO THE READER

The symbol A/CN.4/SR. (followed by a number) used in footnote references in this volume indicates the summary record of the meeting of the International Law Commission bearing the same number. For example, A/CN.4/SR.354 indicates the summary record of the 354th meeting.

The summary records of meetings prior to the eighth session—i.e., A/CN.4/SR. 1-330—are at present available only in mimeographed form.

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE EIGHTH SESSION

331st MEETING

Monday, 23 April 1956, at 3 p.m.

CONTENTS

Chairman: Mr. S. B. KRYLOV, First Vice-Chairman.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA-AMADOR, Faris Bey el-KHOURI, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Opening of the session

1. The CHAIRMAN, welcoming the members of the International Law Commission, said that they were meeting in an era of peaceful co-existence marked by a welcome relaxation of international tension. It was their duty as jurists to stress the role of international law, which provided the most effective means of solving many of the outstanding problems facing the international community. The Commission's agenda was a heavy one, and items 1 and 2—Regime of the high seas and Regime of the territorial sea respectively—were of particular importance.

2. He wished to pay a tribute to Mr. Amado for his outstanding contribution, which had led to some measure of agreement on the subject of the breadth of the territorial sea. He was, moreover, not unmindful of the contribution of the Latin-American members of the Commission generally, who had played such an active part in its work. It should not be forgotten that any progress achieved in the codification of international law had been largely due to the efforts of Latin-American jurists.

3. Expressing the hope that the Commission's work would be fruitful, he *declared the eighth session of the International Law Commission open.*

4. He then said that, in view of the absence of the Chairman, of Mr. Spiropoulos, and of several other members, it might be advisable to defer the election of officers till their arrival.

It was so agreed.

5. Mr. AMADO, speaking on behalf of himself and his Latin-American colleagues, thanked the Chairman for his kind words.

Adoption of the provisional agenda (A/CN.4/95)

6. The CHAIRMAN said that, since the Commission was not at full strength, it would be inadvisable to take any decision on the order in which the items of the provisional agenda should be considered. He would, however, welcome any comments.

7. Sir Gerald FITZMAURICE suggested that, in view of the necessity for submitting to the General Assembly, at its eleventh session, a report on items 1 and 2 of the provisional agenda, those items should be taken first. Moreover, until they had been disposed of, it might be advisable to defer a decision on the remaining items.

Further consideration of the provisional agenda was deferred.

The meeting rose at 3.25 p.m.

332nd MEETING

Tuesday, 24 April 1956, at 4 p.m.

CONTENTS

Chairman: Mr. S. B. KRYLOV, First Vice-Chairman; later Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Election of Chairman and Rapporteur

1. The CHAIRMAN called for nominations for the office of Chairman.

2. Mr. SANDSTRÖM proposed Mr. García-Amador.

Mr. García-Amador was elected Chairman by acclamation and took the Chair.

3. The CHAIRMAN thanked the Commission for the honour done to him.

4. At the previous session it had been agreed that Mr. François, the Special Rapporteur on the topics to which the greater part of the session would be devoted—namely, the regime of the high seas and the regime of the territorial sea—should also act as Rapporteur for the session. He suggested that that procedure be followed again, and that Mr. François accordingly be elected Rapporteur.

It was so agreed.

Order of business

5. The CHAIRMAN asked for members' views on the order in which the items on the provisional agenda (A/CN.4/95) should be taken up. It was essential to allow enough time for the preparation of the final report on the regime of the high seas and the regime of the territorial sea, which had to be submitted to the General Assembly at its forthcoming eleventh session.

6. Mr. FRANÇOIS said that he had already prepared a report (A/CN.4/97) on certain aspects of the final report to be presented by the Commission on the regime of the high seas and the regime of the territorial sea. He also proposed to prepare a supplementary report dealing with the comments from governments, which had been received in considerable numbers. The work would take approximately one week, and he hoped that consideration of items 1 and 2 could be deferred until it had been completed.

7. Sir Gerald FITZMAURICE wondered whether, in the meantime, the Commission might not consider Mr. François' report (A/CN.4/97).

8. Mr. FRANÇOIS suggested that the Commission might start with item 7, " Arbitral procedure: General Assembly resolution 989 (X) ".

9. Mr. LIANG, Secretary to the Commission, explained that in its resolution 989 (X) the General Assembly had invited the Commission to consider the comments of governments and the discussions in the Sixth Committee concerning the draft on arbitral procedure and to report to the General Assembly at its thirteenth session. It had also decided to place on the agenda for the thirteenth session the question of arbitral procedure, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on the subject. As Mr. Scelle, formerly the Special Rapporteur on arbitral procedure, had not yet arrived, it would be difficult to take up that item forthwith.

10. Mr. AMADO considered that the Commission should apply itself without delay to the paramount task of completing the work on items 1 and 2, and saw no reason why a preliminary exchange of views should not be held on Mr. François' report (A/CN.4/97), which was ready, while he was preparing the supplementary report. There was no great hurry to take up item 7, since the Commission had to report on it only in 1958.

11. Mr. ZOUREK, while agreeing with Mr. Amado that the Commission should take up items 1 and 2 as soon as possible, believed that during the coming few days a useful start might be made on items 7, 8 and 9, which in any event would have to be considered some time during the session. Certain matters of general importance raised in the first part of Mr. François' report, such as those listed in paragraph 23, could then be considered, particularly as that could be done without direct reference to the texts of the draft articles themselves, on which governments had submitted their comments.

12. Mr. SANDSTRÖM agreed with Mr. Zourek.

13. Mr. LIANG, Secretary to the Commission, explained that the Secretariat's note on item 9, which involved the examination of certain technical questions, would not be ready until the beginning of the week. It would therefore be desirable to start with item 8, thus giving Mr. Scelle an opportunity to prepare himself for the discussion on item 7.

14. The CHAIRMAN suggested, in the light of the discussion, that the Commission should start with item 8, consult Mr. Scelle on his arrival about taking up item 7, and then pass on to item 9. As soon as Mr. François' supplementary report was ready, the Commission should interrupt its discussions and decide how to proceed with items 1 and 2.

The Chairman's suggestions were adopted.

The meeting rose at 4.40 p.m.

333rd MEETING

Wednesday, 25 April 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Election of First and Second Vice-Chairmen

1. The CHAIRMAN called for nominations for the offices of First and Second Vice-Chairmen.

2. On the proposal of Sir Gerald FITZMAURICE, seconded by Mr. PAL,

Mr. Zourek and Mr. Edmonds were elected by acclamation First and Second Vice-Chairman respectively.

Question of amending article 11 of the Statute of the Commission: General Assembly resolution 986 (X) (item 8 of the provisional agenda) (A/3028, A/CN.4/L.65)

3. The CHAIRMAN invited the Commission to take up item 8 of the provisional agenda: Question of amend-

ing article 11 of the Statute of the Commission: General Assembly resolution 986 (X).

4. Faris Bey el-KHOURI said that, although the Commission was undoubtedly better qualified than the General Assembly to fill any casual vacancy, its composition would be strengthened were the decision to be taken by the latter body. He could see considerable advantage in the Commission's thereby being regarded as enjoying a status comparable with that of the International Court of Justice, and would therefore be in favour of amending article 11 of the Commission's Statute in that sense.

5. Mr. SANDSTRÖM endorsed that view, except in respect of the last year of the five-year term of office, during which time any casual vacancy should preferably be filled by the Commission itself.

6. Mr. ZOUREK, stressing the practical aspect of the question, pointed out that, owing to the General Assembly's regular annual sessions being subsequent to those of the Commission, the proposed amendment of article 11 would entail a very considerable delay whenever a vacancy occurred while the Commission was in session. Moreover, the privilege granted by article 11 to the Commission at its establishment in 1947 had never been abused; the vacancies already filled had given rise to no criticism, for the Commission had always discharged that particular duty with care and competence. The comparison with the International Court of Justice made by Faris Bey el-Khouri, despite its superficial attractiveness, was hardly relevant, for that body was a court of magistrates whose duty it was to administer justice, whereas the Commission's task was to prepare draft recommendations on selected problems of international law for submission to the General Assembly. He was opposed to the amendment of article 11.

7. Sir Gerald FITZMAURICE said that the previous speaker's point was pertinent; in fact, vacancies did tend to occur prior to a session of the Commission and after a session of the General Assembly. He therefore wondered whether consideration had been given to the probability that the proposed amendment would mean that the Commission would have to function at least one short for an entire session.

8. Mr. LIANG, Secretary to the Commission, said that he could recall no detailed discussion of that point at the tenth session of the General Assembly; but there certainly had been prolonged deliberation in 1947, when the Statute of the Commission had been adopted, and the weighty arguments that had led to the adoption of article 11 had been precisely those advanced by the two previous speakers.

9. Mr. AMADO well recalled the practical reasons for which article 11 had been adopted in 1947. At the General Assembly's tenth session, the amendment had been proposed without adequate preparation, and seemed to have been inspired by an exaggerated perfectionism. The argument in favour of the larger electorate had carried no great weight in the General Assembly, and the joint amendment submitted by the delegations of Costa Rica and India reflected the concern of many representatives. In view of the fact that as a result of its adoption the Commission might well be deprived of the services of one of its members for a whole year, he would oppose the amendment.

10. Mr. SANDSTRÖM reiterated that it would be advisable for the Commission itself to fill a vacancy occurring during the last year of the term of office. Speed in filling a given vacancy, however, was not of vital importance, because experience showed that the Commission had rarely been at full strength. Any vacancy which arose during the first four years of the term of office should certainly be filled by the General Assembly, which, in view of the political factors involved —he had in mind in particular the principle of geographical representation—was better fitted than the Commission to undertake that task.

11. Sir Gerald FITZMAURICE questioned the force of Mr. Sandström's point. In fact, the Commission had always tended to elect a national of the same country as his predecessor. The question of geographical representation therefore did not arise, and the issue was the purely practical one of selecting the most suitable individual to fill the vacancy.

12. He endorsed the views of Mr. Zourek and Mr. Amado. A two-year delay in filling a vacancy would be most undesirable. Unless there were stronger reasons for amending the article than had so far been adduced, he would favour the retention of the existing system.

13. Faris Bey el-KHOURI, referring to article 8 of the Commission's Statute, said that not only was the General Assembly better qualified than the Commission to assure a " representation of the main forms of civilization and of the principal legal systems of the world ", it was also the most appropriate body to apply that provision. That was a right that the Commission should not arrogate to itself.

14. With regard to the difficulty that the General Assembly met only once a year, he would recall previous difficulties encountered by the Commission itself in attempting to fill casual vacancies quickly. In any event, a quorum would always be assured. Despite the fact that the Commission's choice might be a better one, the decision should be left to the Assembly.

15. Mr. AMADO suggested that further consideration of the question be deferred until the arrival of the absent members of the Commission.

It was so agreed.

16. The CHAIRMAN said that for the same reason it would be advisable to defer also taking up item 7— Arbitral procedure: General Assembly resolution 989 (X).

It was so agreed.

Publication of the documents of the Commission: General Assembly resolution 987 (X) (item 9 of the provisional agenda)

17. The CHAIRMAN invited the Secretary to the Commission to make a statement on item 9 of the provisional agenda.

18. Mr. LIANG, Secretary to the Commission, recalling that the matter of publication of the Commission's documents had been discussed at the tenth session of the General Assembly, which on 3 December 1955 had adopted resolution 987 (X), based largely on the Commission's recommendations, said that the question had two aspects—current and future documents, and those relating to previous sessions. The General Assembly, while discussing the question of the languages in which the documents should be printed, had adopted a different solution for each part of the problem. It had finally been decided, first, that the current and future documents of the Commission should be published in English, French and Spanish, and, secondly, that documents other than summary records pertaining to previous sessions, such as special reports and principal draft resolutions, should be printed in their original language, while summary records should be printed initially in English only.

19. There were also certain technical questions that the Commission might care to discuss. He had in mind, in particular, the form of publication. The Secretariat's proposal contemplated a yearbook consisting of three parts: Part 1, containing preparatory documents—for example, special rapporteurs' reports, comments of governments and the like; Part 2, the summary records of the Commission's meetings; and Part 3, the Commission's report to the General Assembly. It would be impossible to print all the relevant documents of previous sessions in one year, and it was proposed to liquidate the backlog of the period 1949-1955 in three years.

20. He suggested that detailed discussion of the question should be deferred until the document to be submitted by the Secretariat had been distributed.

21. On the proposal of Mr. KRYLOV, *it was decided to defer further consideration of item 9 of the provisional agenda.*

Regime of the high seas; Regime of the territorial sea (items 1 and 2 of the provisional agenda) (A/CN.4/97)

22. Mr. FRANÇOIS, Special Rapporteur, explaining the issues connected with Section I: Order of chapters, of the special report (A/CN.4/97) he had prepared, said that the question of the order of chapters might appear relatively insignificant, but in view of the necessity for integrating the several questions treated into a systematic whole, it was of some importance. Of the two possible approaches described in paragraphs 5 and 6 of the report, his own preference was for the second—that of dealing with the topics in order of diminishing state sovereignty. If that method were adopted, the order of items would be, after an introduction, the territorial sea, the continental shelf, the contiguous zones and, lastly, the high seas. The Commission itself must decide that question of presentation.

23. In that connexion, he mentioned a letter received from Professor Böhmert, of Kiel, criticizing the fact that the Commission seemed to give equal consideration to the continental shelf and to chapters dealing with the other parts of the sea, and making the point that such treatment created an erroneous impression that what was in fact only *lex ferenda* was *lex lata.* He himself did not attach great importance to that objection, and would not favour the exclusion from a report to the General Assembly on the provisions governing the various parts of the sea of a chapter giving the continental shelf its rightful place, but pointing out, of course, that much still remained controversial in that matter. He therefore preferred the order of chapters set out in paragraph 8.

Further consideration of item 1 of the provisional agenda was deferred.

The meeting rose at 11.10 a.m.

334th MEETING

Thursday, 26 April 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas; Regime of the territorial sea (items 1 and 2 of the provisional agenda) (A/CN.4/97) (*continued*)

1. The CHAIRMAN, inviting the Commission to continue its consideration of the Special Rapporteur's report (A/CN.4/97) on the regime of the high seas and the regime of the territorial sea, called for comments on Section 1.

Section 1. Order of chapters

2. Mr. EDMONDS thought that, although the order of chapters was not of great importance, it would be more logical to start with the general principles relating to the freedom of the high seas and then to continue with the provisions on the territorial sea, the continental shelf and the contiguous zone as derogations from the general

rule. Such an arrangement would conform with that followed in legal codes.

3. Sir Gerald FITZMAURICE, while recognizing the largely practical reasons for which the Special Rapporteur had suggested inverting the order of chapters, also considered that in presenting a work of codification to the General Assembly, the Commission should follow the normal practice of starting with a statement of general principles, which would be followed by the special rules constituting the exceptions. However, for the time being, no final decision need be taken and the Commission could discuss the different sections of the report in whatever order was most convenient.

4. Mr. ZOUREK found the reasons given by the Special Rapporteur for the order he had suggested convincing, but considered that the articles on the continental shelf and the contiguous zone should be incorporated in the chapter on the high seas. The report would then consist of three parts: introduction, territorial sea and high seas. He made that suggestion because, internal waters apart, the sea was traditionally regarded by international lawyers as being divided into the territorial sea and the high seas and he feared that the Special Rapporteur's suggested arrangement might be interpreted as tending to separate the continental shelf and contiguous zone from the high seas. That that had never been the Commission's intention was demonstrated by the wording of articles 3 and 4 of the draft articles on the continental shelf adopted at the fifth session [1] where it was explicitly stated that the rights of the coastal State over the continental shelf did not affect the legal status of the superjacent waters as high seas or of the airspace above them. Since those rights of the coastal State were a restriction on the freedom of the high seas of the same nature as, for example, the right of pursuit, the relevant provisions must belong to the regime of the high seas.

5. Mr. PAL considered that the discussion on the order of chapters could be left till last, particularly as a number of members had still not arrived.

6. Mr. AMADO agreed with Mr. Zourek that the articles on the continental shelf and the contiguous zone, both of which were part of the high seas, could not be treated in separate chapters. He had no definite view as to whether the chapter on the high seas should come before that on the territorial sea and believed that the decision could be taken only after thorough examination of the various considerations involved.

7. Mr. SANDSTRÖM said it would be difficult to arrive at a perfectly logical order: the question should be left open till the end of the discussion. If the Commission met the view expressed by Mr. Edmonds and Sir Gerald Fitzmaurice, it would be faced with the difficulty of defining the high seas, as that could not be done without reference to the territorial sea. He was therefore inclined to favour the Special Rapporteur's order as modified by Mr. Zourek.

8. Mr. FRANÇOIS, Special Rapporteur, said that he had no very rigid opinion on the question of order except that, to be intelligible, the articles on the continental shelf and the contiguous zone must follow those on the territorial sea. He recognized the force of Mr. Zourek's arguments and found his suggestion perfectly acceptable. In the meantime, the decision could be postponed until the conclusion of the discussion.

9. Sir Gerald FITZMAURICE, while agreeing with Mr. Zourek that rules for the continental shelf and the contiguous zone formed part of the law of the high seas, pointed out that there were two possible methods of classification—either according to the status of the waters or according to the rights to be exercised therein. If the latter approach were adopted it would be necessary to start with the articles dealing with common rights, and then to proceed with those special rights enjoyed by the coastal State over the territorial sea, the continental shelf and the contiguous zone.

10. The CHAIRMAN suggested that, pending a final decision, the Commission might provisionally accept the order proposed by the Special Rapporteur as modified by Mr. Zourek.

11. Mr. FRANÇOIS, Special Rapporteur, said that he would have no objection to that procedure provided it were understood that the order of discussion would be dictated solely by practical considerations. For instance, owing to delay in receipt of the French translation of some of the governments' comments, he had had to start his supplementary report with the comments on the articles concerning the high seas.

Subject to that proviso, the Chairman's suggestion was adopted.

Section 2. Establishment of a central authority empowered to make regulations

12. Mr. FRANÇOIS, Special Rapporteur, said that the Commission had to decide whether the time had come to establish a central authority to deal with all questions relating to the sea and whether that authority should be invested with legislative functions with the power to render binding decisions, or whether it should act solely in an advisory capacity. The Commission had already proposed the creation of an international authority for the regulation of fisheries and it must now consider the problem in a wider context. In his report he had enumerated the various objections to a central authority and personally felt that at the present time the idea was impracticable.

13. The CHAIRMAN said that, if the Commission were to decide in favour of a central permanent authority with legislative, executive and quasi-judicial powers of the kind described in the Special Rapporteur's report, it would have to reconsider articles 31, 32 and 33 relating to the conservation of the living resources of the sea in the draft concerning the regime of the high seas, adopted at the previous session.[2] On the other hand, the establish-

[1] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), para. 62.

[2] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), pp. 12-13.

ment of a purely advisory body to co-ordinate the work of all existing bodies in the field would be entirely compatible with earlier decisions. It would be desirable for the Special Rapporteur to submit as a basis for discussion some more definite proposal about the structure and functions of the authority.

14. Mr. ZOUREK pointed out that, while it was true that the Commission, at its fifth session, had proposed the establishment of an international authority within the framework of the United Nations for the purpose of regulating fisheries, the provisions for the settlement of differences concerning the conservation of the living resources of the high seas, agreed upon the previous year, ran counter to that decision.

15. The Special Rapporteur had admirably summarized the objections to the creation of a central authority, but he must, in addition, draw attention to the fact that, apart from the question of expense, it could not be set up without encroaching upon the competence of the Food and Agriculture Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as on that of a number of specialized intergovernmental organizations.

16. Finally, the reception given by the General Assembly to the draft on arbitral procedure had been very instructive. The Commission should bear in mind that a proposal to institute a new organ with functions which States regarded as falling within their own province would undoubtedly meet strong opposition. With such powerful considerations militating against the creation of a central authority, he believed the Commission should explain in the commentary that, after mature consideration, the conclusion reached was that it would be inopportune.

17. Sir Gerald FITZMAURICE said that it was necessary to distinguish between creating a central authority as an integral part of any set of rules, as had been done in the case of the articles on the conservation of the living resources of the sea, which would be inoperable without that central authority, and making some form of quite separate general provision concerning the machinery for the settlement of disputes. From the purely theoretical point of view, the establishment of enforcement machinery was not part of the work of codification and should be left to the General Assembly or a diplomatic conference. At the present stage, it would be inappropriate for the Commission to include in its draft any such general provision concerning the settlement of disputes. It would be a different matter to propose the establishment of a purely advisory body, but even so he hardly thought the necessary provision could suitably be included in a code of rules; it should rather form the subject of a separate recommendation.

18. Mr. KRYLOV observed that the specialized bodies dealing with certain maritime problems had encountered difficulties even over matters affecting only one of the oceans. How much greater would be the difficulties of a central authority, the need for which was in any case very questionable. He strongly advised the Commission against embarking upon what might prove to be a fruitless discussion of a very complex question which could hardly be settled at the present juncture.

19. Mr. LIANG, Secretary to the Commission, agreed with the Special Rapporteur that the question raised in Section 2 must be discussed early in the proceedings, in order to enable the Commission to reach a decision. In view of the nature of the substantive provisions in the draft on arbitral procedure and in the two draft conventions on statelessness, it had been appropriate to include in them provisions concerning implementation. In the present case the question could be settled only by reference to specific articles, and the decision must therefore be postponed until those articles had been discussed in substance.

20. Mr. SANDSTRÖM stressed the importance of the distinction drawn by Sir Gerald Fitzmaurice, though he recognized that the articles on the conservation of the living resources of the sea would have been incomplete without machinery for implementation. Elsewhere in the draft the Commission must exercise the greatest caution before going too far in the direction of what, in his study entitled *Plateau continental et droit international* (1955), Mr. Scelle had called "functional federalism". At all events, before taking any decision, the Commission must first review all the draft articles.

21. Mr. PAL saw no useful purpose in holding a theoretical discussion. The moment to consider whether a central authority was needed would come when the Commission examined the draft article by article. He further pointed out that the provisions concerning settlement of disputes were not at present under discussion. That question was dealt with in Section 3, which would come up for consideration shortly.

22. Faris Bey el-KHOURI, contending that the Commission could not consider the question in the abstract, expressed the hope that the Special Rapporteur would present some definite proposal as a basis for discussion.

23. Mr. AMADO detected a note of irony in paragraph 9 of the Special Rapporteur's report. Indeed, only the most ardent idealist could envisage the possibility of establishing at the present time a central authority of the kind described in Section 2. The Commission must adopt a more realistic standpoint and concentrate on those immediate and practical problems concerning which States looked to it for guidance.

24. Mr. FRANÇOIS, Special Rapporteur, said that Faris Bey el-Khouri's suggestion that he should submit a definite proposal seemed to be based on a misunderstanding of the nature of his task. That was perhaps understandable in view of the fact that concrete proposals had been put forward in some of his previous reports and would in fact also be found in the supplementary report he was now preparing. It was, however, unreasonable to expect a rapporteur to adopt that as a general practice, because new topics might arise on which the Commission's opinion would be essential before he could attempt to draft a text. In any event, in paragraph 18—to which he also invited Mr. Amado's attention

—he had expressed his view quite categorically. He was not in favour of the establishment of a " maritime office ", and he had indicated obstacles in the way of such a course. During the discussion, that solution had not been defended. The general opinion seemed to be against the establishment of an authority with legislative powers, although the views concerning an advisory body were less clear-cut. The idea might be put forward in the comment to the relevant provisions.

25. The distinction drawn by Sir Gerald Fitzmaurice was valuable, but he could not go all the way with him. In any case, the question would be examined further under Section 3: Settlement of disputes. It would perhaps be wiser to say no more than that, for certain members, the establishment of a body or the designation of a *modus procedendi* for the settlement of disputes was an essential condition. In the case of a legislative body, no suggestion had been made that a centralized organ was a pre-requisite for the adoption of the various provisions. Before deciding, however, whether a body with consultative functions should be mentioned in the report, certain aspects of the question would need to be reviewed.

26. Mr. AMADO welcomed the Special Rapporteur's statement and hoped his remarks had not given the impression that he had in any way under-estimated the objective realism of Mr. François' previous reports.

27. Faris Bey el-KHOURI wished to make it clear that he had not intended to suggest that the Special Rapporteur should draft definite proposals as a general practice, but only when dealing with the items under consideration, where his views, which carried great weight, would provide invaluable guidance for the Commission.

28. Mr. SANDSTRÖM pointed out, with regard to the provisions for arbitral procedure in Section 5: Regulation of fisheries, that the question was one of regulation and not of the interpretation of a treaty. The arbitral authority was not a centralized organ, for it could be chosen by the parties themselves.

29. At the suggestion of the CHAIRMAN, *a decision on Section 2 was deferred.*

Section 3. Settlement of disputes

30. Mr. FRANÇOIS, Special Rapporteur, said there was some discrepancy between the different texts adopted by the Commission in respect of the different parts of the sea. In some articles provision was made for compulsory jurisdiction or arbitration, whereas in others no such procedure had been proposed. The Commission would have to take a decision on that situation. For instance, with regard to the high seas, the question arose whether arbitration should be compulsory in the case of disputes over the conservation of living resources only, or be extended to other matters. Pending ascertainment of the Commission's view, he had not prepared any specific texts.

31. Sir Gerald FITZMAURICE said that the distinction he had drawn in respect of Section 2 also applied to Section 3. It had been made clear in the comment on the article on the continental shelf, quoted on page 9 of document A/CN.4/97, that in the case of the continental shelf there were elements which necessitated setting up arbitral machinery for the interpretation of the articles where the rules were rather vague. That, however, was a special case and it did not necessarily follow that similar machinery must be set up for the code as a whole. In any case, such a task did not lie within the Commission's purview, but was properly the concern of the General Assembly.

32. Mr. SANDSTRÖM agreed that there might be certain cases arising out of new topics, such as the continental shelf, where, owing to the vagueness of the provisions, some form of compulsory arbitration would be called for. It should not be regarded as the general rule, however.

33. Mr. ZOUREK also agreed, and added that the Commission should not concern itself with general provisions for the settlement of disputes, for they were a matter for the body which might be called upon to prepare a draft convention on the basis of the Commission's recommendations. In specific cases, such as questions of the conservation of the living resources of the sea or the continental shelf, where the Commission might regard it as necessary to include provisions for compulsory arbitration, it would be essential to devise a formula that would allow States some latitude in selecting the most appropriate procedure. If only one approach were specified, such as recourse to the International Court of Justice, in practice any alternative, however desirable, would be excluded.

34. Mr. FRANÇOIS, Special Rapporteur, admitted that that point of view was defensible but felt it would create a very odd impression if the Commission were to deal only with the settlement of disputes in respect of the continental shelf, omitting the territorial sea and contiguous zone; questions might well be asked on the reason for such a distinction.

35. In the case of the territorial sea and contiguous zone, no stipulation with regard to arbitration had been included, because the question had never been raised. The relevant articles should be reviewed, however, and the necessity for extending the principle of compulsory arbitration to those provisions examined. As indicated in sub-paragraph (1), on page 11 of his report, a cautious approach would be necessary when the Commission came to express a final opinion on the question of comprehensive stipulations for compulsory arbitration.

36. It was true that the absence of such provisions in respect of the high seas, for instance, would undoubtedly stimulate critisism from certain quarters in the legal world, and certain governments might urge the insertion in the regulations of a compulsory jurisdiction or arbitration clause in respect of questions that the Commission had not yet considered. The different provisions should be reviewed, bearing in mind the decidedly vague nature of some of them. An immediate decision was not called for, but there was some force in the argument that, in dealing with certain other items,

the Commission should follow the same line as it had taken on the continental shelf.

37. Mr. ZOUREK thought it might be advisable to take a provisional decision in order to avoid subsequent reopening of the discussion. He suggested that there should be no provision for comprehensive compulsory arbitration, but that the procedure should be determined by the nature of each specific case. For instance, certain provisions with regard to the arbitration machinery applicable to disputes on fishing would not govern cases relating to the continental shelf.

38. At the suggestion of the CHAIRMAN, *further discussion of Section 3 was deferred.*

39. Mr. ZOUREK asked to what extent articles already adopted by the Commission would need revision in the light of replies from governments, and whether the Special Rapporteur had contemplated reopening the whole question of the continental shelf irrespective of government comments.

40. Mr. FRANÇOIS, Special Rapporteur, in reply, said that the Commission had a twofold task. In the first place, it had to examine the replies from governments in order to decide whether any modification of the Commission's original standpoint was called for. Secondly, it had to bring into line various provisions—even those upon which there were no government comments—in order to smooth out possible inconsistencies in the texts —for instance, in the article quoted in paragraph 24 of his report, which Mr. Scelle contended raised a question of discrepancy. He did not accept that contention, but the issue must be decided by the Commission. That, of course, did not imply revision of the text of every article, in particular those which had been adopted after a second reading. There was obviously no time to re-examine every question of principle. Texts already adopted should be reviewed only if uniformity of approach required such a course.

41. The CHAIRMAN, endorsing the Special Rapporteur's opinion, said that a distinction must be drawn between the two types of article: those that had been definitely adopted, such as the provisions on the continental shelf and contiguous zone, and those that had been provisionally approved at the seventh session and subsequently submitted to governments for comment, such as the articles on the territorial sea and the conservation of the living resources of the sea. Provisionally approved articles must be given detailed consideration and, where appropriate, amended. Definitely adopted articles must, as the Special Rapporteur recognized, be brought into line in the final report.

42. There was, moreover, a further reason for reviewing at least some aspects of those articles. The Inter-American Specialized Conference on Conservation of Natural Resources, which had recently met at Ciudad Trujillo, had studied not only the legal, but also the scientific and economic aspects of the subject and had adopted a resolution on the continental shelf very similar to the articles adopted by the Commission at its third session which had, in fact, inspired the Conference's recommendation. The new data on many technical aspects of the whole subject made available by the Conference would materially assist the Commission in its work, while fresh elements arising out of government replies must certainly be taken into account.

43. He himself intended to submit a proposal amending the definition of the continental shelf contained in the draft adopted by the Commission at its fifth session and providing a definition of the term " natural resources " used in the same draft.

The meeting rose at 1.05 p.m.

335th MEETING

Friday, 27 April 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas; Regime of the territorial sea (items 1 and 2 of the provisional agenda) (A/CN.4/97) (*continued*)

Section 7, sub-section A: — Right of passage in waters which become internal waters when the straight baseline system is applied

1. The CHAIRMAN, inviting the Commission to continue its consideration of the Special Rapporteur's report on the regime of the high seas and the regime of the territorial sea (A/CN.4/97), requested the Special Rapporteur to introduce Section 7, sub-section A.

2. Mr. FRANÇOIS, Special Rapporteur, outlined the historical background of the question as set out in paragraphs 43-48 of his report.

3. Sir Gerald FITZMAURICE said it was an important question and should certainly be considered by the Commission.

4. The Special Rapporteur, while summarizing his (Sir Gerald Fitzmaurice's) arguments very fairly, had given reasons for dissenting from them that were not entirely satisfactory. In paragraph 46 he had stated that the case of Her Majesty's Government proceeded from the erroneous assumption that the essential purpose of the straight baseline system was to extend the outer limit of the territorial sea. The proposal he (Sir Gerald Fitzmaurice) had put forward at the Commission's seventh session[1] had certainly not been dependent on that assumption. It was clear that the purpose of the straight baseline system was to increase the area of internal waters and, indirectly—although that consideration was only secondary—to extend the total area of waters over which the coastal State enjoyed jurisdiction.

5. The straight baseline system had two consequences: it extended the area of internal waters and, what was more important, established a new type of internal waters. Prior to the introduction of the straight baseline system, there were two clearly defined types of waters—territorial waters and internal waters. The majority of the latter lay behind the coastline of the State, and in that case no question of the right of innocent passage arose. Thus all or most waters to the seaward of the coastline were territorial waters, carrying the right of innocent passage because they were the only means of approach to the ports of the State in question or the usual means of getting from one part of the sea to the other.

6. The position had since changed; under the straight baseline system, waters to seaward of the coastline might become juridically internal waters and, incidentally, they might be of very considerable extent. In every other respect, however, such waters remained more akin to territorial waters, which they had previously been. It was therefore just as rational and necessary to have recognized access to them as previously. Again, as regards access to the open sea, waters that had been territorial had become internal. There was therefore a strong case for the recognition of the right of innocent passage through waters enclosed between the coastline and a straight baseline, at least in respect of waters to landward of the baseline through which the right of passage had previously been recognized.

7. It might be argued that the provision would be required in the code for that purpose, because in such cases a State would automatically grant the right of innocent passage. That condition, however, had applied when such waters had been territorial waters, and a specific rule that had been found necessary under those circumstances was equally justifiable when, by a change in legal status, they had become internal waters.

8. Mr. PAL wondered what was the precise meaning of the term " coastline " as used by the previous speaker.

9. His understanding was that the judgment of the International Court of Justice in the Fisheries case between the United Kingdom and Norway had not established any new principle of law and that the Commission had based article 5 on that judgment. If that were so, recognition of the establishment of a baseline was merely the application of an existing law. He failed to see, therefore, what was the innovation with regard to internal waters. He could not accept the assumption that a part of the territorial sea had been converted into internal waters, for it would seem that the area in question had always been regarded as internal waters, with accompanying right of innocent passage. Acceptance of Sir Gerald Fitzmaurice's proposal might adversely affect similar cases of tacit recognition of right of passage.

10. Sir Gerald FITZMAURICE, replying to Mr. Pal, said, first, that in referring to the coastline he had had in mind the physical line of delimitation of land and sea as depicted on the chart by the low-water mark.

11. Without going into the question of whether the judgement of the International Court of Justice in the case referred to had given effect to an existing law or had introduced an innovation, it could be said that at most the judgment amounted to a recognition of the faculty of certain countries to establish a straight baseline system. It was not mandatory, and indeed most countries had experienced no difficulties in the functioning of the low-water system. A straight baseline system had to be specially established, and unless and until that had been done, a country was deemed to operate the low-water-mark system, and the sea areas concerned remained part of the territorial sea, with the right of innocent passage. If, at a stroke of the pen, a State could convert those waters into internal waters, with the result of becoming authorized to withhold the right of passage, the situation would obviously be most unsatisfactory. A country's right to establish a straight baseline system should be subject to the right of innocent passage through the areas in question.

12. Mr. SANDSTRÖM, endorsing the opinion expressed by Mr. Pal, said that the judgment of the International Court of Justice in the Anglo-Norwegian dispute had been declaratory and not attributive. He recalled the Swedish Government's comments on article 5,[2] stressing the principle that the baselines delimiting the territorial sea should coincide with the outer limits of internal waters. There was no question of introducing a new type of waters.

13. Sir Gerald Fitzmaurice's argument was, however, fairly strong, and it should be possible, as he had suggested, to reserve the right of innocent passage through internal waters where such a right had been previously recognized.

14. Mr. EDMONDS said that Sir Gerald Fitzmaurice's arguments were compelling and unanswerable. One of the main reasons for the establishment of the straight baseline system was that of necessity where the configuration of certain coastlines made it difficult for a mariner to ascertain whether, at a given point, he was in territorial waters or on the high seas. The purpose of the system was one of clarification. There was no ground for applying different provisions to that part of the internal waters

[1] A/CN.4/SR.299, paras. 85-89 and A/CN.4/SR.316, paras. 44-56.

[2] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), pp. 38-39.

between the straight baseline and the coastline, for the sole reason that the territorial sea had been moved to seaward by the utilization of straight baselines. The Commission should adopt Sir Gerald Fitzmaurice's proposal.

15. Mr. FRANÇOIS, Special Rapporteur, said that the main question at issue was the purpose of establishing baselines. Sir Gerald Fitzmaurice had suggested that it was the extension of the territorial sea. The comments of Scandinavian governments, however, cast doubts on that assumption, for it appeared that the objective was to retain a certain area as internal waters for their own needs. If that were so, the question of recognition of the right of passage did not arise, because it was precisely to prevent such a contingency that the State claimed the straight baseline system.

16. There was a further objection to Sir Gerald Fitzmaurice's proposal. One advantage of the straight baseline system was that of simplicity, when applied to a very indented coast where it was difficult to fix the natural coastline. Sir Gerald Fitzmaurice's proposal would entail the complications of a line closely following the coast; in fact, two lines would be required, and the establishment of one of them could be a difficult operation. The lack of accuracy in the delimitation of the new zone would give rise to difficulties over the right of passage. Mr. Pal and Mr. Sandström had disposed of the impression that article 5 introduced a new system. It would be difficult to adopt a system which distinguished between States that already applied the straight baseline system and were justified in regarding the zone of internal waters as internal, and States that adopted the straight baseline system in future and were compelled to recognize the right of passage in the new zone.

17. Sir Gerald FITZMAURICE, replying to the Special Rapporteur, said that no difficulties should arise with regard to his second point, because granting of the right of passage depended merely on a knowledge of the position of the straight baseline, which was perfectly simple to ascertain. If his principle were admitted, immediately a vessel crossed that baseline it would have the right of innocent passage through the waters between it and the coast.

18. The Special Rapporteur's first point might be met by restricting the right of innocent passage to cases where that right had previously been normally exercised.

19. As regards reasons for the establishment of the straight baseline system, it would be highly probable that if the areas in question had genuinely had the character of true internal waters, they would not previously have been much used by international shipping, for if they had been so used, they would not as a rule have markedly shown the character of internal waters. If so, the case would not arise. On the other hand, he hoped that the Special Rapporteur would admit the possibility of some countries' being tempted to abuse the straight baseline system in order to extend the area of their internal waters to waters habitually used by international shipping.

20. Mr. SANDSTRÖM said that the reason for the establishment of the straight baseline system was surely not an extension of internal waters, but that such waters, owing to the geographical configuration of the coastline, were essentially internal waters in character.

21. Mr. FRANÇOIS, Special Rapporteur, said that there seemed to be grounds for possible agreement between him and Sir Gerald Fitzmaurice. He would appreciate it if the latter would prepare a text setting out his views.

22. Sir Gerald FITZMAURICE said he would willingly do that.

23. Mr. ZOUREK observed that the problem did not seem to be a new one, since even with the low-water-mark system, there was always a certain area of water between the low-water mark and the coast. Besides, as had already been pointed out, there were the waters of bays to be considered. Lastly, it must be remembered that the same problem arose in regard to the waters of ports, which belonged to internal waters, and to the waters of roadsteads, which many writers considered as also forming part of internal waters. It would be difficult to recognize, either in theory or in practice, two classes of internal waters subject to different legal regimes. He thought that the difficulty was mainly due to the fact that the right of innocent passage had not been sufficiently clarified. That right included lateral passage and also passage into and out of ports and roadsteads. If it were free access to ports that was contemplated, that right seemed to be universally recognized with regard to ports opened to international traffic by the coastal State. He felt that if that point were clarified, Sir Gerald Fitzmaurice would be satisfied.

24. The CHAIRMAN said that article 5, as had been his intention when he had submitted a text at the seventh session,[3] had been based on the judgment of the International Court of Justice in the Fisheries case between Norway and the United Kingdom, and it was natural that the Commission, having adopted a new article on the straight baseline system, should take account of the fundamental concept behind the Court's judgment. The Anglo-Norwegian dispute, however, had been in respect not of navigation, but of fishing. The question of navigation could be considered from a different angle. A distinction must be drawn between what he would call the old internal waters and new internal waters based on the straight baseline system. In the case of the former, the right of passage was in practice granted only for access to ports. In the case of the latter, however, the situation was different, because the new delimitation might affect the right of passage through the territorial sea, a right which should be safeguarded. A new law had recently been passed in Cuba providing for measurement of the territorial sea by the straight baseline system. But there was no intention of preventing innocent passage, the purpose of the law having been exclusively the conservation of the living resources of the sea.

25. Since there was no question of setting up a new type of internal waters, there should be no difficulty in

[3] A/CN.4/SR.317, para. 2.

adopting suitable articles, the various cases mentioned being regarded as exceptions to the general system governing internal waters.

26. Mr. KRYLOV said that he could not give a definite opinion on Sir Gerald Fitzmaurice's proposal until he had seen the text. Despite its attractions, he feared that it might be a somewhat risky innovation.

27. Mr. ZOUREK said that one important aspect of the question should be clarified: was any other right of passage involved than that of access to ports? The establishment of straight baselines amounted to simplification of the coastline, and it was therefore difficult to argue that the right of passage in waters thus enclosed was necessary for navigation on the high seas.

28. Sir Gerald FITZMAURICE said that Mr. Zourek's point, however valid, applied only to one, admittedly frequent, case: that of a bay of shallow indentation, the baseline being drawn from one end to the other. Baselines, however, were frequently drawn, not straight across bays, but between the land and islands or outlying rocks. Such baselines might well enclose waters that were a natural passage for ships proceeding on their lawful occasions to and from ports outside that zone.

29. Mr. SANDSTRÖM pointed out that there had been some criticism from governments with regard to the drawing of straight baselines for economic reasons, mentioned in article 5. That question was related to Sir Gerald Fitzmaurice's proposal.

30. Sir Gerald FITZMAURICE said the point was hardly relevant. It was not a question of the method of, or the reasons for, drawing a particular straight baseline. The point was that such a baseline existed.

31. Mr. AMADO referred to the Commission's report on its sixth session where the problem had been presented with admirable clarity. He had an open mind on the question. While appreciating Sir Gerald Fitzmaurice's point of view, he saw some danger in admitting exceptions in a corpus of general provisions.

32. Faris Bey el-KHOURI suggested that article 5 be amended in the sense that the establishment of a straight baseline by a coastal State should not involve any obstruction of navigation. The establishment of a straight baseline system should not be a unilateral act, but should be preceded by consultation with other States.

Further consideration of sub-section A was deferred.

Sub-section B: Exploration and exploitation of the sea-bed and the subsoil of the high seas outside the continental shelf

33. Mr. FRANÇOIS, Special Rapporteur, said there had been some criticism of the Commission for having neglected that aspect of the subject. It was, however, a purely theoretical question, and it would be a work of perfectionism to embark on its codification. The Commission should not examine it at present.

34. Sir Gerald FITZMAURICE, while in substantial agreement with the Special Rapporteur, pointed out that there were sea areas where the depth did not exceed 200 metres which were nevertheless remote from the continental shelf. Admittedly, they were few.

Further consideration of sub-section B was deferred.

Sub-section C: Scientific research on the high seas outside the continental shelf

35. Mr. FRANÇOIS, Special Rapporteur, referring to the articles in the *Yale Law Journal* of April 1955 on the subject of hydrogen bomb tests on the high seas, mentioned in paragraph 51 of his report, endorsed Mr. McDougal's contention, reproduced in abridged form in the *American Journal of International Law* of July 1955, that what was most relevant in prior prescriptions from the regime of the high seas was simply the test of reasonableness. He stressed the importance of the concept of reasonableness, which had been frequently introduced by the Commission. In paragraph 52, he had drafted a statement of principle which the Commission might care to consider.

36. Mr. PAL said that the statement of principle formulated by the Special Rapporteur in paragraph 52 of his report did not cover the issue referred to by him in paragraph 51. The issue referred to in paragraph 51 was not whether one State was entitled to use the high seas to the exclusion of another State on any ground, but whether a particular kind of use was at all and, if so, to what extent, permissible, to any State. Paragraph 51 correctly brought out the issue, but the statement of principle in paragraph 52 completely avoided it and proceeded to provide for some other quite innocuous case. In its comments on article 2 of the draft regulations on the regime of the high seas, the United Kingdom Government had suggested the addition to the four freedoms therein specified of a fifth freedom—namely, " freedom of research, experiment and exploitation ". The statement of principle by the Special Rapporteur in paragraph 52 was really in compliance with that suggestion of the United Kingdom Government.

37. The first question to be considered was whether there should be any statement of principle at all. There he agreed with the Special Rapporteur that the Commission should give a ruling one way or the other, for that the matter constituted an international issue was undeniable. The Commission's decision, however, must be in harmony with the conscience of the international community. The Commission could not ignore the fact that in recent years powerful weapons of mass destruction had been invented and tested on the high seas and that, although political considerations were involved, some provision should be inserted in the draft prohibiting the use of the high seas, which were *res communis*, in a manner which might be injurious to mankind. Unless that new factor were taken into account little purpose would be served by the declaration regarding the freedom of the high seas offered by the Special Rapporteur in the first sentence of the text he had put forward in paragraph 52. He would accordingly propose as a basis for discussion an alternative text reading:

" Freedom of the high seas does not extend to any such utilization of the high seas as is likely to be harmful to any part of mankind. Scientific research and

tests of new weapons on the high seas are permissible only subject to this qualification, as also to the qualification that they do not interfere with the equal freedom of other States."

38. Mr. KRYLOV believed that the first sentence of Mr. Pal's text would suffice. However, he had no rigid objection to the second sentence provided the words " and tests of new weapons " were deleted, since it was widely held that such tests should not be carried out on the high seas at all.

39. Mr. PAL accepted Mr. Krylov's amendment.

40. Sir Gerald FITZMAURICE said that, while there would be general sympathy with the object of Mr. Pal's proposal, it would be difficult to accept in its present form. First, it was couched in terms so general as to be incapable of precise interpretation. Controversy was already rife, and was likely to continue, concerning the extent to which scientific experiments were harmful, but on a strict interpretation of Mr. Pal's wording they might be prohibited altogether. Secondly, Mr. Pal had implicitly drawn an invidious distinction between the use of the high seas and the use of the land for carrying out experiments, which was quite untenable. Whatever the correct conclusion, there was no case for discrimination. In view of the political questions involved, it might be as well to avoid any specific mention of tests of new weapons, particularly as such a provision might prove unacceptable to governments. In article 2 of the draft concerning the regime of the high seas adopted at the previous session, the Commission had already enumerated certain freedoms,[4] and he had always felt that freedom to conduct scientific experiments and research should be added. That might be done now with a qualification on the lines of the first sentence in the Special Rapporteur's text.

41. Mr. PAL, replying to Sir Gerald Fitzmaurice's second objection, said that as he was not framing a general proposition it was unnecessary to mention scientific experiments on land. The Commission was now dealing with the high seas.

42. Mr. SANDSTRÖM said that he had felt hesitant about the need for a statement of principle of the kind put forward by the Special Rapporteur, and the present discussion had done nothing to dispel his doubts. Mr. Pal's text was extremely vague. It was unlikely that anything useful could be said at the present stage when so little was known about the effects of the scientific experiments in question. However, if it were finally decided that some provision had to be included, he would be prepared to support the first sentence of the Special Rapporteur's text.

43. Mr. ZOUREK said that the principle stated in the comment on article 2 that " States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States " [5] was the generally accepted corollary to the freedom of the seas, but the Special Rapporteur appeared to be going back on it by introducing the concept of " reasonableness ". Though the Commission had on some occasions resorted to that criterion for lack of anything better in matters where rules of international law did not yet exist, in the present instance it was quite inadmissible, because it would enable States to violate established principles of international law by claiming that their action was " reasonable ".

44. The Commission must distinguish clearly between scientific experiment and tests of weapons of mass destruction. Experiments on the high seas with atomic or hydrogen bombs must be considered as a violation of the principle of the freedom of the high seas. He feared that the Special Rapporteur had allowed himself to be influenced too quickly by the advocate of one point of view without studying the numerous articles, notably by Japanese authorities on international law, which put forward the other.

45. There was no reason for abandoning or shifting from the position adopted at the previous session. Even those who wished to introduce the criterion of " reasonableness " must admit that if account were taken on the one hand of the interests of native populations, of the rights of all users of the high seas and, with regard to the living resources of the high seas, the rights of all mankind, and on the other hand of the interests of those who carried out experiments with weapons destined to destroy humanity, the answer to the question raised could only be that given by existing international law. He did not agree with those who wished to ignore the question raised during the discussion on the pretext that it was a political one; for the application of international law always had political aspects. The Commission had been called upon to define the regime of the high seas, and it must also explain what constituted a violation of the freedom of the high seas. Otherwise serious harm might result for the populations of regions bordering on the high seas, for maritime navigation and for all those who lived by the produce of the sea. If the Commission's report passed over that point in silence it would be an inexplicable omission. The text proposed by Mr. Pal, in its amended form, was fully justified and formulated existing international law.

46. Mr. FRANÇOIS, Special Rapporteur, said that it was precisely because he realized that the public would be surprised if the Commission were to pass over the subject in silence that he had put forward his text as a basis for discussion. Even if it were eventually decided not to include any provision among the draft articles, at least a useful exchange of views would have been held.

47. He agreed with Sir Gerald Fitzmaurice that Mr. Pal's text was far too general and quite unacceptable as a legal text. There were a number of activities, such as fishing with very modern equipment, which could be prejudicial to other States, but could not be prohibited, and in that connexion he would like to point out in reply to Mr. Zourek that the particular sentence in the comment on article 2 to which he had drawn attention was loosely phrased and would be difficult to defend on purely legal

[4] *Official Records of the General Assembly, Tenth session, supplement No. 9.* (A/2434), para. 18.

[5] Ibid.

grounds. Scientific research and experiment must be judged according to whether they were justified even if harmful, and he saw no way of avoiding the criterion of " reasonableness ". He saw no insurmountable objection to omitting the second sentence of his text, although that would be somewhat unrealistic, since it was obviously tests of new weapons which were in question.

48. Mr. PAL considered that the term " harmful " was perfectly capable of precise definition; nor could there be any doubt about the meaning of the words " any part of mankind ", his object being to protect any group of people, however small. The example of modern fishing techniques chosen by the Special Rapporteur was not a happy one, because, while their use might damage the economic interests of other States, they could not possibly be described as harmful to mankind. He therefore again appealed to the Commission to accept his draft. The Special Rapporteur had really failed to come to grips with the issue, and the first sentence of his text, though it might salve the conscience of those members who were uneasy about omitting all mention of the matter, merely expressed a general limitation on the freedom of the high seas.

49. Mr. KRYLOV said that the difference between the two texts was that the Special Rapporteur's, which he regarded as unsatisfactory, enunciated an obligation on States, whereas the purpose of Mr. Pal's was clearly to protect human beings from exposure to danger. He continued to favour the latter.

50. Mr. FRANÇOIS, Special Rapporteur, said that in order to meet Mr. Krylov's point he would be perfectly prepared to substitute the word " others " for the words " other States " in his text.

51. Mr. SANDSTRÖM maintained that the real difference was that the Special Rapporteur had introduced the concept of what was reasonable and justifiable, so that utility had to be balanced against possible harmfulness. That had been the criterion in the past, when naval exercises and target practice had been carried out although they might have caused inconvenience to other States.

52. Mr. KRYLOV observed that the Commission was at the moment concerned with tests, whose effects could still not be properly measured.

53. Sir Gerald FITZMAURICE maintained his original objections to Mr. Pal's text, which, while covering the special case its author had in mind, would also go far beyond what was desired. He also pointed out that many scientific experiments which had produced results of the utmost benefit to mankind had, during the early stages, proved very harmful to individuals.

54. Mr. AMADO observed that if the Special Rapporteur's second sentence were omitted, the remaining text, while in conformity with the other articles, would contain no specific reference to scientific research. He therefore suggested that the words " for purposes of scientific research " should be inserted after the words " high seas ".

55. While sympathizing with the object Mr. Pal had in mind, he preferred the Special Rapporteur's text, which was framed in more suitable language for a legal code. At the same time he would find it difficult to vote against the first sentence in Mr. Pal's text and hoped that the proposal would be expressed in more suitable form.

56. Mr. EDMONDS said that the Special Rapporteur and Mr. Pal had approached the problem from entirely different angles. The former was concerned to ensure that States should do nothing on the high seas which might prevent others from exercising the same rights, while the latter wished to prevent States from using the high seas in a way which might cause injury to persons. Because of the political considerations involved and the difficulty of assessing the effects of experiments scientifically, he believed it would be prudent to make no statement on the matter. It would only create confusion and might result in unforeseen difficulties.

57. Mr. ZOUREK said that the word " unreasonably " was extremely dangerous and might destroy the freedom of the high seas, so that he could not condone its use. Nor did he think that on any grounds it would be possible to justify tests with weapons of great destructive power. He disagreed with both arguments adduced by Mr. Sandström. Experiments with atomic weapons, unlike naval exercises, could not be controlled and a great deal was already known about their effects, even on people many hundreds of miles away from the site of the experiments. The extremely harmful effects of experiments with atomic bombs were known from previous tests, particularly that in which the Japanese fishing vessel *Fukuryu Maru* had been subjected to radioactivity although outside the danger zone. He agreed with Sir Gerald Fitzmaurice that in the interests of mankind the real solution was to prohibit all tests of that nature.

58. Sir Gerald FITZMAURICE pointed out that he had not expressed any opinion as to whether or not atomic experiments should be carried out. He had only contended that, if they were prohibited, the ban should not single out the sea for the application of a special regime.

59. Mr. AMADO agreed with Mr. Zourek that the concept of reasonableness was far too subjective for a legal text.

60. The CHAIRMAN said that a fundamental difference between the two texts which had not yet been mentioned was that they were designed to protect entirely different interests. The Special Rapporteur was concerned to protect the freedom of the seas, of navigation, of fishing, etc., whereas Mr. Pal's aim was to protect the health and personal safety of human beings throughout the world. Perhaps it might be possible to word the proposals in such a way that both could be adopted on their own merits.

61. Mr. KRYLOV said that the difference between the two texts was not as great as the Chairman had suggested. After all, law was made *ad usum hominis*.

62. Mr. FRANÇOIS, Special Rapporteur, said that after the very useful exchange of views it would be

desirable to postpone a decision until they came to discuss article 2 of the draft of the regime of the high seas, by which time some of the absent members might have arrived.

It was so agreed.

The meeting rose at 1.05 p.m.

336th MEETING

Monday, 30 April 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Adoption of the provisional agenda (A/CN.4/95) (*resumed from the 331st meeting*)

1. The CHAIRMAN, observing that the Commission was now practically at full strength, proposed that the provisional agenda be now adopted.

It was so agreed.

Publication of the documents of the Commission: General Assembly resolution 987 (X) (item 9 of the agenda) (A/CN.4/L.67) (*resumed from the 333rd meeting*)

2. The CHAIRMAN, before inviting the Commission to resume consideration of item 9, welcomed Mr. L. Padilla-Nervo, who was attending the Commission's session for the first time.

3. Mr. PADILLA-NERVO said that he had followed the work of the Commission, which he regarded as one of the most important organs of the United Nations, with great interest. Greatly honoured at having been elected, he had much regretted that special circumstances had prevented his taking part in the Commission's deliberations at the previous session; he hoped to have an opportunity now of making a modest contribution to its work.

4. Mr. LIANG, Secretary to the Commission, introducing the Secretariat's note on item 9 (A/CN.4/L.67) said that it dealt with a number of points in summary form. Of course the Commission was at liberty to submit to the General Assembly any further views it might have concerning the publication of its documents.

5. Mr. KRYLOV thought that most of the essential points had already been settled by the General Assembly in its resolution 987 (X). He agreed with the Secretariat that the documents should be printed by session rather than by subject so as not to run into difficulties of classification. He also agreed that everything must be done to avoid printing anything twice over. He was not entirely clear as to what was meant by " administrative questions of minor importance " in paragraph 8 of the Secretariat's note. He presumed that references to such important matters as the election of officers or elections to casual vacancies would not be omitted from the printed text of the summary records. In any work of codification the choice of documents to be printed was a major problem and he doubted whether memoranda by the Secretariat should be included in the same volume as the essential material—namely, the reports of the special rapporteurs, the summary records and the Commission's final report on the session. He would be particularly averse from such a procedure if the Secretariat's memoranda were disproportionately long by comparison with the reports of the special rapporteurs. The Commission might consider printing such memoranda separately. Finally, he wondered whether, as there would be heavy arrears to make up, it might not be advisable to start work on the more recent sessions rather than adhere to a strict chronological order.

6. Mr. LIANG, Secretary to the Commission, explained that the " administrative questions of minor importance " referred to in paragraph 8 were those of a purely procedural kind, which had no bearing on the substantive work of the Commission. He believed the Secretariat could be entrusted with the responsibility for deleting any such references from the summary records. Obviously passages relating to important matters such as the election of chairmen or discussions on the Commission's place of meeting would be retained.

7. It was for the Commission to decide whether Secretariat memoranda and studies, which were generally prepared for the assistance of special rapporteurs and were factual compilations for which he would not claim any scientific value, were to be printed.

8. Mr. KRYLOV said that it might not always be easy to decide whether or not to print the Secretariat's memoranda when they were related closely to the report of the special rapporteur.

9. Mr. SANDSTRÖM argued that although the Secretariat's memoranda might only be compilations, they sometimes had considerable value and were used extensively by the special rapporteurs. Consequently, in some

instances they might have to be reproduced, particularly if they contained material omitted from the special rapporteurs' reports.

10. Mr. AMADO, referring to the last operative paragraph of General Assembly resolution 987 (X), said that the Commission had to decide whether it was necessary to re-submit the question of the printing of its documents to the General Assembly. Most of the points to be settled had been clearly stated in the Secretariat's note.

11. Mr. SALAMANCA did not think any hard-and-fast rules could be laid down as to which documents should be printed and which not, and therefore suggested that it be left to the Chairman, in consultation with the Secretariat, to decide at the end of each session. The Secretariat's suggestions concerning the publication of documents from previous sessions seemed quite acceptable.

12. Mr. PAL considered that all the types of document, including Secretariat memoranda, mentioned in the Secretariat's note were covered by sub-paragraphs 1 (*a*) and 1 (*b*) of resolution 987 (X) so that there was no need for the Commission to refer the matter back to the General Assembly.

13. Mr. LIANG, Secretary to the Commission, wished to make clear that the final report of each session would continue to be printed in the same form as before for submission to the General Assembly, but would also be reproduced at the end of the volume for each session.

14. He agreed with Mr. Pal that the " studies " referred to in sub-paragraph 1 (*a*) of the General Assembly's resolution included Secretariat memoranda.

15. In reply to Mr. Amado, he said that the Commission could refer the question to the General Assembly again if it chose, but first it should examine whether there was any necessity to do so.

16. Sir Gerald FITZMAURICE considered that the points of principle had already been approved by the General Assembly and that there was no need to refer back to that body. It only remained for the Commission to decide certain matters of detail. The decisions would be recorded in the report on the session, so that any points arising from them could, if desired, be raised in the Sixth Committee.

17. Summarizing those matters of detail, he said that the Secretariat's suggestion about omitting from the summary records minor questions of procedure could be accepted, as well as the suggestions regarding working documents in paragraph 9 of its note. With regard to paragraph 10, he considered that any Secretariat papers containing factual information of value should definitely be printed, but that working papers in the strict sense—that was, documents such as those reproducing two parallel texts for purposes of comparison and whose only aim was to facilitate discussion—should not be printed, because the texts would already have been reproduced elsewhere. He agreed that, as suggested in paragraph 15, editing by session was the only practicable course.

18. Finally, as it was desirable to print all material on the law of the sea as quickly as possible, he would support Mr. Krylov's idea of starting with the more recent sessions, the fifth, sixth and seventh, and leaving the earlier ones until later.

19. Mr. SPIROPOULOS, pointing out that the General Assembly had already authorized the publication of virtually all the Commission's documents, said that there was no need to refer the whole question again to that body. He supported Mr. Salamanca's view that it could be decided at the end of each session which documents should be printed. The decision with regard to the first seven sessions might be left to the Secretary, as it would be quite impracticable for the Commission to examine all the documents involved. The essential was to select those documents which were indispensable for an understanding of the summary records; consequently, any working paper used as a basis for discussion must be reproduced.

20. For practical reasons he was inclined to favour the suggestion to start by printing the documents for the years 1953-1955.

21. Mr. LIANG, Secretary to the Commission, to avoid any misunderstanding over the Secretariat's suggestions in paragraph 9 regarding the printing of documents which had originally appeared in another language than English —the language in which the summary records would be printed—emphasized that those suggestions related only to the first seven sessions; from the present session onwards both documents and summary records would be printed in all three languages.

22. He also wished to make clear that paragraph 10 related only to working papers, in which material reproduced elsewhere was classified, analysed or summarized for the convenience of members.

23. Concerning dates of publication, he wished to inform the Commission that the Secretariat had already started editing the volume on the first session, a comparatively easy task, because there had been no reports by special rapporteurs and the memoranda submitted by the Secretariat at that session had already been printed. The Secretariat also intended to complete work on the second volume by October, so that, together with the volume on the present session, three would have been prepared for the printer by that date. While he appreciated that the material on maritime questions was of great topical interest, it would be impossible, for practical reasons, to follow Mr. Krylov's suggestion, and the volumes for the fifth, sixth and seventh sessions might not be out until 1958.

24. Mr. SPIROPOULOS pointed out that although, since the Sixth Committee could not discuss the draft in detail, it was not particularly important for the General Assembly to have all the reports on maritime questions in printed form when it came to discuss the Commission's final draft to be prepared at the present session, the volumes from the fifth session onwards would be very much needed if an international conference on the matter were convened.

25. Mr. SALAMANCA said that the Secretariat's note should have mentioned the fact that work had already been started on the volumes for 1949 and 1950.

26. Mr. LIANG, Secretary to the Commission, explained that as the publication programme was subject to certain financial arrangements, the Secretariat had not wished to commit itself to any specific dates.

27. Faris Bey el-KHOURI believed that the Secretariat could proceed immediately with the work, since all the points at issue had already been approved by the General Assembly.

28. Mr. ZOUREK also considered that there was no need to refer the question again to the General Assembly, which had left the Commission all the necessary latitude to proceed with the publication of its documents.

29. With regard to the title, he suggested that " Yearbook " would not be an entirely satisfactory description of the contents, and that the volume might be called " Documents of the International Law Commission for the year —— ".

30. Mr. LIANG, Secretary to the Commission, said that the suggestion made by Mr. Krylov the previous year to call the volume a yearbook had been considered a practical one by the Secretariat, because that title conformed with United Nations practice and had as a precedent the yearbook of the Institut de droit international. The title suggested by Mr. Zourek was not so satisfactory. Moreover, it might be misleading as suggesting a distinction between the Commission's documents and its summary records.

31. Mr. EDMONDS suggested that the volume might be called " Proceedings of the International Law Commission for the year —— ".

32. Mr. LIANG, Secretary to the Commission, wondered whether such a title might not convey the impression that the volume contained the summary records only, without any of the supporting documents or the final report.

33. The CHAIRMAN did not feel the Commission need take any final decision at the present stage. The consensus of opinion was clearly that the subject need not be referred to the General Assembly again. Perhaps it would suffice to request the Rapporteur to insert a passage in the final report summarizing the views expressed during the present discussion.

34. Sir Gerald FITZMAURICE maintained that, having already agreed not to re-submit the question to the General Assembly, the Commission should now approve the suggestions put forward by the Secretariat in its note, it being understood that they would be interpreted in the light of the present discussion, and should reach some agreement on the title of the publication and the order in which the first seven volumes should be printed, so as to give the Secretariat some guidance.

35. Mr. AMADO agreed that, after the present exchange of views, a decision could be taken.

36. As perfection was not of this world, he saw no reason why the volume should not be called a yearbook.

37. The CHAIRMAN thought it would be difficult to adopt any general and rigid decision *a priori* as to which documents should be printed each time.

38. Mr. SALAMANCA pointed out that that was precisely the reason why he had advocated the practical solution of the documents being selected at the end of each session by the Chairman in consultation with the Secretariat.

39. Mr. SANDSTRÖM supported Mr. Salamanca's view.

40. Mr. LIANG, Secretary to the Commission, did not believe that that solution was altogether practicable, owing to the great pressure of work towards the end of the session. However, the problem of selection would really arise only with regard to documents of previous sessions and the Secretariat could consult the Chairman by correspondence on any doubtful points.

41. The CHAIRMAN suggested that the Commission decide not to re-submit the question of printing its documents to the General Assembly, and that the Chairman and the Commission, in consultation with the Secretary, should decide at the end of each session which documents should be printed, as well as the order of publication of the volumes for previous sessions. He also suggested that the Commission approve in principle the suggestions put forward in the Secretariat's note (A/CN.4/L.67).

The Chairman's suggestions, together with the further suggestion that each volume should contain an index, were approved.

Question of amending article 11 of the Statute of the Commission: General Assembly resolution 986 (X) (item 8 of the agenda) (A/3028, A/CN.4/L.65) (*resumed from the 333rd meeting*)

42. The CHAIRMAN, inviting the Commission to resume its consideration of item 8 of its agenda—Question of amending article 11 of the Statute of the Commission, relating to the filling of casual vacancies in the membership —recalled the Commission's decision at its 333rd meeting[1] to defer further consideration of the question, pending a fuller attendance of members.

43. Mr. PADILLA NERVO said that, in view of the fact that the question of amending article 11 would be before the General Assembly at its forthcoming eleventh session, it was desirable that the Commission should express its views clearly. There was no doubt that in such an important matter the Sixth Committee of the General Assembly would acknowledge the weight of the Commission's opinion.

44. Mr. SALAMANCA, in the light of the Commission's historical development, stressed the importance to be attached to the political factor in any consideration of the question of amending article 11. For that reason, the filling of casual vacancies should be undertaken by the General Assembly. The summary record of the previous discussion did not suggest that the difficulties indicated were of vital importance, because in fact the Commission often worked at less than full strength.

[1] A/CN.4/SR.333, para. 15.

Moreover, the extension of the term of office of members from three to five years would mitigate that disadvantage to some extent.

45. Sir Gerald FITZMAURICE pointed out that, with regard to the person elected, the result would be the same whether casual vacancies were filled by the Commission or by the General Assembly. The political element would have been effectively taken into account at the previous full elections by the General Assembly, which always gave due consideration to, *inter alia*, the principle of geographical distribution. Experience had shown that the Commission had tended to fill any casual vacancies by electing a national of the same country as the previous member. The only question that arose, therefore, was that of the particular individual upon whom the choice should fall; there again, the tendency had been to pay careful attention to the views, unofficially expressed, of governments; that tendency, already evident in the Commission, would be even more clearly manifested in the General Assembly. The only factor involved was that of practical convenience. The sole result of leaving the decision to the General Assembly would be that the person elected would have to miss at least one session before being able to take an active part in the Commission. The only possible advantage of amending the article would be that the Commission would be relieved of a certain responsibility. The value of that particular relief, however, had not been assessed.

46. Mr. SANDSTRÖM agreed that the question of which body should fill casual vacancies in the Commission was not of great importance in itself. While appreciating the stress laid by Mr. Salamanca on the political factor, he would stand by the opinion he had voiced at the 333rd meeting [2] to the effect that, while the General Assembly could fill any vacancy arising during the first four years of the term of office, the Commission itself should fill any vacancy occurring during the last year.

47. Mr. AMADO said that the Commission should place on record in simple, precise and objective terms its opinion that, while appreciating the General Assembly's interest in the question, for reasons of practical convenience it was of the opinion that casual vacancies should be filled by the Commission itself.

48. Mr. ZOUREK, also recalling the opinion he had expressed previously,[3] said that the existing system had worked well. While acknowledging the force of Mr. Salamanca's point, he would remind him that political factors were very much to the fore in elections by the General Assembly. Provided that the Commission respected the spirit of the General Assembly's decisions, there could be no disharmony between the two bodies. The elections by the Commission under article 11 of its Statute showed that, as regards the final choice of new members, the Commission had in all cases observed the geographical distribution of the legal systems represented in the Commission, resulting from the earlier elections by the General Assembly. Practical considerations, as Sir Gerald Fitzmaurice had pointed out, should rule out the lengthy and complicated procedure of an election by the General Assembly, all for one vacancy alone. Mr. Amado's views [4] deserved support.

49. The CHAIRMAN put the question to the vote in the form of a proposal to recommend that article 11 of the Statute of the Commission be amended to provide that casual vacancies should be filled by the General Assembly instead of by the Commission itself.

The proposal was rejected by 8 votes to 2, with 3 abstentions.

50. The CHAIRMAN said that the Commission's report to the General Assembly would make clear the weight given by it to the practical considerations involved.

It was so agreed.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/99 and Add.1-5)

Conservation of the living resources of the high seas

51. Mr. FRANÇOIS, Special Rapporteur, said that some governments had submitted comments in which the principles proposed by the Commission regarding conservation of the living resources of the high seas were criticized. The objections of principle—in particular those of the Governments of China and India—called for careful consideration. The Government of the United Kingdom had also made a full reply, reproduced in document A/CN.4/99/Add.5, which contained criticisms of principle on certain points.

52. The Indian Government's criticism bore mainly on the alleged inadequacy of the provision safeguarding the rights of the coastal State which, it was claimed, should have the exclusive right of taking measures for the protection of the living resources of the sea within a reasonable distance of its coast. That criticism affected in particular those under-developed countries which for political reasons had hitherto been unable to assert their rights to develop their fishing fleets. The Chinese Government had expressed its view in less detail.

53. The United Kingdom Government had taken the opposite view in its criticism of article 29, which aimed at giving a wide degree of latitude to coastal States in that matter. Without proposing an amendment, it had found the principle enunciated in article 29 unacceptable. The replies of those three governments had fully ventilated the problem; other government comments had dealt with the jurisdiction given to the coastal State in article 29, and, in particular, with paragraph 3 of that article, and with other aspects of the question.

54. Sir Gerald FITZMAURICE thought that the Special Rapporteur had hardly given a fair description of the opinion of the United Kingdom Government. There was no question of any radical objection to the principle of article 29; indeed, the document made it clear that the United Kingdom Government was by no means unsympathetic to the idea. It had merely

[2] A/CN.4/SR.333, para. 10.

[3] A/CN.4/SR.333, para. 6.

[4] A/CN.4/SR.333, para. 9.

pointed out that articles 29 and 32 would require further study before an opinion could be reached as to whether an acceptable formulation could be devised for what was fundamentally a new principle.

The meeting rose at 5.50 p.m.

337th MEETING

Tuesday, 1 May 1956, at 10 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/99 and Add.1-5) (*continued*)

Conservation of the living resources of the high seas (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the comments by governments on the draft articles relating to conservation of the living resources of the high seas.

2. Mr. PAL, recalling that in article 2 of the provisional articles concerning the regime of the high seas the Commission had in part defined freedom of the high seas, including freedom of fishing, said that in the comment on that article it was pointed out that any freedom exercised in the interests of all entitled to enjoy it must be regulated. Articles 24 to 30 were accordingly regulating articles, while article 24 in addition reaffirmed the freedom of fishing. The Government of India had no quarrel with the drafting of that article. Articles 25 to 30 were regulating articles proper, while articles 31 to 33 dealt with the settlement of disputes, and—as he understood the position—the main concern of the Government of India was with the regulating articles proper.

3. The Commission, in its comment, had recognized the special interests both of the coastal State and of all other States interested in fishing on the high seas, and the Indian Government had proceeded on that basis. The coastal State, however, had not been defined in articles 25 to 30, and the Indian Government, in its amendment to article 26, had therefore proposed a limitation of the contiguous sea area to a belt of a hundred miles from the coast.[1] The Indian proposal concerning article 25 amounted to a qualification of the area of the high seas concerned by granting regulatory powers of the coastal State. In other areas of the high seas, of course, freedom of fishing would be enjoyed by the nationals of all States. Where the three conditions—the hundred-mile belt, engaging in fishing by nationals of the coastal State, and the fact that nationals of other States were not so engaged —were fulfilled, the coastal State with its special interests had a perfectly legitimate claim. In article 26 again, the Indian proposal would limit the contiguous area to a belt of one hundred miles from the coast, within which the coastal State would have regulatory powers, while beyond that belt the general provisions of the article would apply. It would be seen, therefore, that in both articles 25 and 26, the Indian Government proposed that in the contiguous zone—which was defined—regulatory powers would be granted to the coastal State. That fundamental idea also underlay its amendments to the other articles which, however, should not raise any difficulty.

4. With regard to articles 31 to 33, he understood that the Government of India would reserve its position until a decision had been reached on the subject of arbitral procedure. He wished to reserve his right to revert to the Indian proposals in the light of the discussion.

5. Mr. SANDSTRÖM said that, if a balanced view were to be obtained on the articles on the conservation of the living resources of the high seas, they should not be taken separately; for instance, if article 25 were read in relation to articles 28 and 29, a very different light would be thrown upon it. Paragraph 1 of article 28 was also applicable to cases covered by article 25, and under articles 28 and 29 the coastal State was granted what he might call its natural rights; it would, moreover, always have the opportunity of taking the initiative in making conservatory regulations. It would be inappropriate further to extend those rights to the detriment of those of other States interested in fishing in the same waters.

6. The only possibility that might be considered was a stipulation that a single State whose nationals were engaged in fishing in the area in question should approach the coastal State prior to initiating such conservation measures.

7. Sir Gerald FITZMAURICE said that the main impression he had received from reading the comments by governments on the provisional articles was one of optimism, tempered, however, by a certain sense of disappointment. On the whole, no serious objections had been raised, so it might be inferred that there was substantial acceptance of the provisions; that was all to the good. On the other hand, comments by some governments raised doubts as to whether the essential objectives of the Commission could be achieved.

8. The question of fisheries was linked with the problem of the limits of the territorial sea. Appreciating that many claims to a wide belt of territorial sea were inspired by

[1] A/CN.4/99.

fishery considerations, the Commission had hoped that the approach by means of the articles on the conservation of living resources might be successful in obtaining a modification of such claims and, subsequently, a large measure of agreement on the proper extent of the territorial sea. Unfortunately, the prospects of that hope being realized did not seem bright, for there was no indication that the governments in question were likely to regard the Commission's fishery proposals as sufficient. In fact, to judge from its comments, which seemed to represent a certain school of thought, the Government of Iceland appeared to regard the Commission's articles not as a substitute for exclusive coastal fisheries jurisdiction, but as merely additional. If that were so, the Commission would have to admit failure in that respect. That would not justify withdrawal of the provisional fishery articles, which were of considerable value, but it would be likely to increase the difficulties of reaching eventual agreement on generally acceptable regimes of the high seas and of the territorial sea.

9. Turning to the amendments of the Chinese and Indian Governments (A/CN.4/99), he pointed out that the former related solely to the specific case of a country with only potential fishing interests in any contiguous zone. Pending clarification of the Chinese attitude, he would have thought that that position was adequately covered by article 28.

10. As to the Indian amendments, he would agree with Mr. Sandström that the desiderata of the Indian Government had already been granted. In article 25 there had been a deliberate intention not to restrict the sea area to a coastal zone; on the other hand, the article certainly applied to an area contiguous to the coast, which surely met the Indian point.

11. In granting the coastal State a specific right up to a distance of a hundred miles from its coast, the Indian amendment to article 26 went farther than was desirable. He wondered whether the Indian Government appreciated that article 29 really satisfied all its requirements. Fisheries experts had expressed the opinion that, owing to the movements of fish, it would be extremely difficult to define any limitation of the area in which measures of conservation might be applicable and it was for that reason that no particular limit had been specified. He was convinced that article 29 provided a better system than one which granted the coastal State the right to take conservation measures within specific limits.

12. Mr. PAL explained that the Indian amendment to article 25 was based on the view that it would be undesirable to grant a State the right to take conservation measures in areas contiguous to the coast of another State merely because nationals of the former State had engaged in fishing in such areas in the past. That was a situation which the Indian Government wished to avoid, and its proposals therefore had a twofold objective: to prohibit a State engaged in fishing in a sea area contiguous to the coast of another State from initiating conservation measures; and to grant such regulatory powers to the coastal State.

13. Mr. ZOUREK said that some governments, such as the United Kingdom Government, had stressed the need for a definition of the term " conservation of the living resources of the high seas ". That point should certainly be considered.

14. Other governments, such as that of Norway, had raised the question of whether the articles proposed by the Commission should also apply to whaling and sealing, which were already governed by international conventions. Whaling had been placed under control at the world level. That point, which raised the question of the relationship between the new convention and former conventions, certainly deserved consideration.

15. Another important question which had been raised in the comments by governments was the settlement of disputes. At the previous session he had opposed the proposal to entrust the settlement of disputes to a so-called arbitral commission, whose decisions would be binding on the parties. That was not really arbitration, the object of which, as generally understood, was the settlement of disputes between States on the basis of law, by judges chosen by the parties concerned. The conservation of the living resources of the sea generally entailed making new regulations, which was a matter for States. To entrust such a task to arbitral commissions would be equivalent to surrendering part of the sovereign powers of States to an international commission.

16. Again, several governments had drawn attention to the necessity of defining the rights of a coastal State. That, indeed, was the core of the matter, and the Commission was fully justified in basing its discussion of the regime of the high seas on the question of the conservation of living resources because, failing a solution of that question acceptable to coastal States, there would be no widespread support for a system covering the whole range of high seas, territorial sea and continental shelf. Some governments, in particular that of India, held that the draft articles did not give adequate protection to the coastal State in the matter of conservation. Mr. Pal's detailed statement on the Indian proposals was compelling, particularly when account was taken of the changing situation of as yet under-developed areas, for which the exploitation of marine products was not an opportunity for making substantial profits, but often the only means of feeding their very dense populations. It would be equitable, therefore, to give the coastal State greater prerogatives, as suggested by the Indian proposals, the acceptance of which would in no sense entail any discrimination against other States whose nationals engaged in fishing in that area.

17. The CHAIRMAN said that the discussion had thrown light on two particular aspects of the question. With regard to the first, the nature and the extent of the Indian Government's proposals, he welcomed Mr. Pal's clarification, which had dissipated the apprehension caused by the comment of the Indian Government on articles 24 to 30, to the effect that a coastal State should have exclusive conservation rights in an area of the high seas contiguous to its coast. He was glad to note that the proposals reflected no such claims, and Mr. Pal's third condition—that the area concerned would be one in which the nationals of other States were not engaged

in fishing—went far towards making the Indian proposals acceptable.

18. The other aspect was the claim by certain governments, such as those of Iceland and Brazil, to exclusive conservation rights. He pointed out that a distinction had to be drawn between the right to initiate regulatory measures of conservation and the right to exclude other States from fishing in the area. The Commission was at present concerned only with the former right; the latter was not a question of conservation, but pertained to the regime of the territorial sea. In that connexion, he pointed out that the comment of the Government of Iceland did not raise any objection to the Commission's proposals for areas of the high seas beyond what it regarded as a contiguous zone.

19. Mr. Zourek's point with regard to the definition of the term " conservation of the living resources of the high seas " was pertinent; it must not be overlooked, however, that under its terms of reference the Commission should eschew the study of technicalities, particularly bearing in mind that its report would be submitted to the General Assembly.

20. Mr. SALAMANCA said that the basic issue with regard to the proposed new conservation rights was their extent. The absence of any reference by Mr. Pal to arbitration seemed to imply a specific contiguous zone over which the coastal State would enjoy exclusive conservatory jurisdiction. In that connexion, he recalled the Chairman's (Mr. Garcia-Amador's) proposal at the seventh session,[2] which had been largely embodied in article 29.

21. With regard to the definition of the term " conservation of the living resources of the high seas ", he agreed that the Commission was not competent to examine technical details. Its aim was to achieve agreement on the whole problem of providing effective protection for the living resources of the sea adjacent to the shores of a coastal State and in that respect some progress had been made.

22. Stress had since been laid on the special position of the under-developed countries. There was no doubt that the Commission should give full attention to that aspect of the problem, always bearing in mind that the principles adopted should be general in nature, particularly as developments in technical and scientific research could not be foreseen. The fundamentals of the existing draft articles, therefore, should be retained.

23. Mr. FRANÇOIS, Special Rapporteur, said that, despite Mr. Pal's clarification, his doubts regarding the real extent of the Indian Government's proposals, still remained, for the general point of view expressed in its comments on articles 24 to 30 was, as the Chairman had pointed out, hardly compatible with its amendments to articles 25 and 26 as interpreted by Mr. Pal. What had aroused apprehension was the claim in the former that a coastal State should have " the exclusive and pre-emptive right of adopting conservation measures for the purpose of protecting the living resources of the sea within a reasonable belt of the high seas contiguous to its coast "; that apprehension was hardly dissipated by the vagueness of the Indian attitude towards the arbitral procedure proposed in articles 31 to 33. It might be advisable for a small sub-committee to be set up in order to examine in more detail the precise consequences of acceptance of the Indian amendments which, of course, were more important than any general comment. It might thus be possible to go some way towards meeting the Indian point of view by according a greater measure of protection to a coastal State without giving it any exclusive rights to take measures of conservation.

24. Mr. PAL, while accepting that proposal, suggested that the proposed sub-committee should not restrict its examination to the Indian amendments, but that all suggested modifications be considered.

25. Mr. FRANÇOIS, Special Rapporteur, urged that the sub-committee should not examine other amendments unless they raised similar doubts, and so far that had not been the case. The sub-committee should for the time being confine itself to the issue raised by the Indian amendments while the general discussion was proceeding in the Commission. Any other doubtful points could be referred to the sub-committee as they arose.

26. Mr. KRYLOV regarded the Special Rapporteur's proposal as premature. The general discussion was still proceeding and he agreed with Mr. Pal that, if a sub-committee were to be set up, it should not be restricted to discussing the amendments of only one government. On the whole, the draft articles stood up well in the light of the comments by governments, and the Commission should certainly not give a physical delimitation to the area of the high seas in question without further close study.

27. He had been interested by the Indian Government's reservation of its attitude on articles 31 to 33 pending a final decision on the subject of arbitral procedure. During his six years' service as a member of the International Court of Justice he had come to appreciate the value of that supreme tribunal and had also realized the importance, in such matters as fisheries, of the expert advice, made available to the Permanent Court of Arbitration, in the work of which the Soviet Union had decided to participate. He pointed out that articles 26 to 30 all contained a proviso referring to arbitration. Difficulties arising out of the contingencies contemplated in those articles should be left to the Permanent Court of Arbitration, and the Commission should confine itself to the questions of principle that it had considered at its previous session.

28. The CHAIRMAN agreed that at a subsequent stage it might be helpful if a sub-committee were to consider all the amendments proposed by governments and any other relevant issues.

29. Mr. ZOUREK said that a sub-committee could do useful work; he agreed with Mr. Krylov, however, that it would be premature to set it up at that moment.

30. Sir Gerald FITZMAURICE said that the Commission must bear in mind that the articles adopted at

[2] A/CN.4/SR.296, para. 16.

the previous session were the outcome of a compromise between two schools of thought, one of which had strongly defended the interests of the coastal State and the other those of States with a large overseas fishing industry. The Commission had gone far—indeed, farther than ever before—towards achieving what had been its prime object of meeting the special needs of the coastal State by conceding to it considerable powers of unilateral action.

31. But the condition by which the whole scheme was made acceptable to other States was the provision of arbitration machinery as an essential element in the whole project, so that other countries which found the measures instituted by the coastal State unacceptable could have some means of appeal. There had been general agreement that the arbitration provisions were indispensable, and the main point on which controversy had centred had been whether or not the coastal State should be required to submit any proposed conservation measures to the arbitral commission before putting them into operation. The Commission had finally decided against such a requirement in order to safeguard the interests of the coastal State. That being the position, any suggestion of dropping the arbitration provisions would largely destroy the value of the whole draft, with which, in the main, all could agree.

32. Turning to the question of procedure, he said it would be preferable for the Commission not to enter into details at the present stage, but to reserve them for the time when it came to examine the whole draft on the high seas, article by article. Members could then put forward their amendments for discussion along with those suggested by governments.

33. Mr. SANDSTRÖM said that it would be very helpful to have an analysis of the replies from governments.

34. Mr. SPIROPOULOS agreed that it would be useful if the Special Rapporteur could summarize all government comments on each article, stating whether or not they should be taken into account and giving reasons.

35. Mr. LIANG, Secretary to the Commission, explained that that was precisely what the Special Rapporteur had done in his report, which would be available in a few days' time.

36. Mr. FRANÇOIS, Special Rapporteur, said that the second part of his report would not deal with the articles on the conservation of the living resources of the sea, because he did not wish to analyse the comments of governments before the Commission had expressed its views on certain general principles. Once he had been given some guidance in that regard he would be prepared to draw up an additional section on those articles.

37. The points which he considered the Commission must examine before entering into a detailed consideration of the articles themselves were the following. First, the United States' suggestions (A/CN.4/99/Add.1, page 76) to insert the word "substantial" before the word "fishing" in article 26, paragraph 1; to substitute the words "substantial fishing of the same stock or stocks of fish in any area or areas of the high seas" for the words "fishing in any area of the high seas"; and to substitute the words "conservation of such stock or stocks of fish" for the words "conservation of the living resources of the high seas" in the same paragraph. All those amendments raised matters of principle. Secondly, the United States' additional comments (page 80), particularly the proposition that where States had energetically increased and maintained the productivity of stocks of fish, and where more fishing was not likely to increase the sustainable yield, other States which had not in recent years exploited those stocks should be required to abstain from doing so. Thirdly, there was the question of principle, raised by both the Belgian and the Swedish Governments, whether unilateral measures instituted by a coastal State should be maintained while a dispute between two States regarding them was under arbitration.

38. Finally, the Commission should consider the composition of the arbitral commission. Members would have noted that the United States Government had proposed something very different from what had been agreed on by the Commission at its previous session.

39. Mr. SPIROPOULOS declared himself satisfied with the procedure suggested by the Special Rapporteur.

40. The CHAIRMAN thought that once the general discussion on conservation had been concluded, the Commission, while waiting for the Special Rapporteur's report, could open the general discussion on the draft articles on the contiguous zone and the continental shelf.

41. Mr. EDMONDS said that he had not anticipated questions of detail being raised at the present stage. Judging from the previous session, not very much was accomplished during general discussions, when the Commission was prone to vote on matters of principle, leaving it to a drafting committee to express its decisions in a precise text; that procedure had sometimes led to both unexpected and unsatisfactory results. He therefore urged the Commission to pass as quickly as possible to detailed examination of actual texts. If it could not take up the draft articles *seriatim* because the Special Rapporteur's report was not yet ready, perhaps it could usefully consider a number of amendments, whether proposed by governments or by members.

42. Mr. ZOUREK felt it would be a waste of time for the Commission again to interrupt the discussion while waiting for the Special Rapporteur's report, particularly as the latter would not deal with the conservation articles. The Commission could consider the general points enumerated by the Special Rapporteur, and subsequently amendments proposed by governments and members.

43. The CHAIRMAN pointed out that the Commission must decide what it could take up while waiting for the Special Rapporteur's report, once the general discussion had been concluded. He had suggested proceeding with the articles on the contiguous zone and the continental shelf because, generally speaking, governments had not commented on them.

44. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom was the only Government to have included observations on those two topics in its reply. His personal preference would have been to take up the draft articles on the high seas and the territorial sea first,

45. Mr. KRYLOV said that there was no reason why the Commission should not discuss the articles on the contiguous zone, particularly in the light of the Icelandic Government's comments.

46. Sir Gerald FITZMAURICE considered that the Commission must discuss the points referred to it by the Special Rapporteur in order to enable him to prepare an analysis of government comments on the conservation articles. Such analyses had proved valuable in the past.

It was agreed to continue at the next meeting the general discussion on the articles concerning the conservation of the living resources of the high seas.

The meeting rose at 1 p.m.

338th MEETING

Wednesday, 2 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/99 and Add.1-5) (*continued*)

Conservation of the living resources of the high seas (continued)

1. The CHAIRMAN invited the Commission to continue its general discussion of the draft articles relating to the conservation of the living resources of the high seas.

2. Mr. EDMONDS said that, in considering the subject at its previous session, the Commission had been guided by the following five principles. First, that within its territorial sea, the coastal State had full jurisdiction over fisheries; secondly, that outside that area the nationals of each State enjoyed equal rights to fish; thirdly, that the coastal State had a special interest in the living resources of the sea in the area contiguous to its coast and that that interest should be recognized and protected by international law; fourthly, that for practical purposes fishing in areas where nationals of more than one State operated could be carried on only if the rights of each were protected by bilateral or multilateral agreement; and fifthly, that it was important to settle disputes about fishing rights on the high seas by arbitration. Those principles, which were essentially those recognized and formulated at the International Technical Conference on the Conservation of the Living Resources of the Sea,[1] were the basis of the draft articles adopted by the Commission at its previous session.[2]

3. In order to achieve greater clarity and to state a number of additional principles omitted from the draft he had prepared a new text, reading as follows:

Article 24

All States have the right to engage in fishing on the high seas, subject to their treaty obligations, to applicable principles of international law, and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Article 25

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.

2. For the purposes of this and succeeding articles the conservation of the living resources of the sea is to be understood as the conduct of fishing activities so as:

(a) Immediately to increase or at least to maintain the average sustainable yield of the living resources of the sea;

(*b*) Ultimately to obtain the optimum sustainable yield so as to maintain a maximum supply of food and other marine products; and

(*c*) To develop the yield of various species through selectivity and control of that particular species.

Article 26

1. If the nationals of two or more States are engaged in substantial fishing of the same stock or stocks of fish in any area or areas 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 such stock or stocks of fish.

2. If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of conservation measures proposed by any of them, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations depending upon the nature of the disagreement:

(*a*) Whether conservation measures are necessary to make possible the maximum sustainable productivity of the concerned stock or stocks of fish;

(*b*) Whether the specific measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly:

(i) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;
(ii) The cost of their application and enforcement; and
(iii) Their relative effectiveness and practicability.

[1] Hereinafter referred to as the "Rome Conference".

[2] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), pp. 10-13.

(*c*) Whether the specific measure or measures discriminate against the fishermen of any participating State as such.

3. Measures considered by the arbitral commission under paragraph 2 (*b*) of this article shall not be sanctioned by the arbitral commission if they discriminate against the fishermen of any participating State as such.

Article 27

1. If, subsequent to the adoption of the measures referred to in articles 25 and 26, nationals of other States engage in fishing the same stock or stocks of fish in any area or areas of the high seas, the measures adopted shall be applicable to them.

2. If the States whose nationals are so engaged in fishing do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested States may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the determinations set forth in paragraph 2 of article 26 of these articles, depending upon the nature of the disagreement. Subject to the provisions of paragraph 2 of article 33 of these articles, the measures adopted shall be obligatory pending the arbitral decision.

3. Where the maximum sustainable yield is, within reasonable limits, already being obtained from any stock of fish, and the maintenance and further development of such yield is dependent on the conservation programme, involving research, development and conservation being carried on by all the States whose nationals are fishing such stock substantially, States not fishing such stock substantially or which have not done so within a reasonable period of time, excepting the coastal State adjacent to the waters in which this stock occurs, shall abstain from fishing such stock. In the event of disagreement as to whether a particular stock meets the above qualifications for abstention, the matter shall be referred for decision to an arbitral commission to be set up as provided in article 31.

4. The arbitral commission shall reach its decision and make its recommendations under paragraph 3 of this article on the basis of the following criteria:

(*a*) Whether the stock is subject to reasonably adequate scientific investigation with the object of establishing and taking the measures required to make possible the maximum sustainable yield;

(*b*) Whether the stock is under reasonable regulation and control for the purpose of making possible the maximum sustainable yield, and whether such yield is dependent upon the programme of regulation and control; and

(*c*) Whether the stock is, within reasonable limits, under such exploitation that an increase in the amount of fishing will not reasonably be expected to result in any substantial increase in the sustainable yield.

Article 28

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 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.

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 31.

Article 29

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 31. Subject to paragraph 2 of article 33, the measures contemplated shall remain obligatory pending the arbitral decision.

Article 30

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas, has a special interest in the conservation of the living resources in that area, may request the State or States whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no action is taken upon such a request within a reasonable period, such requesting State may initiate the procedure contemplated in article 31.

3. The arbitral commission shall, in procedures initiated under this article, reach its decision and make its recommendations on the basis of the following criteria:

(*a*) Whether scientific evidence shows that there is a need for measures of conservation to make possible the maximum sustainable productivity of the concerned stock or stocks of fish; and

(*b*) Whether the conservation programme of the States fishing the resource is adequate for conservation requirements.

4. Nothing in this article shall be construed as a limitation upon the action a State may take within its own boundaries.

Article 31

1. The differences between States contemplated in articles 26, 27, 28, 29 and 30 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 *ad hoc* arbitral commission composed, in any combination, of seven members well qualified in the legal, administrative or scientific fields of fisheries, depending upon the nature of the dispute to be settled.

Article 32

1. Two members shall be named by the State or States on the one side of the dispute; and two members shall be named by the State or States on the other side of the dispute. The remaining three members, one of whom shall be designated chairman of the commission, shall be named by agreement of the States in dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure to name any member, such member or members shall, upon the request of any State party to the dispute, be named by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice, in the case of the naming of a member well qualified in the legal field of fisheries, and with the Director-General of the Food and Agriculture Organization,

in the case of the naming of a member well qualified in the field of fishery administration or fishery science. Any vacancy arising shall be filled in the same manner as provided for the initial selection.

2. The arbitral commission shall be convoked by the chairman within five months from the date of the request for arbitration. Its determination or determinations shall be submitted to the States parties to the dispute within a further period of three months, unless the arbitral commission decides to extend such period.

3. Except as herein provided, the arbitral commission shall determine its own procedure.

4. The remuneration of members of the arbitral commission shall be paid by the State or States selecting the member or on whose behalf the member was selected by the Secretary-General of the United Nations; the remuneration of the three members to be named jointly by the parties to the dispute, or failing agreement, by the Secretary-General of the United Nations, shall be an item of joint expense. Joint expenses arising from the arbitration shall be divided equally between the States parties to the dispute.

Article 33

1. The determinations of the arbitral commission shall be by majority vote and shall be based on written or oral evidence submitted to it by the parties to the dispute or obtained by it from other qualified sources.

2. The arbitral commission may decide that pending its determination or determinations under paragraph 2 of article 27 of these articles the measure or measures in dispute shall not be applied.

3. The determinations of the arbitral commission shall be binding upon the States concerned. If the determination is accompanied by a recommendation, it shall receive the greatest possible consideration.

4. During the detailed discussion of the draft articles he would state his reasons for the changes he had proposed, but in the meantime would confine himself to commenting on three of the points raised by the Special Rapporteur at the previous meeting.

5. First, the United States Government had proposed the insertion of the word " substantial " before the word " fishing " in article 26, paragraph 1, in order to prevent abuse whereby a State whose nationals were engaged only in sporadic fishing in a particular area might insist that a State whose nationals fished there on a substantial scale should enter into negotiations with it for a conservation programme. If the negotiations broke down, the former would be in a position to inconvenience the latter in a very irresponsible manner.

6. Secondly, in order to ensure absolute clarity, the United States Government had proposed that that paragraph should refer to fishing " of the same stock or stock of fish ". The present text, which spoke of " fishing in any area of the high seas " was somewhat ambiguous. The amended wording would conform to the conclusion of the Rome Conference that conservation measures should be based upon geographical and biological considerations. His proposed text would also prevent any State whose nationals did not fish the same stock from asking a State whose nationals did so to enter into negotiations for conservation measures.

7. Thirdly, his purpose in article 27, paragraph 3, was to meet the point made by the United States Government that any State which by its own measures had increased the sustainable yield should be allowed to profit thereby. By the use of present-day technological skills, within the foreseeable future there would be a continuing and increasing productivity of the stocks of fish as a result of the operations of nationals of a State or a group of States. The right to such increased production should be recognized by the Commission in its definitive articles. Failure to take into consideration technological advances would encourage the abandonment of conservation activities. The Commission should formulate articles which would stimulate conservation of fisheries.

8. Mr. PADILLA-NERVO, making some general observations, reminded the Commission that the original intention in granting certain unilateral powers to the coastal State had been to forestall excessive claims with respect to the territorial sea. Thus, in response to the complaints made by some under-developed countries regarding the extermination of stocks by fishing fleets from larger countries many thousands of miles away, the Commission had recognized the right of the coastal State to protect effectively the living resources of the sea in any area of the high seas contiguous to its coasts.

9. While that decision of principle had very considerable merit, it did not fully meet the need and, as the Governments of Chile and Iceland had pointed out, it was not a satisfactory substitute for an extension of the territorial sea. The inescapable conclusion was that the system proposed by the Commission offered inadequate guarantees for many countries and would have to be amended in favour of the coastal State if considerable extensions of the territorial sea were to be avoided. No effective solution would be found unless the Commission recognized that the overriding consideration was the interest of the coastal State, as had been done at the Rome Conference, albeit by a small majority. The special interest of the coastal State existed by virtue of its very position, since it was vitally important to its population that stocks were not exterminated.

10. The interest of the coastal State in preventing over-fishing in the area contiguous to its coast was self-evident and did not need to be demonstrated. The Commission had failed to bring out sufficiently clearly the difference between the interests of the coastal State and the interests of other States. Article 29 was altogether too rigid and would be difficult to apply. Though he certainly did not wish to suggest that there should be no limitation on the unilateral right of the coastal State to adopt measures of conservation in the absence of any international agreement, it should suffice to set out certain conditions such as those in article 29, paragraph 2, without including a provision of the kind contained in paragraph 3, since any coastal State disregarding the requirements laid down would in any case have to accept the responsibility.

11. The rights allowed to the coastal State in article 28 did not amount to much and the remaining provision contained in paragraph 1 might result in the creation in favour of possibly remote States of what might be

described as a reserved zone in the high seas off the coast of the coastal State—a possibility which small States could hardly be expected to welcome.

12. He supported the Indian Government's suggested amendment to article 25 (A/CN.4/99) which would then clearly apply solely to coastal States. Similarly, he favoured the Indian Government's amendment to article 26, so that their interests might be properly safeguarded.

13. As stated in the joint Cuban-Mexican proposal submitted at the Rome Conference, conservation of the living resources of the sea could most efficaciously be achieved by means of international agreements, and some statement of that sort should be included in the present draft. But in the absence of international agreement coastal States could take steps to prevent the extermination, or partial extermination, of the living resources of the sea.

14. Turning to the articles on implementation, he said that no one could entertain any illusions about the possibility of securing acceptance of compulsory arbitration. In certain cases that gave strong States the opportunity of putting pressure on the weak and often created greater problems than those it solved, thereby postponing settlement indefinitely. The only kind of durable settlement was that reached through arbitration voluntarily accepted by the parties, or by recourse to one of the processes enumerated in Article 33 of the Charter. Although admittedly under the concluding phrase of article 31, paragraph 1, such procedures were not excluded, the main emphasis throughout was on compulsory arbitration.

15. Summarizing his conclusions, he said that articles 25 and 26 should be amended in the sense proposed by the Indian Government. Article 28 should be deleted. Article 29 should be re-drafted so as to recognize that the coastal State always had a special interest in maintaining the productivity of the area contiguous to its coasts, instead of requiring it to prove such an interest. The proviso at the end of article 29, paragraph 1, should be dropped and in that connexion he failed to understand the alternative text suggested by the Indian Government, since it was obvious that any State could ask the coastal State to initiate negotiations on conservation measures. Article 29, paragraph 3, should be replaced by a provision that in the event of measures not being accepted, some means of settlement should be sought under Article 33 of the Charter. Article 30 should be omitted. The remaining articles, 31-33, should be deleted in consequence of the changes suggested.

16. The Commission should find some way of reconciling the interests of coastal States and those of States with a large fishing industry. Neither the spirit nor the letter of the present text was satisfactory to a large number of coastal States, particularly the less advanced ones, and they would not support the draft articles in the General Assembly as they stood at present.

17. Mr. PAL, associating himself fully with Mr. Padilla-Nervo's observations, reminded the Commission of the considerations put forward in the comment on the draft articles adopted at the fifth session.[3] The Commission had on that occasion concluded that it was necessary to move cautiously and that the aim might best be achieved on a regional basis. In the absence of any international organ empowered to promulgate binding regulations, moderation was necessary if conservation regulations were to secure acceptance. The special interests of the coastal State had been recognized at the Rome Conference, when suggestions had been made as to the manner in which it could take part in the establishment of conservation measures.

18. While reserving detailed observations until later, he would confine himself at the present stage to pointing out that the opening words of article 29 were ambiguous and might be interpreted as drawing a distinction between coastal States having a special interest in the maintenance of productivity and those having no interest whatsoever.

19. Sir Gerald FITZMAURICE expressed his grave concern at Mr. Padilla-Nervo's observations. If those views prevailed the Commission could abandon the project altogether, since, in the form outlined by Mr. Padilla-Nervo, there was not the slightest chance of its being accepted by the principal maritime countries, and, as Mr. Pal had rightly implied, any system such as that of the Commission's draft could only be enforced by agreement amongst all the States concerned.

20. In that field the Commission was not engaged in a task of codification *de lege lata*, but was proposing a system *de lege ferenda* to regulate fisheries, and must steer a middle course if it was to find a generally acceptable solution. He believed that article 29, as it stood, represented the limit of what was both practicable and acceptable.

21. With respect to Mr. Padilla-Nervo's proposal to delete the provisions for compulsory arbitration, he reaffirmed his conviction that they formed an essential part of the draft and that without them many States would find it impossible to subscribe to articles conferring extensive unilateral rights on the coastal State.

22. It was an over-simplification to describe the issue as a straight conflict between the interests of two groups of States. The issue was in fact far more complicated, since it was not only the economic interests of under-developed countries that were at stake, but also those of others which were equally dependent on overseas fishing—as for example, Japan. Among the latter group, large communities even in the richest countries were entirely dependent on overseas fisheries and their livelihood might be threatened irremediably if their fishing activities were severely curtailed. Thus it was imperative to take full account of all the interests involved and not to favour one side disproportionately. If the draft were heavily weighted in favour of the coastal States, they would be unlikely to benefit because the scheme would become unacceptable, so that none of the measures they instituted would be enforceable except among the signatories of any particular agreement. On the other hand, if the coastal States supported the present draft, even though it

[3] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), paras. 97 and 98.

did not go as far as they wished, it would become possible for them to impose certain conservation measures on other States provided those measures complied with the requirements laid down. Some States, it should be noted, had already gone a long way towards meeting the views of the coastal States by expressing a considerable measure of support for the draft articles.

23. Finally, although in some respects the articles adopted the previous year were open to improvement, if they were amended as drastically as proposed by Mr. Padilla-Nervo, the balance of the project would be destroyed and the safeguards which alone could make it generally acceptable would be removed.

24. Faris Bey el-KHOURI said that it was essential to devise a generally acceptable draft, and as the fishermen of small coastal States seldom went outside the territorial belt, the rights of such States should be protected.

25. Mr. SANDSTRÖM doubted the accuracy of that statement. Swedish and Norwegian fishermen, for example, fished at great distances from their native shores and, particularly for the latter, freedom to continue to do so was of vital importance.

26. He shared the views of Sir Gerald Fitzmaurice regarding the need to reconcile the various interests involved and urged that interests established by long usage should not be sacrificed. He felt sure that some compromise was possible and that the draft adopted the previous year, though undoubtedly capable of improvement, would be judged acceptable.

27. Finally, article 25 contained a statement of existing law. Any regulations of the kind mentioned could be instituted by any State. However, if they were regarded by others as detrimental to their interests, a remedy was provided.

28. Mr. SPIROPOULOS considered, in contrast to certain other members, that the Commission had taken the interests of the coastal State fully into account. It would be well to bear in mind that at present any State was free to fish in any area of the high seas however near the coast, provided it was outside the territorial belt, and unless special agreements existed, that right was not circumscribed in any way. The Commission in its draft was aiming at creating new law and would indeed confer on coastal States certain rights which they did not at present possess. He hoped that, textual improvements apart, the Commission would preserve the draft as it now stood.

29. The CHAIRMAN said that, in view of the number and scope of the amendments to articles 24-33 submitted by Mr. Edmonds, it would be advisable to defer discussion of them until members of the Commission had had time to digest their significance.

30. Having regard to his special responsibilities in respect of the draft articles on the conservation of the living resources of the high seas, he said that it might be useful if he were to clarify briefly the decisions taken by the Commission at its seventh session, subsequent to the study of the question by the Rome Conference in April 1955. The Commission had had two main factors to bear in mind. In the first place, there had been the system of international co-operation in measures of conservation, based on the application of regulatory measures collectively agreed upon. That system had been followed for over half a century and was the system on which the Commission had based the articles it had drafted at its fifth session. In the light of the Rome Conference, however, it had been realized that that traditional system had been lacking in two respects. First, it was a *sine qua non* that there should be general agreement on the measures of conservation to be adopted; one single State withholding its consent could frustrate the whole system of international regulation by agreement, and that contingency of unilateral action was the first defect which the Commission had taken into account. The second defect of the traditional system was that it had not recognized the special interest of any individual State.

31. The Rome Conference, however, had remedied that situation by acknowledging the special interests of the coastal State,[4] and when the Commission had come to review the whole subject at its seventh session it had attempted to reconcile the opposing tendencies, while maintaining the fundamental freedom of fishing on the high seas by following the line taken in that respect by the Rome Conference and granting the coastal State increased prerogatives over a certain area of the high seas. That had constituted an innovation in international law, and he could not help reflecting that the States Members of the United Nations would have been somewhat surprised in 1953 had they been able to foresee the radical development that had taken place in the Commission's approach to that problem in the space of only two years. The Commission's proposals represented a compromise between the traditional system and the system that had been outlined by Mr. Padilla-Nervo.

32. In that connexion, he would stress one aspect that had been referred to by Sir Gerald Fitzmaurice in his reply to Mr. Padilla-Nervo's linking of the major interests of the coastal State and of States fishing overseas grounds with the question of small and of economically more powerful States. A generalization of that kind was, as Mr. Sandström had pointed out, weakened by so many exceptions—in that a number of small countries had vital interests in overseas fisheries—that it quite lost any general validity. Certain coastal States undoubtedly had a special interest in overseas fisheries, whereas others, owing to the lack of economic motive, had never displayed any interest in the matter. The Commission had recognized that the mere fact of being a coastal State did not confer an inherent right to special prerogatives on any country. That was the fundamental idea underlying article 29. Having established the principle of the recognition of a special right, the Commission had decided that, in order to prevent that right being exercised to the detriment of other States, it must be circumscribed, and paragraph 2 of article 29 stated the requirements that must be fulfilled in order to justify any measures of conservation taken unilaterally by the coastal State. The need to regulate the right of the coastal State arose from the

[4] A/CONF. 10/6, Section II, para. 18.

possibility of the principle of conservation being applied as if it were one of appropriation.

33. Mr. Padilla-Nervo, while accepting the conditions in sub-paragraphs (*a*) and (*b*) of article 29, paragraph 2, had raised serious objections to the provisions for compulsory arbitration, preferring the provisions in Article 33 of the United Nations Charter, under which the method of settlement of a dispute was left to the choice of the parties. Although the Commission had preferred the method of compulsory and automatic arbitration adopted in 1948 at the ninth Inter-American Conference, held at Bogotá, he would admit that that solution might not command general support. That particular point, however, was not the Commission's immediate concern, save in regard to the question of the type of arbitration that should be adopted. The disputes that the Commission had had in mind had been mainly of a technical nature, arising out of the use of fisheries in those areas of the high seas in which the Commission had recognized the special interests of the coastal State. The principle of arbitration was essential to the functioning of the system proposed by the Commission. A coastal State could rest assured that, provided it had fulfilled the requirements in article 29, paragraph 2, and had acted in good faith, no question of compulsory arbitration would arise.

34. Mr. AMADO said that he had not heard the phrase " fishing industry " used during the discussion. Yet it was the rapid and extensive development of fishing owing to scientific research and technical progress that really lay behind the new provisions that the Commission was attempting to codify. The idea of conservation of the living resources of the high seas had been born of the necessity for protection against large-scale fishing by big industrial interests, with the consequent possibility of abuse and the risk of denuding the sea of vital marine products. The Rome Conference had acknowledged the responsibilities of States fishing in areas of the high seas and had recognized the special position of coastal States —he had in mind the case of Peru—whose special interest in the area of the high seas off its coast was paramount. The extension of rights previously restricted to the three-mile limit had opened wide the door to the coastal State, which previously had been excluded from the enjoyment of such rights in sea areas of vital importance to it.

35. Mr. Padilla-Nervo had felt that the Commission had not gone far enough in that respect; it must therefore decide whether it would be possible still further to improve the position of the coastal State. He would not conceal the fact that in matters of arbitration his own preference was for the voluntary method which, though perhaps old-fashioned, had solid advantages. He would go to the limit of practicability in attempting to meet Mr. Padilla-Nervo's point, but in that process care should be taken not to undo the valuable work already accomplished.

The CHAIRMAN *declared closed the general discussion on the conservation of the living resources of the high seas.*

The meeting rose at 12.55 p.m.

339th MEETING

Thursday, 3 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary of the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add.1, A/CN.4/99 and Add.1-5) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of item 1 of the agenda: Regime of the high seas.

2. Mr. FRANÇOIS, Special Rapporteur, introducing the addendum (A/CN.4/97/Add.1) to his report on the regime of the high seas and the regime of the territorial sea, pointed out the impossibility of dealing in such a document with all the comments by governments, some of which were excessively detailed; others proposed drafting changes, and those could be dealt with by a drafting committee. If the articles were discussed *seriatim*, he would outline the salient comments by governments and, where necessary, explain his own views.

It was so agreed.

Article 1: Definition of the high seas

3. Mr. FRANÇOIS, Special Rapporteur, referring to the comment of the Philippine Government, said that as the Commission had discussed the question of groups of islands at its seventh session and provisionally decided against the insertion of special provisions,[1] he would suggest that that question be dealt with in connexion with " groups of islands " in the chapter on the territorial sea.

4. The criticisms of the Turkish and Israeli Governments might be met if a definition of internal waters were given in the chapter on the territorial sea, as suggested in paragraph 6 of the addendum to his report.

5. The Yugoslav proposal seemed to regard the contiguous zone as not forming a part of the high seas. That

[1] A/CN.4/SR.319, paras. 57-66.

had not been the view of the Commission, which had accepted the contiguous zone as being definitely part of the high seas.

6. His conclusion, therefore, was that the article should stand as drafted.

7. Mr. KRYLOV, while appreciating the risks taken in formulating definitions, sympathized with the Israeli point of view, which might perhaps be met by an indication in the comment that " high seas " was used in the article in a general sense. Certain waters, such as landlocked seas, had special characteristics, and it could not be assumed that the only high seas were the broad open spaces of the ocean. That question was clearly a matter of concern to the Turkish Government also.

8. Mr. SANDSTRÖM said that those criticisms could to some extent be met if the chapter on the regime of the territorial sea preceded that on the regime of the high seas.

9. Faris Bey el-KHOURI agreed with the Special Rapporteur that the article should not be amended. The Philippine objection could be covered by article 10 of the draft on the regime of the territorial sea. In the case of islands in a group that were remote from one another, each would have its own territorial sea and the zone between them would necessarily fall under the regime of the high seas.

10. Sir Gerald FITZMAURICE, while agreeing with the Special Rapporteur's conclusion, said the Israeli and Turkish criticisms ought to be considered, if only in order to place on record the Commission's reasons for rejecting them. He could sympathize with Mr. Krylov's point concerning the Turkish objection, in the sense that normally there would be no need to make specific mention of internal waters, because they did not form part of the sea. Since the introduction of the straight baseline system, however, certain areas of the sea had become internal waters and had to be distinguished from the territorial sea and the high seas. While appreciating the Turkish concern that the term " internal waters " might not apply to an internal sea, he agreed with the Rapporteur that an internal sea would geographically be a lake and could not be regarded as anything else but internal waters. Mr. Krylov's point was also covered. There were two types of landlocked sea. On the one hand, seas such as the Mediterranean and the Baltic, whose shores were the territory of several coastal States, were obviously not internal waters; on the other hand, a sea wholly surrounded by the territory of one country would be so regarded.

11. Mr. PAL observed that the Israeli Government's criticism raised two points. First, the definition of the high seas by reference to the territorial sea and internal waters suffered from lack of precision, inasmuch as there was no clear definition of those two expressions themselves. Secondly, reference to internal waters was meaningless because internal waters never formed part of the high seas, since territorial sea always intervened. There was no substance in the second point. High seas had been defined by reference to the sea and by exclusion of two distinct parts of the sea; the territorial sea having been taken as part of the sea, its exclusion in express terms was not irrelevant or meaningless. The first point, however, indicated a genuine shortcoming of the present definition. The Commission was well aware of the difficulty of finding a precise definition of the territorial sea acceptable to all States. It would probably have to remain satisfied with the present imprecision in its definition of the territorial sea and consequently of the high seas. As regards internal waters, no definition had even been attempted in the draft articles but what little indication they afforded seemed to show that hitherto internal waters had been taken to be something that was part of a sea. Both Mr. Krylov and Sir Gerald Fitzmaurice, however, had referred to internal waters in the shape of a landlocked sea. That made it imperative for the Commission to define the term " internal waters " as used in the draft articles.

12. Mr. SPIROPOULOS shared the views of Mr. Pal to some extent. There were obvious disadvantages in defining one term by other terms ill-defined in themselves. He wondered, however, what was the practical value of a definition. Admittedly, there were special cases of internal waters, such as the Black Sea, but it must be realized that no definition would cover all cases. In any event, any attempt to define the high seas should take into account other existing rules of international law.

13. Mr. FRANÇOIS, Special Rapporteur, explained that the definition of high seas in the article had been arrived at by process of elimination, and its validity therefore depended on a clear understanding of the meaning of the terms " internal waters " and " territorial sea ". Since the essential purpose of the report was the presentation of a balanced corpus of provisions, the question of explaining existing definitions could be resolved only after consideration of the other chapters of the report. He would propose that the article be adopted provisionally, pending further examination in the light of the discussion of the other parts of the report.

14. Mr. KRYLOV, endorsing Mr. Sandström's view, suggested taking first the chapter on the territorial sea. He was not proposing to amend the article, but merely to insert in the commentary a reference to the fact that certain waters had special characteristics.

15. Mr. SANDSTRÖM said that, alternatively, the text might define high seas as being waters outside the territorial sea.

16. The CHAIRMAN said that Mr. Sandström's first point was pertinent. The Commission was, for the first time considering the articles relating to the law of the sea as a whole, and in considering article 1 the criterion appropriate to the whole must be applied. The terms used in the chapter on the territorial sea must bear an exact meaning so that a reader of the following chapter on the high seas would be left in no doubt as to the meaning of that concept. That, of course, would not preclude the insertion of a reference in the commentary as suggested by Mr. Krylov.

17. Mr. SPIROPOULOS concurred.

18. Mr. ZOUREK said that certain comments by governments stressed the vague nature of some of the

definitions employed. The meaning of the term " territorial sea " would be expounded elsewhere, but the commentary on article 1 should attempt to meet the criticisms by defining internal waters. The criticism that the definition was too categorical also had some force, and the discussion had revealed cases such as landlocked seas where the regime of the high seas was not applicable. The case of the polar seas was another that was not covered by the draft. The commentary should bring out that the article did not apply to those two cases.

19. The objections raised by the Philippine Government were important, because they might well be shared by all island States. The Commission might consider the reintroduction of the article on groups of islands, which it had omitted, although, to the best of his recollection, only provisionally, at the seventh session.[2]

20. Mr. PAL thought that mere definition of internal waters might not solve the problems relating to landlocked seas, because the draft articles treated internal waters only as part of an open sea. Nothing in the draft applied to any questions relating to landlocked seas, and even if the definition of internal waters were now made to cover landlocked seas the application of the substantive articles would not extend to landlocked seas. Some comment at any rate was surely called for in that respect.

21. The CHAIRMAN said that the Special Rapporteur's proposal to adopt the article provisionally pending further consideration of the chapter on the territorial sea should meet with approval.

It was so agreed.

Article 2: Freedom of the high seas

22. Mr. FRANÇOIS, Special Rapporteur, said that the Belgian amendment had probably been inspired by difficulties arising out of the different meanings attached to the English and French usages of the word " jurisdiction ". In the interests of clarity, the amendment was acceptable.

23. The proposal of the Indian Government, however, really had no justification, for the point it covered was obvious.

24. With regard to the Israeli amendment, the question of aerial law was one for future consideration.

25. The United Kingdom amendment in paragraph 21 was really a drafting point, and was acceptable.

26. The United Kingdom proposal in paragraph 23, for the addition of a fifth item, " Freedom of research, experiment and exploration " had already been taken up at the 335th meeting, when he and Mr. Pal had submitted proposals.[3] It might be as well to revert to that question there and then. Alternatively, the point might be deferred until a decision had been taken on his and Mr. Pal's proposals.

27. He would suggest, therefore, that the article, as amended by the Belgian proposal and the United Kingdom amendment in paragraph 21, be adopted, subject to a decision on the United Kingdom proposal in paragraph 23 being deferred.

28. Sir Gerald FITZMAURICE pointed out that paragraph 25 did not reflect the intentions of the United Kingdom Government. The proposal was not, as stated, to add a sixth freedom, but to add to the list of limitations in the penultimate paragraph of the comment on the article (A/2934, page 3), the item as drafted in paragraph 25.

29. Mr. PAL said that, if the Special Rapporteur's conclusions referred only to the four freedoms in the article as drafted, that was well and good. He foresaw difficulties, however, in the case of the United Kingdom proposal for the addition of a fifth item on freedom of research, experiment and exploration.

30. Mr. FRANÇOIS, Special Rapporteur, supported by Mr. KRYLOV, said he had no objections to reserving the question of the fifth freedom, but that was surely the appropriate moment for the discussion of the United Kingdom proposal.

31. Sir Gerald FITZMAURICE, explaining the reasons for the United Kingdom proposal, said that the point was actually mentioned in the second paragraph of the comment, which made it clear that the list of four freedoms was not restrictive. In paragraphs 53 to 55 of the Special Rapporteur's report (A/CN.4/97) attention was drawn to the concern aroused in international scientific circles by the Commission's proposals on the continental shelf. The omission of freedom of research, experiment and exploration from a specific list of the freedoms open to all nations on the high seas had not unnaturally aroused serious concern, based on the apprehension that a State might use its rights over the continental shelf to the detriment of scientific research. That fifth freedom was surely as important as the four others that had been listed.

32. The CHAIRMAN said that, in view of the importance of the United Kingdom proposal, the Commission should discuss it together with the Special Rapporteur's draft and Mr. Pal's proposal as amended by Mr. Krylov, for the two latter were not mutually exclusive.

33. Mr. AMADO said it should be borne in mind that acceptance of the United Kingdom proposal would open the door to demands for the addition of further freedoms. The list of four freedoms as drafted was quite adequate and the words " *inter alia* " made it clear that it was not intended to be comprehensive.

34. While appreciating the desire of the Belgian Government for a comprehensive text, he could not refrain from pointing out that its text was too repetitive and that the terms " sovereignty " and " any authority whatsoever " were hardly compatible; it would be advisable to delete both the word " jurisdiction " and the words " or any authority whatsoever " from the Belgian and the Special Rapporteur's texts.

35. The CHAIRMAN pointed out in that connexion the relevance of the second paragraph of the comment on the article (A/2934, page 3).

[2] A/CN.4/SR.319, paras. 57-66.

[3] A/CN.4/SR.335 paras. 35 and 36.

36. Mr. SANDSTRÖM shared Mr. Amado's opinion on the United Kingdom proposal; the proposed fifth freedom was not in the same category as the four listed, which were, so to speak, every day freedoms, whereas freedom of research would not be exercised frequently and was of less importance. At most, the Commission might insert the first part of the Special Rapporteur's proposal as contained in paragraph 57 of his report (A/CN.4/97).

37. Mr. SPIROPOULOS, endorsing the views of Mr. Sandström and Mr. Amado, said that previously international law had concerned itself only with the three classic freedoms: freedom of navigation, freedom of fishing and freedom to lay submarine cables and pipelines. The fifth freedom proposed by the United Kingdom was adequately covered by the comment and the article had simply emphasized the most important freedoms; an extension of the list of freedoms would be undesirable. His own feeling was that the fourth freedom had really no place in the article either, because there was no question of the use of the sea as such; what was involved was rather freedom of the air.

38. The word "jurisdiction" in the first sentence adequately conveyed the meaning intended, and did not call for any addition. He would not, however, oppose its replacement by the word "sovereignty". He saw no advantage in the United Kingdom amendment. In modern times, no State would in fact ever claim jurisdiction over the high seas. He did not attach great importance to the point, but in general he did not favour the amendment of texts already adopted unless by so doing they were definitely improved.

39. Mr. KRYLOV said he could not agree with Mr. Spiropoulos' last remark. The United Kingdom amendment, in foreseeing possible contingencies, had some force.

40. In reply to Mr. Amado, he said that repetition was sometimes of great value in clarifying the meaning of a concept, and the idea of jurisdiction was by no means easy for continental jurists to grasp.

41. If the United Kingdom proposal concerning a fifth freedom were accepted, there should be a proviso that such freedom of research, experiment and exploration should not be exercised to the detriment of humanity. He could not share Mr. Sandström's view of the relative importance of that freedom. Other important aspects of the question stressed by the Special Rapporteur and Mr. Pal should not be overlooked. In view of the interest in that point taken by other bodies, the Commission should decide the question of its competence in the matter.

42. Mr. LIANG, Secretary to the Commission, emphasized the need for precision in the wording of a key article. Like Mr. Amado, he questioned the wisdom of juxtaposing the words "sovereignty" and "jurisdiction", and thereby creating doubts about their meaning. It might also be ambiguous to refer to "authority" without specifying whether it was national or international. In view of the explanation contained in the second sentence of the comment, it might be preferable to retain the text as it stood and refer only to "jurisdiction".

43. Sir Gerald FITZMAURICE said that, following the comments by Mr. Amado, Mr. Sandström and Mr. Spiropoulos he would not press for the addition of a fifth freedom in article 2, and if the Commission decided that such an amendment was either undesirable or unnecessary he would remain content with the statement contained in the first two sentences of the second paragraph of the comment. If that were to be the final decision, however, and if the Commission contemplated incorporating in article 2 either the Special Rapporteur's or Mr. Pal's text, the subject of scientific research would be introduced without any previous mention of it in the earlier part of the article. Consequently the subject might better be treated in the comment. Another reason for that procedure was that the incorporation of Mr. Pal's proposal in the draft articles could render the whole project unacceptable to certain governments because the proposal went far beyond the restriction on the freedom of the seas intended by its author. If its scope were restricted by deleting the second sentence it might become less objectionable.

44. Turning to the United Kingdom Government's proposal to insert the words "purport to" in article 2, he explained that its purpose was to remove what might be considered an element of tautology in the present text, since, strictly speaking, no State could assert exclusive jurisdiction over any part of the high seas; even if a physical attempt to do so were made, it could have no legal validity. On the other hand, there could be instances of States purporting to assert such jurisdiction, to which category he would assign claims to a territorial sea of 200 miles' breadth. However, the matter was not of major importance and he would not press the amendment.

45. By and large he shared the Secretary's preference for referring only to "jurisdiction" in the text of the article, particularly as "sovereignty" and "authority" were mentioned in the comment.

46. Faris Bey el-KHOURI contended that no State would make the preposterous claim to subject all the high seas to its jurisdiction; the article should accordingly be qualified by referring to "any part of the high seas".

47. Mr. FRANÇOIS, Special Rapporteur, said that if it were agreed not to add the fifth freedom proposed by the United Kingdom, the Commission must first decide on the text of a provision concerning scientific research, and then decide what should be its proper place.

48. He had no very rigid views about the term "jurisdiction", which was frequently misunderstood, and had found the Belgian Government's proposal acceptable because both "sovereignty" and "authority" had been referred to in the comment adopted the previous year.

49. Mr. AMADO said that he had often been questioned by students of international law about the meaning of the words "sovereignty" and "jurisdiction", and though he did not wish to insist, he was anxious that the Commission, as a scientific body, should not propose texts capable of creating confusion and doubt. He had been satisfied with the text adopted at the previous session because of the explanation furnished in the

comment. If, however, the Commission decided to use the word " sovereignty ", coming as he did from the Latin-American continent where the greatest importance was attached to that concept, he must urge that it stand alone.

50. Mr. SANDSTRÖM considered that the Belgian Government's amendment was of dubious value and that the words " any authority whatsoever " might be in contradiction with the fact that certain rights were exercised by the coastal State in the contiguous zone. He felt that article 2 should refer either to " sovereignty " or to " jurisdiction ", but he had no particular preference.

51. Mr. PAL said that he was satisfied with the wording of article 2 as it stood and did not believe there was any need to amplify it in the way proposed by the Belgian Government.

52. He had thought that the fifth freedom (to conduct research, experiment and exploration) referred solely to the matters enumerated in the first three sub-paragraphs of article 2, in which case the United Kingdom proposal would have been innocuous because limited in scope, though he hardly thought it was a freedom of the high seas properly speaking. However, as Sir Gerald Fitzmaurice was not pressing that proposal, the Commission must choose between his own and that put forward by the Special Rapporteur in paragraph 52 of his report (A/CN.4/97). As he had already pointed out [4] the latter text failed to come to grips with the real point at issue, which was whether or not States were entitled to test atomic weapons on the high seas at all. The Special Rapporteur, after referring in paragraph 51 of his report to the two points of view, had then proceeded, in paragraph 52, to evade the whole question by presenting a text on an entirely different point prohibiting States from using the high seas in a manner which would unreasonably prevent other States from doing the same.

53. Mr. ZOUREK, fully supporting Mr. Pal's views, said that the Commission must state unequivocally that no State had the right to carry out experiments on the high seas with weapons of mass destruction, because they were undoubtedly a danger to man, caused pollution of the seas from radio-activity and were a source of contamination of various species of fish. Remembering that the Pacific danger zone for atomic and hydrogen bomb experiments was at present 400,000 square miles, it could hardly be claimed that such experiments did not affect the regime of the high seas. It would certainly be difficult to reconcile his point of view with that of the Special Rapporteur, who, accepting the defence of the experiments put forward in an article published in the *Yale Law Journal*, had concluded that such experiments, even if they violated the freedom of the high seas, were permissible if they could be claimed to be " reasonable ".

54. Mr. SPIROPOULOS observed that, if the United Kingdom proposal for the addition of a fifth freedom were rejected, the passage in the comment concerning scientific research must be retained. The question raised by Mr. Pal, however, was an entirely different one, and must be decided on its merits.

55. Mr. PADILLA-NERVO welcomed Sir Gerald Fitzmaurice's decision not to press for the acceptance of the United Kingdom Government's proposal for the addition of a fifth freedom. If Mr. Pal's assumption that freedom of research was related to the other freedoms listed in article 2 was correct, there was no need for the proposed addition, particularly in view of the clear statement made in the second paragraph of the comment. He was far from certain, however, whether that had in fact been the intention of the United Kingdom Government, since scientific bodies were clearly concerned that freedom of research in the waters above the continental shelf should not be endangered. He believed that a resolution on the subject had been transmitted to the Economic and Social Council through the United Nations Educational, Scientific and Cultural Organization (UNESCO) and he would be interested to know if the matter had been examined by the Council and, if so, with what results. The Commission itself might be interested to know that a number of Latin-American States had jointly reached certain decisions concerning the exploitation and exploration of the continental shelf.

56. With regard to atomic tests on the high seas, which were an entirely different problem, he believed that the Commission should take no positive stand, because of the political implications involved. The draft statutes of the proposed international atomic energy agency had been sent to governments for comment and would subsequently be referred to an international conference, which would also consider the effects of experiments connected with the peaceful uses of atomic energy. Certain aspects of the problem were also under consideration in the Disarmament Sub-Committee, where no final decision had yet been taken. Finally, the Scientific Committee on the Effects of Atomic Radiation had only just started its work and had not yet arrived at any conclusions. Thus the Commission, which did not possess the necessary technical knowledge to take into account all the complicated problems at stake and was not in a position to pronounce on the type of experiment which was permissible or the restrictions to which it should be subjected, must proceed with the greatest caution.

57. If the subject were mentioned in the comment, the reference should be limited to a statement that the high seas must not be used by any State in a manner harmful to mankind. A universal provision of that kind stated in general terms would not arouse objections.

58. Sir Gerald FITZMAURICE wished to make clear that if he did not press the United Kingdom amendment for the addition of the fifth freedom, it was only on the understanding that the reference to scientific research, as it stood in the comment, would be retained. The omission of that perfectly innocuous passage would cause serious alarm in scientific circles by giving the wholly unintended impression that the Commission was seeking to prohibit scientific research.

59. Mr. Pal's interpretation of the United Kingdom Government's intention was not entirely correct, since

[4] A/CN.4/SR.335, para. 36.

research was regularly carried out on, for example, meteorological conditions and mineral deposits under the sea-bed, which were not specifically mentioned in the present text of article 2.

60. Mr. Spiropoulos and Mr. Padilla-Nervo were perfectly correct in thinking that there was a fundamental difference between the proposal made by the Special Rapporteur and that made by Mr. Pal. The former was a legal proposition deriving naturally from article 2, and though unobjectionable hardly needed stating. The latter, on the other hand, entirely prohibited the use of the high seas for certain purposes and was politically highly controversial. Mr. Padilla-Nervo had adduced strong arguments against acceptance of that text, and he himself was firmly of the opinion that the Commission should say nothing on the subject.

61. Mr. PAL said that while it was true that the first sentence of the Special Rapporteur's text added nothing of substance, the whole mischief lay in the second sentence, which indirectly sought to sanction tests of new weapons on the high seas. That second sentence surely did not come within the scope of article 2 as it now stood, and could not appropriately be included in any comment on the article. Should that nevertheless be done, his own (Mr. Pal's) text must also be included. It was more appropriate for inclusion than the Special Rapporteur's text, since it sought to define freedom itself and emphasized that freedom of the seas must not be understood as unqualified licence. The fence and the boundary line were indeed the symbols of the spirit of justice, and the Commission should not refrain from setting up fences and boundaries, especially in view of the unfortunate human tendency to be more concerned with one's own weal than with that of others.

The meeting rose at 1.10 p.m.

340th MEETING

Friday, 4 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-5) (*continued*)

Article 2: Freedom of the high seas (concluded)

1. The CHAIRMAN observed that it had been generally agreed at the previous meeting not to add a fifth freedom concerning scientific research to those listed in article 2, but to retain the reference to it in the comment (A/2934, p.3). It remained for the Commission to decide whether a passage should also be included in the comment either on the lines of the text proposed by Mr. Pal[1] or in the form suggested by the Special Rapporteur in paragraph 52 of his report (A/CN.4/97).

2. Mr. SALAMANCA said that both the Special Rapporteur and Mr. Pal had recognized that the freedom of the high seas would be endangered by tests of nuclear weapons, since areas of several thousand square miles were declared prohibited zones for fishing while such tests were being conducted. Mr. Pal had brought out clearly that States could not exercise their rights on the high seas to the injury of others.

3. The Commission must bear in mind that the General Assembly, recognizing the importance of problems relating to the effects of ionizing radiation upon man and his environment, had, in its resolution 913 (X), established a scientific committee for their study, and on the basis of its findings might eventually decide that atomic experiments on the high seas should be prohibited.

4. It was difficult to foretell the fate of the draft articles at present under consideration, and even if they were finally accepted it would be some time before they were applied in international practice. In the meantime he believed a solution could be found which would conform with the nature of the Commission's strictly legal task and the decisions of the General Assembly concerning the problem of radiation. In fact, the Commission was really faced with a question of drafting, and he personally could have supported either of the two texts, since both stated that freedom of the seas was subject to certain conditions—an obviously legal proposition free from any political element.

5. Mr. PAL wished to remove one misapprehension about his proposal which some members repeatedly characterized as a political proposal. Perhaps those members were influenced by considerations of political prudence or expediency in so doing. In article 2 the Commission was dealing with the question of freedom of the high seas. It was accordingly perfectly logical, relevant and legal to proceed to define that freedom itself, and to say that it did not extend to certain categories of acts. He must consequently disown the characterization of his proposal as a political one, when in fact it contained a purely legal definition of the limits of the freedom of the high seas.

6. Mr. EDMONDS disagreed with Mr. Salamanca that the problem was merely one of drafting, because,

[1] A/CN.4/SR.335, para. 36.

as he had indicated,[2] the two proposals before the Commission were on two entirely different subjects and had quite different purposes. Mr. Pal's text was altogether too drastic to be acceptable, for there were numerous inventions, such as motor vehicles, which it could be claimed might be harmful to some part of mankind.

7. He also wished to point out to Mr. Salamanca that fishing was only temporarily prohibited in areas within a certain radius of the site of nuclear tests.

8. Faris Bey el-KHOURI suggested that Mr. Pal's point was, in fact, covered in the Special Rapporteur's text, which would prohibit tests of new weapons that interfered with the rights of other States on the high seas. Perhaps the text might be slightly modified to make that point more explicitly.

9. Mr. Pal's provision would be difficult to apply, because some expert body would have to decide what tests were likely to be harmful.

10. Sir Gerald FITZMAURICE agreed with Faris Bey el-Khouri's interpretation of the Special Rapporteur's text, beyond which he did not feel that the Commission, as a body of lawyers, could go, since it was in the present instance engaged in codifying existing law and not in devising rules *de lege ferenda*. The Special Rapporteur had emphasized the implicit corollary to the freedom of the high seas—namely, that it could not be exercised in a way which prevented other States from doing the same. Mr. Pal, on the other hand, had proposed what was virtually a new rule of law prohibiting the use of the high seas for certain purposes.

11. Mr. SANDSTRÖM also affirmed that the two proposals were of an entirely different nature, and supported the Special Rapporteur's proposal for the reasons given by Sir Gerald Fitzmaurice.

12. Mr. ZOUREK considered that the first sentence of Mr. Pal's text simply enunciated the same principle as was expressed in the third sentence of the first paragraph of the comment, which read: " States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States. " In his second sentence he had gone no farther than to state that tests of new weapons were also subject to the same limitation.

13. Mr. Edmonds had argued that other modern inventions might be harmful, but there was an essential difference because, unlike tests of new weapons on the high seas, they did not endanger the nationals of other States, and furthermore the danger was of a different order of magnitude. Nor could he agree that the Commission had not sufficient facts on which to take a decision. He need only refer to the works of various Japanese specialists in international law, particularly those of Mr. Kaoru Yasui, Professor of international law at Hosei and Kagawana Universities. There was no doubt whatsoever in his mind that the Commission was discussing a purely legal question connected with the definition of the freedom of the high seas, and that to accept the limitation proposed by Mr. Pal on that freedom would not go one jot beyond existing law, since his proposal was simply a logical development of the rule already stated in the second paragraph of the comment.

14. Mr. FRANÇOIS, Special Rapporteur, said that there was no need to amend his text, as suggested by Faris Bey el-Khouri, because it already referred to freedoms of the sea in general and was not restrictive in the way some members appeared to think.

15. The real difference between his text and Mr. Pal's was that his own wording prohibited activities which " unreasonably " prevented other States from exercising their rights, whereas Mr. Pal's ruled out altogether any use of the high seas which might be harmful to man. As Sir Gerald Fitzmaurice had emphasized, Mr. Pal's text went too far because certain activities, though they might adversely affect other States, might be justifiable, and that was why he (the Special Rapporteur) was convinced that the concept of " reasonableness " must be introduced.

16. As he had already stated at the 335th meeting,[3] he would be prepared to meet Mr. Krylov's point by deleting from his text the reference to States.

17. The CHAIRMAN said that the Special Rapporteur's text should be read in conjunction with the third sentence of the comment and was designed to safeguard the exercise of the freedoms listed in article 2, whereas Mr. Pal's object was an entirely different one—namely, to protect human beings from the noxious effects of certain scientific experiments.

18. Mr. PADILLA-NERVO said that if the Special Rapporteur's text was to be incorporated in the comment, for reasons he had given at the previous meeting, the second sentence should be modified to read: " Scientific research and tests of new weapons are also subject to this general principle of international law." That would make it clear that, as Sir Gerald Fitzmaurice had emphasized, the Commission was not creating new law. If, on the other hand, the Commission rejected the first sentence of the Special Rapporteur's draft in favour of the third sentence of the comment, the second sentence as amended by him would need to be inserted in the comment.

19. Mr. PAL considered that if that course were taken the word " experiments " should be substituted for the words " tests of new weapons ", since such tests might have been carried out already but were not yet recognized as legal.

20. Mr. FRANÇOIS, Special Rapporteur, said that he was prepared to withdraw the second sentence of his text and to accept Mr. Padilla-Nervo's proposed insertion in the comment.

21. Mr. ZOUREK believed the Commission should first vote on Mr. Pal's text, which was in effect an amendment. If that were rejected, it would be preferable to

[2] A/CN.4/SR.335, para. 56.

[3] A/CN.4/SR.335, para. 50.

retain the third sentence of the comment, followed by the first sentence of the Special Rapporteur's proposal.

22. Sir Gerald FITZMAURICE asked for separate votes on the two sentences of the Special Rapporteur's text. He saw no grounds for singling out scientific research as the only kind of activity which could be prejudicial to the rights of other States, particularly when that freedom was not even mentioned in article 2.

23. He welcomed the Special Rapporteur's decision to withdraw the second sentence of his text, but regretted his willingness to introduce the same statement in the comment. In his opinion the Commission should only make some kind of general statement to the effect that the freedom of the seas could not be used in such a way as to impair the rights of other States.

24. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice that it was undesirable to make specific reference to tests of new weapons and that a general statement of the kind outlined by Sir Gerald was what was needed.

25. Mr. Pal's text, being the most radical, should be voted on first.

26. Mr. PAL said that if the Commission followed the advice of Sir Gerald Fitzmaurice there would be no room for his own proposal, which was intended as a limitation on the right mentioned in the second sentence of the Special Rapporteur's text, so that in that eventuality he would withdraw his proposal altogether.

27. Mr. PADILLA-NERVO agreed with Mr. Zourek in preferring the third sentence of the comment to the first sentence in the Special Rapporteur's text. His purpose in suggesting an amendment had been to take Mr. Pal's proposal into account, but if it were withdrawn and the Special Rapporteur's second sentence were also dropped, there would be no need to refer to tests of new weapons at all.

28. Mr. AMADO proposed that, instead of adopting the Special Rapporteur's text, the third sentence of the comment be retained, since it amply covered the ground.

29. Mr. SANDSTRÖM said that the only difference between the two texts was that the Special Rapporteur had introduced the concept of "reasonableness"—perfectly justifiably in his (Mr. Sandström's) opinion since it was the condition governing the exercise of rights on the high seas. If the third sentence of the comment were retained, he would have no objection to its being amended in that sense or even to introducing the concept in the text of article 2 itself.

30. He joined Sir Gerald Fitzmaurice in asking for separate votes on the two sentences of the Special Rapporteur's draft.

31. Mr. PADILLA-NERVO observed that, once the Commission had chosen between the third sentence in the comment and the first sentence in the Special Rapporteur's text, which said virtually the same thing, it could decide whether or not specific reference should be made to tests of new weapons.

32. Mr. ZOUREK considered that the Commission should first vote on Mr. Amado's proposal, which he supported.

33. Mr. EDMONDS said that he had assumed that the wording of the comment would remain unchanged if the Special Rapporteur's text were rejected.

34. Mr. PAL said that if a new sentence of the kind suggested by Mr. Padilla-Nervo were added to the comment, his own proposal still stood.

35. Mr. PADILLA-NERVO said that as the Special Rapporteur had withdrawn the second sentence of his text, his own proposed amendment was eliminated.

36. The CHAIRMAN pointed out that the third sentence of the comment would then refer only to the four freedoms enumerated in article 2.

37. Mr. ZOUREK said that unless a formal vote were taken there would be a risk of a subsequent—and decidedly unprofitable—reopening of the whole discussion. Whatever the text adopted it must refer not only to the four freedoms listed, but also to freedom to engage in scientific research. That matter, however, could be safely left to the Special Rapporteur.

38. Sir Gerald FITZMAURICE pointed out that the sentence in the comment was in fact comprehensive. If any doubts remained, however, all that was required was to change its position in the comment.

39. The CHAIRMAN concurred.

40. Mr. LIANG, Secretary to the Commission, suggested that some modification of the comment on article 2 would still be required in order to avoid creating the impression, in the report, that the question was still under consideration.

41. Mr. AMADO urged the overwhelming advantage of the sentence in the comment, namely, that it was comprehensive.

42. In reply to the CHAIRMAN, who had suggested that the question could be safely left in the hands of the Special Rapporteur, Mr. FRANÇOIS, Special Rapporteur, appealed to the Commission to give him some clearer guidance in the matter.

43. Mr. SALAMANCA failed to see the advantage of voting on the question. The text approved at the seventh session (A/2934) contained a general principle which seemed to meet Mr. Pal's point. He had every confidence in the Special Rapporteur's ability to draft a text that would faithfully reflect the Commission's mind.

44. Mr. ZOUREK pointed out that the Commission was engaged in preparing a report for the General Assembly, and that in the interests of absolute clarity the Commission should give the Special Rapporteur a rather more precise directive.

45. The CHAIRMAN put to the vote the proposal to retain the third sentence of the first paragraph of the comment on article 2.

The proposal was adopted by 11 votes to none, with 1 abstention.

46. Sir Gerald FITZMAURICE, explaining his abstention, said that he had no actual objection to the proposal in itself, but preferred to abstain in view of the implica-

tions which, in the light of the debate, might now be read into it.

47. Mr. ZOUREK, supported by Mr. AMADO, proposed that the sentence should be so placed that it was perfectly clear that its application covered the whole use of the high seas, including scientific research and experiments with thermo-nuclear weapons.

Mr. Zourek's proposal was adopted unanimously.

48. The CHAIRMAN said the Commission should take a decision with regard to the Special Rapporteur's proposed text for article 2, given in paragraph 26 of the addendum to his report (A/CN.4/97/Add.1).

49. Mr. KRYLOV said that, in the light of Mr. Amado's unanswerable arguments, he would agree that, at the end of the first sentence of the article, the term " sovereignty " alone should be used.

50. The CHAIRMAN said that, in view of the difficulties arising out of the interpretation of the term " jurisdiction ", he too would prefer the term " sovereignty ".

51. Mr. PADILLA-NERVO also supported Mr. Amado's proposal to retain only the term " sovereignty " and delete the words " jurisdiction " and " or any authority whatsoever ".

52. In view of the subjective element in the word " purport ", he would oppose its insertion as proposed by the United Kingdom. It would unnecessarily complicate interpretation of the article.

53. Mr. PAL urged the acceptance of the United Kingdom proposal to insert the words " purport to ". That additional concept improved the text.

54. The CHAIRMAN pointed out that Article 1 of the Charter of the United Nations referred not only to " acts of aggression ", but to " threats to the peace ". There was some advantage in stressing the idea of intention.

55. Mr. LIANG, Secretary to the Commission, understood the verb " purport " as being synonymous with " claim " and he would differ from those who read into it the idea of intention. To " purport " was an act capable of objective ascertainment.

56. Faris Bey el-KHOURI proposed the insertion of the words " any part of " in the first sentence of the Special Rapporteur's text between the words " subject " and " them ".

57. Mr. PADILLA-NERVO, supported by Mr. AMADO, said that the proposal should be voted on by parts. First, the United Kingdom proposal in paragraph 21 (A/CN.4/97/Add.1) for the insertion of the words " purport to "; secondly, Faris Bey el-Khouri's proposal for the insertion of the words " any part of ", taken from the United Kingdom proposal in paragraph 21; and, lastly, Mr. Amado's proposal to delete the words " jurisdiction " and " or any authority whatsoever ", retaining only the word " sovereignty ". He himself could accept the last proposal only; acceptance of the first two would only complicate the General Assembly's task when it came to consider the Commission's report at its forthcoming eleventh session.

58. The CHAIRMAN put to the vote the United Kingdom proposal in paragraph 21 to insert the words " purport to ".

The United Kingdom proposal was adopted by 7 votes to 4, with 1 abstention.

59. Mr. PADILLA-NERVO and Mr. AMADO explained that they had voted against the proposal for the reasons they had already given.

60. Mr. SALAMANCA said that he also had voted against the proposal for the same reasons.

61. Mr. ZOUREK explained that he had voted against the proposal because he could see no necessity for the insertion of the word " purport " without qualification. The concept required modification by some such word as " legitimately ".

62. The CHAIRMAN put to the vote Faris Bey el-Khouri's proposal to insert the words " any part of " between the words " subject " and " them " in the Special Rapporteur's text in paragraph 26.

Faris Bey el-Khouri's proposal was adopted by 8 votes to 4.

63. Mr. PADILLA-NERVO explained that he had voted against the proposal for the reasons he had already given.

64. The CHAIRMAN put to the vote Mr. Amado's proposal to delete from the Special Rapporteur's text in paragraph 26 the words " jurisdiction " and " or any authority whatsoever ".

Mr. Amado's proposal was adopted by 10 votes to 2, with no abstentions.

65. The CHAIRMAN put to the vote the Special Rapporteur's text in paragraph 26, as a whole and as amended.

The Special Rapporteur's text for article 2, in paragraph 26 of document A/CN.4/97/Add.1, as a whole and as amended, was adopted by 11 votes to none, with 1 abstention.

66. Mr. KRYLOV, referring to the third freedom listed in article 2, drew attention to the comment of the Swedish Government regarding the possibility of the submarine transmission of electric power.[4]

The meeting rose at 1 p.m.

[4] A/CN.4/99, p. 30.

341st MEETING

Monday, 7 May 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-5) (*continued*)

1. Before inviting the Commission to continue its consideration of item 1 of the agenda—Regime of the high seas—the CHAIRMAN welcomed Mr. Georges Scelle, saying that he was sure that he would be expressing the feelings of the whole Commission in congratulating Mr. Scelle on the speedy recovery he had made from his recent illness.

2. Mr. SCELLE thanked the Chairman for his kind words.

Article 3: Right of navigation

3. Mr. FRANÇOIS, Special Rapporteur, referring to the addendum to his report (A/CN.4/97/Add.1), said that the United Kingdom amendment to article 3 was one of drafting only, and could be supported. The Yugoslav proposal, however, was not acceptable, for an " equal " right would not exclude limitations applying to all nations.

4. Mr. ZOUREK failed to understand the Special Rapporteur's objection to the Yugoslav proposal, which seemed to have some merit.

5. Mr. SPIROPOULOS pointed out that equality of right applied to all the draft provisions; the principle was self-evident.

6. Sir Gerald FITZMAURICE agreed and said that, except where the contrary was stated, all rights were equal rights. There were no historical grounds for suggesting that some nations would have a greater right than others, and the introduction of the idea of equality in that single article would simply lead to confusion.

7. Mr. SANDSTRÖM, Mr. SCELLE and Mr. AMADO concurred.

8. Mr. ZOUREK withdrew his support of the Yugoslav proposal.

Article 3 was adopted subject to the drafting change in the English text proposed by the United Kingdom Government.

Article 4: Status of ships

Article 5: Right to a flag

9. Mr. FRANÇOIS, Special Rapporteur, referring to article 4, said that, whereas at its seventh session the Commission had been of the opinion that the question of the right of international organizations to sail vessels exclusively under their own flags called for further study, which would be undertaken in due course,[1] certain governments, in particular those of Israel and Yugoslavia, had since called for immediate consideration of the matter. In view of the fact that the question deserved a more thorough study than could be given to it at the present session, the Commission should re-state that same opinion.

10. The United Kingdom amendment in paragraph 32 (A/CN.4/97/Add.1) was acceptable. It was, however, linked with the same government's amendment to article 5.

11. He failed to see the force of the Yugoslav proposal in paragraph 34. For instance, it seemed entirely to ignore treaties concluded prior to the setting up of the United Nations. The proposal should not be accepted.

12. Mr. EDMONDS pointed out that in the second paragraph of the comment on article 4 (A/2934), it was stated that the term " jurisdiction " was used in the same sense as in article 2. The substitution of " sovereignty " for " jurisdiction " in article 2, however, would require either a similar amendment to article 4 or the deletion of the second paragraph of the comment thereto.

13. Mr. LIANG, Secretary to the Commission, said that the Secretariat had compiled a volume [2] dealing with the various national laws concerning the nationality of ships, copies of which had already been distributed to members of the Commission.

14. On the question of the right of international organizations to sail vessels under their own flags, the Secretariat had prepared a paper for the assistance of the Special Rapporteur. If the Commission decided to reopen the question, it should do so during the present session.

15. With regard to the point raised by Mr. Edmonds, in that context, " jurisdiction " was the only suitable word.

16. Mr. SANDSTRÖM agreed with the Secretary's last point. What was meant was obviously legislative and judicial jurisdiction.

17. It would be advisable to take articles 4 and 5 together. If the question of international organizations were discussed, the comment by the Government of Israel should be carefully considered. In that connexion,

[1] A/2934, p. 4, comment on article 4.

[2] United Nations *Legislative Series*, ST/LEG/SER.B/5.

the protection aspect would be of major importance, and he recalled that, during the Second World War, the International Committee of the Red Cross had chartered ships to carry medical supplies for prisoners of war which, while sailing under the flag of the State that owned the ship, also prominently displayed the sign of the Red Cross. That was the right method to follow.

18. Mr. ZOUREK said that the question should certainly be dealt with at the present session; an unfortunate impression would be created if draft articles covering the whole of the regime of the sea did not suggest any solution for a problem which the Commission had held over from its last session for further study.

19. The CHAIRMAN said that further discussion of the question could await the submission of a text by the Special Rapporteur.

20. The Yugoslav proposal in paragraph 34 obviously commanded no support, but the Commission would have to take a decision on the United Kingdom draft text proposed in paragraph 32. It was clear that articles 4 and 5 could most conveniently be taken together.

21. Mr. FRANÇOIS, Special Rapporteur, suggested that, in view of the large number of amendments submitted by governments to article 5, it might be convenient to dispose first of the Belgian proposal in paragraph 38, which he would support.

22. Mr. KRYLOV said that there were so many amendments that it would be advisable to take first those dealing with questions of principle, submitted by the Netherlands and United Kingdom Governments and reproduced in paragraphs 50 and 54 respectively. A decision on those might well lead to the elimination of several of the other proposals. His own view was that the article had been well drafted, although perhaps with an excessive concern for detail. He found the Netherlands proposals decidedly attractive.

23. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Krylov's proposal. If, for instance, the Netherlands amendment were accepted, the other proposals dealing with points of detail would be automatically eliminated. He had proposed taking the Belgian amendment in paragraph 38 first, because a decision on it would not necessarily affect any other part of the article. He was perfectly willing, however, to examine the question of principle first, and in that connexion he recalled the difficulties the Commission had encountered in formulating the conditions for recognition of the national character of a ship by other States. The Commission had not been entirely satisfied with the text drafted, which had been based on the rules of the Institute of International Law adopted over fifty years previously. It would be convenient, without going into specific details, to examine the connexion between the State and the ship as put forward in the Netherlands proposal.

24. Mr. SANDSTRÖM said that the Special Rapporteur's recollection of the Commission's lack of enthusiasm for the draft of article 5 was correct; the article amounted to little more than a stop-gap. The United Kingdom proposals showed that both articles had the defect of being too narrowly conceived and at the same time too vaguely expressed. He would support the United Kingdom amendment to article 4; as to article 5, both the United Kingdom and Netherlands proposals had much to commend them.

25. Mr. SALAMANCA said that the Commission would be wise to confine itself to consideration of the general principle that should apply. Behind the stress on the necessity for " genuine connexion between the State and the ship " was probably the fear of competition from States with very liberal registration laws. Introduction of detailed conditions might have some effect on the freedom of the high seas. Such details should therefore be avoided.

26. Mr. SCELLE said that, at its seventh session, the Commission had been far too ambitious in attempting to draft a text embracing the commercial legislation of all States. Although he had not yet had an opportunity to study the documents, his first impression of the United Kingdom and Netherlands proposals was favourable. For the moment the Commission should confine itself to an attempt at a simplification of the text, based on either the United Kingdom or the Netherlands amendments.

27. Mr. SPIROPOULOS said that the issues raised by the article were highly complex and defied codification. The Commission would be wise to confine itself to the formulation of general principles as set forth in the United Kingdom and Netherlands proposals, either of which or a combination of both could be selected.

28. Mr. ZOUREK, endorsing Mr. Spiropoulos' view, recalled his criticisms of the draft text at the seventh session,[3] in particular with regard to legal entities other than States. The existing text settled nothing and whereas in 1955 the Commission might have claimed that it had insufficient materials from which to draft a satisfactory formulation, the replies received from governments in 1956 had entirely changed the situation. The very wide divergencies in national practice and the variety of criteria for the registration of ships provided a powerful argument for substituting general principles for detailed provisions.

29. Article 4 had the great merit of stating categorically the principle that the nationality of a ship was determined by its port of registry. That was an important principle which should be retained.

30. On the whole, he preferred the Netherlands proposal for article 5 to the United Kingdom proposal, which was based on quite a different concept.

31. Sir Gerald FITZMAURICE said that the Commission should decide whether it wanted a detailed text or a general formula. If the latter, he would propose that the question be referred to a small sub-committee, which, on the basis of the United Kingdom and the Netherlands or any other proposals, could prepare a text for subsequent consideration by the Commission.

32. While there was nothing in the Netherlands proposal to provoke positive disagreement, it suffered, perhaps, from a tendency to the extreme of generality. The

[3] A/CN.4/SR.294, paras. 3 and 23.

United Kingdom proposal was an attempt, while eliminating controversial detail, to give some content to the idea of a substantial connexion between the State and the ship flying its flag.

33. In 1955, he would have accepted Mr. Zourek's point. After mature reflection however, he doubted whether the principle of registration by States was correct. Some ships—the outstanding example being warships—were not registered at all, and in many countries fishing craft and vessels below a certain tonnage were also exempt. The principle, therefore, was not of general application. There was considerable variation, also, in the conditions themselves; a ship might, for instance, be registered in more than one country although, of course, it would not have the right to fly more than one flag.

34. Mr. SALAMANCA said that article 5 had both a general and a specific aspect. If the Commission were to confine itself to general principles it could not at the same time, except superficially and in an unsatisfactory manner, make concrete and detailed provisions. The document prepared by the Secretariat had made it clear that the Commission could not undertake codification of such matters; moreover its report must be an integrated whole.

35. He would support the proposal to set up a sub-committee.

36. The CHAIRMAN, referring to article 5, said that the Commission should first decide whether it wished to formulate a general principle or detailed provisions.

37. Mr. AMADO said that the problem was complicated by its various aspects: that of registration, which was the Netherlands approach; that of the flag, which the United Kingdom preferred; and that of the general principle of the connexion between the State and the ship, which was stressed in the Netherlands proposal and clarified by the second sentence of the United Kingdom proposal. Those aspects should be considered in that order. The choice between what he would call the flag and the registration aspects was admittedly a complicated and difficult matter.

38. Mr. SPIROPOULOS suggested that a decision on the points raised by Mr. Amado should be deferred, and that a small sub-committee should be set up which, in the light of the discussion, could draft a suitable text for submission to the Commission.

39. Mr. AMADO concurred.

40. Mr. SCELLE supported Sir Gerald Fitzmaurice's proposal that the Commission should first decide on the method it was to follow. He himself preferred the formulation of a general principle to the enumeration of detailed provisions.

41. Faris Bey el-KHOURI said that any attempt to redraft article 5 following the approach adopted at the previous session could lead only to confusion.

It was unanimously decided that article 5 should be redrafted on the basis of formulation of a general principle.

It was further decided to set up a sub-committee consisting of Mr. François, Special Rapporteur, Sir Gerald Fitzmaurice, Mr. Krylov, Mr. Salamanca, Mr. Scelle and Mr. Zourek, to prepare a text of article 5 in accordance with the foregoing decision, and to review the text of article 4.

Article 6: Ships sailing under two flags

42. Mr. FRANÇOIS, Special Rapporteur, said that both the Israeli and Yugoslav Governments considered that the question of change of flag should be dealt with, but although, at the previous session, there had been general agreement on the importance of the question, the Commission had decided not to deal with it, because of the many difficulties involved. He recommended that that decision be adhered to, particularly as the Commission would be hard pressed to conclude discussion of all the existing articles by the end of the session.

43. He found the two drafting amendments, proposed by the Netherlands and United Kingdom Governments respectively, acceptable.

44. The Yugoslav Government had proposed the addition of a new paragraph reading, " Ships sailing without a flag or under a false flag may also be assimilated by other States to ships without a nationality".

45. Mr. ZOUREK wondered whether the draft would not be incomplete without a provision concerning change of flag, since it was generally felt that dual nationality was most undesirable. Perhaps, as time was short, a general statement of principle might suffice.

46. Mr. KRYLOV considered that the wording of article 6 was not particularly felicitous and should be revised; it should refer to registration and not to the flying of flags.

47. Sir Gerald FITZMAURICE said that the Special Rapporteur was wise in suggesting that the Commission should not go back on its previous decision to leave aside the question of change of flag, which had been debated at considerable length at the previous session.[4] The Commission had concluded that, owing to the differences in national legislation and the time-limits laid down for registration to take effect, it would be impossible to ensure that loss of nationality coincided exactly with the moment at which the new nationality was acquired. That difficulty could not be overcome unless all States were prepared to adopt uniform and rigid legislation on the subject.

48. The Yugoslav Government, concerned at the policy followed by certain countries which were loth to release ships from registration, had proposed an elaborate system whereby a State would be given three months to remove from its register a ship whose owner wished to change its nationality and if that were not done the ship would then be deemed to be free to acquire a new nationality. Again, such a system would only be operable with the consent of all concerned.

49. He personally believed that the Commission could not go farther than to provide, as was done in article 6, that a ship was entitled to fly one flag only.

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[4] A/CN.4/SR.293, paras. 71-103; A/CN.4/SR.294, paras. 52-77.

50. Mr. PAL pointed out that it would appear from the last sentence of the United Kingdom Government proposal for article 5 that a ship could fly two flags. He wondered how that position could be reconciled with article 6.

51. Sir Gerald FITZMAURICE explained that that was not the intention of the United Kingdom Government's proposal, the purpose of which was to cover cases where it was not unlawful for nationals of one country owning a vessel to fly the flag of another. However, once they had elected to do so, they were no longer entitled to fly the flag of their own country on that vessel.

52. Mr. ZOUREK said that he had learned that it was the practice of some States to allow ships to fly two flags by way of exception, when chartered by a foreign company; perhaps that contingency should be covered in article 6.

53. Mr. SPIROPOULOS wondered whether article 6 was strictly necessary, particularly as the proposed penalty was inadequate.

54. Mr. FRANÇOIS, Special Rapporteur, believed that as there was a close connexion between articles 6 and 5, the former might also be referred to the Sub-Committee once the Commission had decided the point of principle whether or not a provision on change of flag should be inserted.

55. He saw no reason for deleting article 6, and indeed no government had questioned its utility.

56. Mr. SANDSTRÖM agreed with the Special Rapporteur that it would be undesirable to omit article 6; some statement of principle on the subject of ships sailing under two flags was necessary.

57. He had some sympathy for the addition proposed by the Yugoslav Government, but would like to hear the opinion of the Special Rapporteur.

58. Mr. SPIROPOULOS said he would not oppose the retention of article 6, which should be referred to the Sub-Committee.

59. Mr. PAL also considered that the article should be referred to the Sub-Committee so that its wording might be brought into line with article 5.

60. Mr. FRANÇOIS, Special Rapporteur, in answer to Mr. Sandström, said that the Yugoslav proposal for the addition of a new paragraph raised a number of difficulties, for example, the question of how other States were to determine whether a flag was false. However, perhaps the problem was one of drafting rather than substance and could be referred to the Sub-Committee.

61. Mr. SANDSTRÖM considered that it was even more necessary to apply the severe penalty imposed in article 6 to ships flying false flags than to ships sailing under two flags.

62. Mr. SPIROPOULOS had no objection to the additional text proposed by the Yugoslav Government being referred to the Sub-Committee.

63. Sir Gerald FITZMAURICE said that although he was prepared to agree to the Yugoslav proposal being examined by the Sub-Committee, he must point out that the question of a ship flying a false flag was already implicitly covered in article 6.

It was agreed not to include a provision concerning change of flag, but to refer article 6 to the Sub-Committee for re-drafting, together with the Yugoslav proposal for the addition of a new paragraph.

Article 7: Immunity of warships

64. Mr. FRANÇOIS, Special Rapporteur, reminded members that at its previous session the Commission had based its definition of warships on articles 3 and 4 of the Hague Convention of 1907 concerning the Conversion of Merchant Ships into Warships. The Netherlands and Yugoslav Governments had pointed out that the definition was not quite complete and the former had proposed a text for paragraph 2 which would bring it more closely into line with the Convention. That wording, which he found acceptable, would probably also satisfy the Yugoslav Government.

65. Mr. SPIROPOULOS, while understanding the reasons for attempting to provide a definition, was not altogether happy about the text adopted at the previous session. For example, it was not clear whether, if one of the conditions were not fulfilled, the vessel would not be regarded as a warship. He doubted whether an enumeration of the characteristics of a warship, which were now commonly known, was really essential.

66. Mr. FRANÇOIS, Special Rapporteur, considered that those objections were less applicable to the proposed new text of paragraph 2 which now referred to " the external marks distinguishing warships ".

67. Mr. LIANG, Secretary to the Commission, pointing out that the purpose of the Hague Convention was to prevent warships from masquerading as merchantmen in order to evade capture, questioned whether the definition it contained was appropriate to a draft essentially concerned with peace-time conditions.

68. Sir Gerald FITZMAURICE said that the Secretary had made a useful distinction between the purpose of the two texts. The definition in the Hague Convention, while satisfactory in its own context, was defective for the general purposes of a draft dealing with the regime of the high seas in times of peace. For instance, the passage reading: " The term ' warship ' means a vessel under the direct authority, immediate control and responsibility of the Power the flag of which it flies " failed to differentiate between warships and other publicly owned government vessels. Perhaps the best and simplest definition was that proposed by the Commission in the first phrase of paragraph 2 of the article, reading: " The term ' warship ' means a vessel belonging to the naval forces of a State."

69. In reply to Mr. SANDSTRÖM, Mr. FRANÇOIS, Special Rapporteur, explained that the external marks distinguishing warships were a flag or action pennant.

70. Mr. AMADO considered that the definition given in paragraph 2 and in the Netherlands amendment was not scientific and could not be regarded as a state-

ment of existing law. He believed the first phrase of the Netherlands text, up to the words " it flies ", would suffice.

71. Mr. FRANÇOIS, Special Rapporteur, said that he could support that amendment to the Netherlands proposal.

72. Mr. SALAMANCA, after expressing agreement with Mr. Amado, said that the article should lay stress on the functions rather than the characteristics of warships.

73. Mr. SPIROPOULOS said that he was still uncertain whether ships not possessing some of the features enumerated in the definition would be thereby excluded from the official list of warships of the country concerned. Perhaps the Sub-Committee might be requested to draft a definition in the light of the present discussion.

74. Sir Gerald FITZMAURICE said that some degree of precision was essential; otherwise there was danger of the kind of abuse which the authors of the Hague Convention had sought to prevent.

75. Mr. AMADO agreed.

76. Mr. PADILLA-NERVO considered that paragraph 2, as adopted at the previous session, already contained the necessary elements, and that perhaps the only addition required was a reference to the external marks distinguishing warships.

77. Mr. SPIROPOULOS said that if the enumeration in paragraph 2 was to be retained, Mr. Padilla-Nervo's suggestion should be followed, so as to make the definition complete.

78. The CHAIRMAN, observing that there seemed to be general support for paragraph 1, proposed that the decision on paragraph 2 be deferred until the next meeting.

It was so agreed.

The meeting rose at 6.10 p.m.

342nd MEETING

Tuesday, 8 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) (*continued*)

Article 7: Immunity of warships (concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of article 7, paragraph 2 (A/2934).

2. Mr. FRANÇOIS, Special Rapporteur, said that in the light of the discussion at the previous meeting he would suggest that the words " which is under the command . . . under regular naval discipline " be replaced by the words " and bearing the external marks distinguishing warships of its nationality ". He believed that that suggestion, which was according to what had been proposed by Mr. Amado at the previous meeting, would satisfy the Netherlands and Yugoslav Governments.

3. Mr. SPIROPOULOS asked in what relation that definition would stand to the definition in the Hague Convention concerning the Conversion of Merchant Ships into Warships. Perhaps it should be made clear that the Commission's definition was for times of peace.

4. Mr. ZOUREK believed it might be desirable to retain the latter part of paragraph 2 as adopted at the previous session, because it contained at least some precise criteria.

5. Mr. SANDSTRÖM said it was bad policy to alter a definition already established after exhaustive discussion, and to do so would only give rise to misunderstanding and criticism. He saw no reason why the Commission should not retain the substance of the definition in the Hague Convention by inserting in the text adopted at the previous session a reference to the external marks distinguishing warships.

6. Mr. AMADO said that he would not press his proposal.

7. Mr. PADILLA-NERVO believed that the wording suggested by the Special Rapporteur would suffice, and would be acceptable to the Netherlands and Yugoslav Governments. There was no need for the Commission to discuss the consequences of adopting such a definition, because all the aspects of the problem had been thoroughly studied at the previous session.

8. The CHAIRMAN suggested that Mr. Spiropoulos' point could be met by prefacing paragraph 2 with the words " For the purposes of this article ".

9. Mr. LIANG, Secretary to the Commission, pointed out that the definition in the Hague Convention had been drafted in such a way as to facilitate visit and search in order to ascertain whether a merchantman had been genuinely converted into a warship, and the wording, at least to some extent, reflected the legal usage of that time.

In present-day circumstances it was inconceivable that a vessel not commanded by a commissioned officer on his government's navy list and the crew of which was not subject to regular naval discipline could be a warship. He would therefore go so far as to suggest that the latter part of paragraph 2 was not only superfluous, but out of date. All the necessary elements were covered in the opening phrase: " The term ' warship ' means a vessel belonging to the naval forces of a State."

10. The Chairman's amendment would make it clear that the Commission was not putting forward a general definition of warships.

11. Mr. SPIROPOULOS, observing that a definition had been included in the Hague Convention for obvious reasons, reiterated his doubts about the necessity of a definition in the present draft. If the Commission insisted on including one, he hoped it might be placed in the comment; but if that were done the Chairman's amendment was essential, in order to ensure that there was no conflict between the two definitions.

12. Mr. ZOUREK said that once a reference had been made in paragraph 2 to the external marks distinguishing warships, there would be no essential difference between the two definitions. Moreover, he considered it entirely undesirable to embody in the text a definition of a warship which did not correspond to the generally accepted definition of that term.

13. Faris Bey el-KHOURI thought it would be altogether inappropriate to insert a definition of warships in the draft, because it was for States themselves to determine which of their vessels came into that category. On the other hand he believed that the Commission should impose the requirement that they bear a clearly visible distinguishing mark.

14. The Sub-Committee should be requested to prepare a recommendation concerning a uniform international sign which, once adopted by all States, would be easily recognizable and would eliminate mistakes of identification.

15. Mr. LIANG, Secretary to the Commission, said that if the Commission decided to include a definition of warships, article 7 was not the proper place for it, since the impression might be given that the definition did not apply to the warships mentioned in articles 15 and 20.

16. Sir Gerald FITZMAURICE, observing that it was not easy to decide whether a definition was desirable, said that although there was considerable force in Mr. Spiropoulos's contention that it was not strictly necessary, he himself would hesitate to support its omission. The object of the Hague Convention had been to prevent merchant ships from turning themselves into commerce raiders in wartime, and seeking to acquire, quite inadmissibly, the status of warships simply by hoisting a naval flag in order to board, capture, or sink other vessels, after which they would revert to their former status of merchant ships. There was a parallel between that situation and the one dealt with in article 14, where it was laid down that piracy was an offence which could not be committed by a warship, so that there was some justification for providing the same kind of safeguard against merchant vessels claiming the status of warships as was contained in the Hague Convention. For that reason he was inclined to favour paragraph 2 as adopted at the previous session, with the addition of a requirement that warships must carry distinguishing external marks.

17. Mr. AMADO regretted that he should have instigated a prolonged discussion. Although he still maintained his objection to the latter part of paragraph 2, he was prepared to withdraw it in favour of Mr. Padilla-Nervo's suggestion at the previous meeting.[1]

18. Mr. SPIROPOULOS proposed that paragraph 2 be deleted and the second sentence of the comment redrafted to indicate that the Commission did not think it necessary to give a definition of the term " warship ", the reference to articles 3 and 4 of the Hague Convention being retained.

19. Mr. EDMONDS believed that a decision to omit paragraph 2 after it had been adopted at the previous session would be misconstrued, and therefore favoured Mr. Padilla-Nervo's suggestion, for the reasons given by Sir Gerald Fitzmaurice.

Mr. Spiropoulos' proposal was rejected by 5 votes to 3, with 6 abstentions.

20. Mr. KRYLOV said that he had supported the proposal because he considered that the definition contained in the Hague Convention was a good one and that there was no need to add another in the present draft.

21. The CHAIRMAN put to the vote the first part of paragraph 2 with the amendments suggested during the discussion, reading: " For the purposes of these articles, the term ' warship ' means a vessel belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality."

The amended wording was adopted by 13 votes to none, with 1 abstention.

22. The CHAIRMAN then put to the vote the remainder of paragraph 2, from the words " which is under the command " to the end.

The remainder of the paragraph was adopted by 8 votes to 1, with 5 abstentions.

23. Mr. SCELLE said that, although any definition was likely to be faulty because incomplete, the one just adopted was not restrictive and he welcomed the acceptance of the minimum conditions laid down in the latter part of the paragraph. Nor was there any harm in amplifying the text adopted at the previous session by referring to external distinguishing marks.

Article 8: Immunity of other state ships

24. Mr. FRANÇOIS, Special Rapporteur, said that the Governments of the Netherlands and the Union of South Africa had both objected to the Commission's decision to depart from the International Convention for the Unification of Certain Rules relating to the

[1] A/CN.4/SR.341, para. 76.

Immunity of State-owned Vessels by granting to state ships used on commercial government service the same immunity as was enjoyed by other state ships. Both had proposed that the Commission should revert to the Brussels Convention on that point. As he had indicated in paragraph 77 of the addendum to his report (A/CN.4/97/Add.1), such a change would be contrary to the Commission's intention to assimilate state ships used for commercial purposes to warships for the purposes of article 8, which, in practice, was likely to come into play only in the infrequent cases of pursuit or visit on suspicion of piracy or slave traffic. It remained for the Commission to decide whether the objections raised by the two governments he had mentioned were persuasive enough to justify modifying its previous decision.

25. Mr. PADILLA-NERVO believed the Commission should adhere to its earlier decision.

26. He found the United Kingdom amendment substituting the words " shall have the same immunity as " for the words " shall be assimilated to ", acceptable.

27. Mr. LIANG, Secretary to the Commission, pointed out that there might be inconsistency between the comment and the text of article 8: the latter made no reference to commercial government service.

28. He also considered that the expression " auxiliary vessels " was imprecise.

29. Mr. AMADO proposed that the United Kingdom amendment be added after the phrase it was intended to replace.

30. Sir Gerald FITZMAURICE suggested that Mr. Amado's proposal might widen the scope of the provision. The purpose of the United Kingdom amendment was to make it clear that the State ships listed in article 8 were assimilated to warships only for the purposes covered in that article.

31. It would be remembered that the United Kingdom Government had also raised the question how a warship could verify the flag of a state ship other than by boarding it (A/CN.4/99/Add.1, page 56), which was precisely what it would be unable to do under article 8. If that were a serious difficulty, perhaps the Commission might consider a provision by which vessels on government service could not claim immunity from visit unless they bore a distinguishing mark.

32. Mr. SCELLE agreed with Mr. Padilla-Nervo that the United Kingdom amendment would make the text clearer and should be accepted.

33. Mr. ZOUREK observed that if the amendment were adopted, the opening words of the article would have to be revised, since they governed the phrase " shall be assimilated to ".

34. Sir Gerald FITZMAURICE saw no reason for changing the opening words, which were useful in explaining the purpose of the article. The wording proposed by the United Kingdom Government was more in consonance with the spirit of the article and did not entail a change of substance.

Mr. Amado's proposal that the words " and shall have the same immunity as " be inserted after the words " shall be assimilated to " was adopted.

35. In reply to a question by the CHAIRMAN, Sir Gerald FITZMAURICE said that he had no formal proposal to make at that stage concerning the question raised by the United Kingdom Government. Perhaps the question had some indirect connexion with the Netherlands Government's misgivings about the Commission's decision to extend the application of article 8 to government ships on commercial service. Concern was felt in some quarters that article 8 might lead to an unduly wide extension of the classes of vessels enjoying complete immunity on the high seas. Consequently, there might be some value in stipulating that they could claim immunity only if they carried some distinguishing mark easily recognizable at sea.

36. Mr. SCELLE hoped that Sir Gerald Fitzmaurice would make a formal proposal to that effect.

37. Mr. SANDSTRÖM concurred.

38. Mr. PADILLA-NERVO suggested that the Special Rapporteur be requested to prepare a text to meet Sir Gerald Fitzmaurice's point.

39. Mr. FRANÇOIS, Special Rapporteur, said that he understood the reason for Sir Gerald Fitzmaurice's hesitation to make a formal proposal. It was difficult to prescribe the use of a uniform sign in the present case, which was quite different from .that dealt with in article 7. Perhaps it might be enough for the Commission to draw attention to the question in the comment in the hope that international agreement on a sign would be reached. He did not feel that the time was ripe for inserting a mandatory provision in the draft itself.

40. Mr. SPIROPOULOS said that while international agreement on a sign would undeniably be useful, the only possible course at present was the one suggested by the Special Rapporteur.

41. Mr. SCELLE said there was nothing revolutionary in requiring State vessels to carry an internationally accepted sign, and it was both reasonable and necessary to include such a provision in draft articles designed to codify the law of the high seas.

42. Faris Bey el-KHOURI also considered that it was certainly time for the Commission to propose some uniform sign for adoption by all States.

43. Sir Gerald FITZMAURICE was prepared to accept the Special Rapporteur's suggestion that the question should be referred to in the comment. Indeed, that was the least the Commission could do, because it would be illogical to give a definition of warships and then, as it were, throw the door open to a wide class of vessels to claim the same immunity for certain purposes, without any of the safeguards imposed in article 7.

44. Mr. SANDSTRÖM, while unable to see how article 8 could be applicable if a vessel did not carry some distinguishing mark, considered that the Commission should merely draw attention to the situation in the

comment, without inserting a mandatory provision on the subject.

45. Mr. SCELLE appreciated the reasons why the Special Rapporteur and Sir Gerald Fitzmaurice felt that it was perhaps not the Commission's task to invent a sign for universal use, but thought it would not be enough to mention the point in the comment. He repeated his conviction that the vessels covered by article 8 should be required to carry a distinguishing mark, and that a mandatory provision to that effect should be included in the article itself.

46. Mr. SANDSTRÖM thought that the provision should be in rather different form—namely, that vessels could not claim immunity unless they carried an internationally accepted sign.

47. Mr. SPIROPOULOS asked whether such a sign was essential in order to prove that the vessel was a government one.

48. Mr. FRANÇOIS, Special Rapporteur, said he could not accept a provision of the kind described by Mr. Sandström, because it would not be enforceable until all States had agreed on the sign.

49. Mr. SANDSTRÖM said that he had been misunderstood. All he had meant was that as a general rule the right of visit could be invoked only if a vessel carried no sign.

50. Mr. FRANÇOIS, Special Rapporteur, did not believe the Commission could go so far as to stipulate that a vessel bearing no distinguishing mark could not claim immunity. Verification of the flag of another State was a delicate matter, and he would therefore prefer the United Kingdom Government's point to be covered in the comment.

51. Mr. ZOUREK pointed out that modern means of telecommunication rendered identification much easier, so that it should suffice to mention the question of a distinguishing mark in the comment.

52. Mr. AMADO proposed that, in order to expedite the work, the Special Rapporteur be asked to prepare a text covering the United Kingdom Government's point for inclusion in the comment.

53. Sir Gerald FITZMAURICE, endorsing the comments of Mr. Amado and Mr. Spiropoulos, said that the real problem was the establishment of the status of the vessels in question. On the whole, it would be advisable to leave the text of the article unchanged and make the required point in the comment.

54. The CHAIRMAN put to the vote the proposal that the question of a special sign to be borne by the vessels covered by article 8 be referred to by the Special Rapporteur in the comment on the article.

The Chairman's proposal was adopted by 11 votes to none, with 3 abstentions.

Article 9: Signals and rules for the prevention of collisions

55. Mr. FRANÇOIS, Special Rapporteur, said that the Yugoslav proposal in paragraph 82 of the addendum to his report (A/CN.4/97/Add.1) was the only one that had been received. The Commission had adopted the text, as drafted,[2] by a majority vote and he could see no reason for reversing that decision.

56. Mr. SALAMANCA said the article was linked with article 5—Right to a flag—because if the Netherlands amendment to the latter article were taken up, the question would inevitably be reopened in any general discussion of that amendment.

57. Mr. PAL agreed with Mr. Salamanca that article 9 should be considered in conjunction with the text of article 5 *b*, proposed by the Netherlands Government, and noticed in paragraph 50 of the addendum to the Special Rapporteur's report. He further pointed out that in any case the drafting of the article would have to be amended. The words " their ships " in the present draft would require clarification. Those words might refer to the various categories of ships dealt with in article 8 as " owned or operated by a State " or to ships having the nationality of a State as referred to in articles 4 and 5, or, again, to ships having the nationality of one State though flying the flag of another, as contemplated in the United Kingdom proposal noticed by the Special Rapporteur in paragraph 54. The article should not be left so extremely vague.

58. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Salamanca regarding the relationship between articles 5 and 9: a decision must be taken as to whether the text of the latter should be retained or amended.

59. While reserving the question of the place of the article, the Commission could take a decision on the phrase " the vessels forming the greater part of the tonnage of sea-going ships ", which the Yugoslav Government wished to amend.

60. He agreed with Mr. Pal that the phrase " their ships " was not very felicitous; some such phrase as " ships flying the flags of those States " might be substituted for it.

61. Mr. KRYLOV also agreed, and suggested that the suitability of the latter part of the second sentence of article 9 could appropriately be considered after a decision had been reached on article 5. The wording of the second sentence certainly called for reconsideration.

62. Mr. SALAMANCA was unable to accept Mr. Krylov's suggestion. The Commission should decide there and then on the Yugoslav amendment, since its decision would assist the Sub-Committee in its review of article 5. The Sub-Committee itself would not be competent to discuss the Yugoslav amendment to article 9, the decision on which would have repercussions on article 5.

63. Mr. SANDSTRÖM, while agreeing with Mr. Pal on the need for clarification of the phrase " their ships ", could not accept the Special Rapporteur's amendment. " Ships under their jurisdiction " would be a more suitable rendering of the idea.

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[2] A/CN.4/SR.321, paras. 1 and 85-92.

64. On the choice between article 9 or the Netherlands proposal for article 5 *b*, the shorter text (article 9) adopted by the Commission was to be preferred.

65. As to the latter part of the second sentence, he reiterated his opinion that the text as drafted was the most suitable.

66. Mr. SCELLE shared Mr. Sandström's preference for article 9 rather than the Netherlands proposal for article 5 *b*. The question should be decided by the Commission in plenary session before the Sub-Committee came to consider article 5.

67. Sir Gerald FITZMAURICE did not see the supposed relationship between articles 5 and 9, which covered entirely different questions. Article 5 was concerned with the circumstances under which a ship was entitled to fly a particular flag, whereas article 9 dealt with the regulations imposed upon the ships so entitled.

68. The question of the place of article 9 could be reserved, but the question of its substance must be considered separately from article 5.

69. Mr. SPIROPOULOS agreed with the previous speaker.

70. With regard to Mr. Pal's point, he would support Mr. Sandström's proposed wording, " under their jurisdiction ".

71. The most important question, however, was the criterion of tonnage in the last phrase of the article. In fact, article 9, which he could accept as a general statement, dealt with matters quite outside the codification of international law. If it were desired to re-draft the article, a definite proposal should be made—for instance, the adoption of the Yugoslav amendment.

72. The CHAIRMAN said that there were three questions to be decided. First, the relationship between articles 5 and 9; it appeared to be agreed that an article 9 —whatever form it might take—should be retained; secondly, the question, raised by Mr. Pal, of the drafting of the first part of the first sentence of article 9; and, lastly, the question of the last part of the second sentence and the Yugoslav suggestion for its amendment.

73. Mr. AMADO, referring to the Chairman's second question, proposed amending the article to begin: " The regulations issued by States for ships under their jurisdiction must not be inconsistent . . ." He would reserve his position with regard to the Chairman's third question.

74. Mr. SANDSTRÖM pointed out that the article as drafted had the advantage over Mr. Amado's proposal that it made the issuing of regulations compulsory.

75. Faris Bey el-KHOURI suggested that a recommendation be inserted in the comment on the article, to the effect that a conference of maritime powers, preferably under the auspices of the United Nations, be convened to consider the issues raised in articles 7, 8 and 9.

76. Sir Gerald FITZMAURICE pointed out that, in accordance with many Maritime Conventions in force, and also with the International Code of Signals, which was followed by every maritime country in the world, the principle of the article was already applied. It was a matter with which the Commission need hardly concern itself. Mr. Sandström was right in his comment on Mr. Amado's proposal, which was one not of drafting, but of substance. The question was of such importance that the Commission should categorically pronounce that States were under an obligation to issue regulations concerning the use of signals and the prevention of collisions on the high seas.

77. Mr. AMADO said that if the Commission preferred a mandatory provision, he would not press his proposal.

78. The CHAIRMAN said that there seemed to be general agreement that the text of the first sentence should read: " States shall issue for ships under their jurisdiction regulations concerning the use of signals and the prevention of collisions on the high seas."

It was so agreed.

79. Mr. ZOUREK, referring to the Chairman's third question, said that the criterion adopted by the Commission, by a small majority, at its previous session was unsatisfactory in that it introduced a concept of size, based on economic or political power; that concept was alien to international law, which was based on the equality of States. He need point only to the difficulties that would be met with in the drafting of provisions on the law of the air if codification were undertaken on that basis. The Yugoslav proposal was acceptable.

80. Mr. SANDSTRÖM recalled that the objectives of international law were practical and that the principle of majority tonnage, upon which the text was based, derived from essentially practical considerations.

81. Mr. SCELLE suggested that a discussion on the real and theoretical equality of States would be both endless and profitless. The Commission must decide that issue without delay.

82. Sir Gerald FITZMAURICE said that Mr. Zourek's point was of unquestionable general application. The case under consideration, however, was exceptional. It was not a question of the text being tailored to suit the convenience of Great Powers. A large proportion of the sea-going tonnage of the world was owned by small States, such as Norway and the Netherlands. Mr. Sandström was right in stressing the practical aspect of the question. Countries with large fleets had already been forced to give serious consideration to the best means for ensuring maximum safety at sea. The methods adopted therefore applied to a majority of vessels. It would be regrettable if an existing and satisfactory state of affairs were to be upset by a decision—that could not be unanimous—inspired by considerations quite remote from the essential technical requirements. He would vote against the Yugoslav proposal.

83. Mr. PADILLO-NERVO said that the core of the argument was contained in the first sentence and the first part of the second sentence, the final phrase being merely descriptive. As Sir Gerald Fitzmaurice had pointed out, the regulations in question were already in existence and were being observed. Since the article would not suffer by being abbreviated, he would propose the deletion from the second sentence of all the words after " accepted ".

84. Mr. SPIROPOULOS, Mr. AMADO and Mr. KRYLOV supported Mr. Padillo-Nervo's amendment.

85. The CHAIRMAN put to the vote Mr. Padillo-Nervo's proposal to amend article 9 by the deletion from the second sentence of the words " for the vessels forming the greater part of the tonnage of sea-going ships ".

Mr. Padillo-Nervo's proposal was adopted by 9 votes to 3, with one abstention.

86. The CHAIRMAN suggested that article 9, as amended, be referred to the Sub-Committee for revision in the light of the discussion.

It was so agreed.

The meeting rose at 1.15 p.m.

343rd MEETING

Wednesday, 9 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of item 1 of the agenda: Regime of the high seas.

Article 10: Penal jurisdiction in matters of collision

2. Mr. FRANÇOIS, Special Rapporteur, said it was interesting to note that the principle affirmed in the judgement of the Permanent Court of International Justice in the *Lotus* case was endorsed by only two countries, China and Turkey (A/CN.4/97/Add.1).

3. Other suggestions by governments dealt merely with drafting points, except the South African proposal, which was of substance and should be considered by the Commission. The article had not contemplated the case of a State waiving its jurisdiction over its own nationals in case of their penal or disciplinary responsibility for collision on the high seas. There was a certain analogy with the case of renunciation by a State of the diplomatic immunity enjoyed by its nationals, thus conceding jurisdiction to the other State.

4. Mr. KRYLOV said that the text was fully adequate; the South African proposal should be rejected.

5. Mr. PAL pointed out that in any case the drafting of the article called for revision. In the first phrase of paragraph 1, reference was made to " a collision or any other incident of navigation ", whereas a few lines later only collision was mentioned.

6. Further, towards the end of the same paragraph, the phrase " flying the flag " was used. In view of the fact that in article 12—Slave trade—the wording used was " authorized to fly " a flag, it should be made clear whether the authorization to fly a flag or the actual use of a flag was the decisive criterion for the jurisdiction of the flag State.

7. On the whole, the Netherlands amendment provided a better text.

8. Mr. SANDSTRÖM pointed out that the South African amendment raised the thorny question of whether the waiving by a State of its jurisdiction, to the detriment of its own nationals, was legitimate—a question, surely, to be settled by case-law.

9. The CHAIRMAN said that Mr. Pal's points would be considered by the Sub-Committee. The general opinion of the Commission was against the South African proposal.

Subject to drafting changes, *article 10 was adopted.*

Article 11: Duty to render assistance

10. Mr. FRANÇOIS, Special Rapporteur, said that the amendments proposed referred to drafting changes only.

11. He wished to draw attention to an omission from his conclusion in paragraph 102 of document A/CN.4/97/Add.1. Between the two paragraphs of the proposed text, the last sentence of the present article 11 should be inserted, beginning with the work: " After a collision . . . etc. " His proposal was based on that of the Yugoslav Government.

12. Sir Gerald FITZMAURICE pointed out that, whereas the Yugoslav proposal referred to " the other vessel ", the Special Rapporteur's wording " other vessels " was extremely vague.

It was agreed to refer the Special Rapporteur's text in paragraph 102 of document A/CN.4/97/Add.1 to the Sub-Committee.

Article 12: Slave trade

13. Mr. FRANÇOIS, Special Rapporteur, said that the only amendment of substance was that proposed by the Government of Israel, substituting the term " state

ship " for " warship ". He reminded the Commission that the Economic and Social Council at its last session had decided to call a conference for the adoption of a supplementary convention on the abolition of slavery, the slave trade and institutions and practices similar to slavery. The relevant parts of the draft to be submitted to that conference seemed to be in conformity with the principles embodied in the Commission's articles on slavery.

14. Mr. PAL suggested clarification of the phrase " that purpose ", which did not seem consistent with the first part of the sentence.

15. Sir Gerald FITZMAURICE suggested that the significant word in the second part of the sentence was " prevent ". If Mr. Pal had in mind that a State should in every circumstance be bound to prevent the unlawful use of its flag, that was surely a different question. The intention, in the article, was to ensure that the flag State was under an obligation to take steps to avoid that particular contingency.

16. Mr. SPIROPOULOS, while appreciating Sir Gerald Fitzmaurice's explanation, wondered whether the second part of the sentence was really necessary, since it was implicit in the first part.

17. Sir Gerald FITZMAURICE, dissenting, pointed out that the first part referred to the prevention and punishment of the transport of slaves in vessels authorized to fly the colours of a State, while the second part of the sentence dealt with the transport of slaves in ships which might unlawfully fly the flag of a State.

18. Mr. PAL observed that he now saw the point. The unlawful use of a State flag by a vessel generally had international consequences. The intention of the present article was to give jurisdiction to the State whose flag was thus abused, so that it could take preventive measures. Such jurisdiction was intended to be conferred only in the case of abuse and for that special purpose.

Subject to drafting changes in the light of the discussion, *article 12 was adopted.*

Article 13: Piracy

19. Mr. FRANÇOIS, Special Rapporteur, said that the Netherlands Government had proposed the deletion of the words " on the high seas ". He would accept that amendment.

20. Mr. KRYLOV concurred.

21. Mr. PAL asked whether, if that proposal were adopted, a State in whose territorial waters an act of piracy was committed would allow the vessels of another State to intervene.

22. The CHAIRMAN pointed out that an essential condition of piracy was that it should be committed outside the jurisdiction of any State. A vessel so captured would be subject to the jurisdiction of the State of the vessel effecting the capture.

23. Sir Gerald FITZMAURICE observed that in article 14, paragraph 1 (*b*), the intention had been to cover the case of piracy committed on desert islands, which were not under the jurisdiction of any State. If that were so, the Netherlands proposal was logical.

24. Mr. AMADO said that international co-operation could be ensured only on the high seas, so that in one sense the phrase " on the high seas ", while adding precision to the article, was redundant.

25. Mr. SANDSTRÖM urged that it was surely an obligation of States to suppress piracy wherever it was committed.

26. Mr. SPIROPOULOS suggested the addition of the phrase " or in any other place not within territorial jurisdiction of another State ", to be found in the first sentence of article 18.

27. Mr. PAL pointed out that, as drafted, the phrase " on the high seas " might refer not to the place of piracy, but to the situs for measures of co-operation. The phrase " on the high seas " should be retained, but expanded to cover all cases of piracy. Mr. Spiropoulos' proposal would meet that requirement.

Article 13, as amended by Mr. Spiropoulos, was adopted.

Article 14

28. Mr. FRANÇOIS, Special Rapporteur, said that the Netherlands Government had proposed that it should be made clear that the article did not refer to warships or state-owned vessels having a non-commercial public function.

29. Mr. KRYLOV said that he would maintain the position he had taken up when the article was discussed at the seventh session.[1]

30. Mr. LIANG, Secretary to the Commission, said that since the previous session the question of the interpretation of paragraph 1 (*b*) had arisen in connexion with the question of slavery. The problem was whether acts referred to in article 14 were to be regarded as acts of piracy when committed on land outside the jurisdiction of any State. He himself had read paragraph 1 (*b*) to imply a definite connexion between the act of piracy and the high seas, but it might be advisable to clarify further the phrase " territory outside the jurisdiction of any State ".

31. Sir Gerald FITZMAURICE thought that point had been made clear in paragraph 1 by the reference to " a private vessel or a private aircraft ".

32. Mr. SPIROPOULOS, while agreeing, quoted the case of the crew of a ship landing in " no man's land " and committing an act of piracy 100 miles from the coast. It would be impossible in an article of that kind to cover all possible contingencies.

33. He emphasized that the text was only a minimum definition of piracy. States had the right to punish other acts of piracy than those mentioned, as could be seen from a comparison between the article and the piracy legislation of individual States.

34. Mr. AMADO, while appreciating the Secretary's

[1] A/CN.4/SR.330, para. 36.

point, suggested that the question of territory outside the jurisdiction of any State be left to the Sub-Committee.

35. Mr. SPIROPOULOS, concurring, said it should be made clear in the comment on the article that the territory referred to was some such place as a desert island or shoal, and not some remote spot in the hinterland.

36. Mr. LIANG, Secretary to the Commission, said that in the case he had quoted, his own interpretation of article 14—namely, that " piracy " meant acts committed on the high seas or from vessels on the high seas—was partly based on the first part of paragraph 1, referred to by Sir Gerald Fitzmaurice. However, the phrase " or a private aircraft " might provide some basis for a different interpretation, if the sense of the article were not further clarified.

37. Mr. ZOUREK said that he would take his stand on the reservations that he had made in the discussions on the definition of piracy at the seventh session.[2] He considered, in particular, that the acts of violence and depredation referred to in article 14 constituted acts of piracy even when committed (*a*) for political ends; (*b*) by warships or military aircraft; or (*c*) by aircraft or seaplanes against foreign aircraft or seaplanes, unless, in those three cases, the acts in question were acts of aggression committed; (*d*) from the high seas against ships, persons or goods situated in territorial waters or internal waters, or against the land.

38. The Secretary's point was linked with the South African comment. The question of aircraft in general in relation to piracy was an interesting one which had various aspects, such as the question whether acts of violence committed by an aircraft taking off from a desert island or some other place not within the territorial jurisdiction of a State could be regarded as acts of piracy. The analogy between vessels and aircraft was close, and intention and violence were elements common to such acts committed by both.

39. Mr. SPIROPOULOS suggested that the Commission should restrict its consideration to acts of piracy committed by vessels. He wondered whether any cases were known of acts of piracy committed by aircraft. It would be a mistake further to complicate an already controversial subject. In that connexion, sub-paragraph 5 of the first paragraph of the comment on the article (A/2934) would require re-examination.

40. Mr. PAL proposed that in the opening sentence the word " is " be replaced by the word " includes ", and that in paragraph 1 the words " or a private aircraft " be deleted.

41. He further pointed out that in paragraph 1 (*a*) the words " on which " were somewhat confusing. The intention was not to exclude the vessel " on which " piracy was committed, but the vessel " from which" it was committed. An act of piracy " against " a vessel would normally be committed on that vessel. It should be made clear that the intention was to exclude the pirate vessel from which the act of piracy might be committed " against ", " in " or " on board " another vessel.

42. Sir Gerald FITZMAURICE urged that a precise definition of piracy was required because it gave warships of all nations a right of visit and seizure.

43. Mr. Spiropoulos was correct in pointing out that the definitions of piracy would vary from one country to another. Nevertheless, for cases outside the territorial waters of a State, the jurisdiction of its vessels was limited by the definitions of piracy in international law.

44. With regard to Mr. Pal's second proposal, it would be a pity to delete the reference to private aircraft, because the Commission should not disregard an aspect of piracy that was both novel and potentially real. Ships could be controlled by aircraft in war; aircraft were also used for fishery protection patrols in territorial waters. It was not difficult to conceive of piracy being committed by an aircraft, particularly a flying-boat.

45. Mr. PAL admitted the force of Sir Gerald Fitzmaurice's argument for a precise definition of the term " piracy ".

46. Mr. SPIROPOULOS, referring to private aircraft, said that he had merely adduced a point, and had not made a formal proposal. His only desire was to avoid unnecessary complications. While accepting Sir Gerald Fitzmaurice's argument, he was still of opinion that sub-paragraph 5 of the comment should be revised.

47. In reply to Mr. KRYLOV, Mr. FRANÇOIS, Special Rapporteur, said that deletion of the reference to private aircraft would obviously facilitate the task of the Sub-Committee. Sir Gerald Fitzmaurice's arguments were, however, compelling and the draft would be enriched by the retention of the reference to private aircraft.

48. Mr. AMADO suggested that sub-paragraph 4 of the first paragraph of the comment should be taken as a basis for reviewing the text of paragraph 1 (*b*).

49. Mr. KRYLOV and Mr. ZOUREK wished to place on record their opposition to the article in its existing form.

Subject to drafting changes in the light of the discussion, *article 14 was adopted.*

Article 15

50. Mr. FRANÇOIS, Special Rapporteur, said that the Government of the Netherlands had made the same proposal as for article 14—namely, the assimilation of warships to State-owned vessels having a non-commercial public function. The other proposals were drafting amendments only.

51. Mr. KRYLOV said that the text should be retained and the Netherlands proposal rejected as quite unrealistic.

52. Sir Gerald FITZMAURICE, while sharing Mr. Krylov's dislike of modifying an adopted text, felt that the Commission was bound to give serious consideration to a proposal of substance raised by a government.

53. The Commission's conception had been that piracy was essentially an act committed by a ship's company or persons acting on their own authority, thereby excluding warships. There had come into existence, however, a

[2] A/CN.4/SR.321, para. 4.

new class of vessel which, though not a warship, was nevertheless acting under the authority of the State. The Netherlands proposal, therefore, had some force. The case contemplated in article 15 was admittedly exceptional. If, however, that was possible in the case of a warship, was it not much more likely to occur in the case of other kinds of government-owned vessels? The question should be ventilated in the Sub-Committee.

54. Mr. PAL supported Sir Gerald Fitzmaurice's last suggestion; precision in such a matter was of the utmost importance.

55. On a point of drafting, he would draw attention to the fact that, whereas article 14, paragraph 1, referred to acts committed " by the crew or the passengers of a private vessel", article 15 referred merely to acts committed by the vessel itself. It should be made clear that the meaning intended was that the acts were committed by persons.

Subject to drafting changes in the light of the discussion, *article 15 was adopted.*

Article 16

56. Mr. FRANÇOIS, Special Rapporteur, said that the government comments related only to points of drafting.

57. Mr. SANDSTRÖM noted that the Special Rapporteur appeared to accept the Belgian Government's amendment, which would have the effect of removing the limitation on the period during which a ship or aircraft would be considered a pirate.

58. Mr. FRANÇOIS, Special Rapporteur, suggested that the point might be referred to the Sub-Committee.

59. Mr. SANDSTRÖM said he would have no objection.

It was agreed to refer article 16 and the point raised by Mr. Sandström to the Sub-Committee.

Article 17

Article 17 was adopted without comment.

Article 18

60. Mr. FRANÇOIS, Special Rapporteur, said that he saw no need to insert a provision concerning the disposal of the pirate ship after seizure, as suggested by the United Kingdom Government. It was undesirable for the Commission to go into too much detail and the matter could be left to national legislation.

61. Sir Gerald FITZMAURICE, while not dissenting from the Special Rapporteur's view, pointed out that the United Kingdom Government was anxious to make it clear that the word " property " in the second sentence included the vessel itself, since the present text might be misconstrued as meaning that the State seizing a pirate ship could take action only with regard to the property on board.

62. Mr. SANDSTRÖM considered that the United Kingdom Government was right in thinking a provision was needed concerning the disposal of a pirate ship after seizure, particularly as confiscation was not always justified—for example, in cases when the crew had mutinied.

63. Mr. SCELLE agreed with Sir Gerald Fitzmaurice.

64. Mr. PAL thought the text was obscure and should be revised so as to make it clear that the State seizing a pirate ship or a ship taken by piracy could take action to dispose of either or both vessels.

65. Mr. PADILLA-NERVO suggested that Sir Gerald Fitzmaurice's point might be met by inserting the words " ships, aircraft or " after the words " action to be taken with regard to the " in the second sentence.

Mr. Padilla-Nervo's amendment was accepted.

Article 18, thus amended, was adopted.

Article 19

66. Mr. FRANÇOIS, Special Rapporteur, said that the government comments were confined to drafting points: he agreed that the wording of the article should be amended to bring it into line with that of article 21, paragraph 3.

Subject to that amendment article 19 was adopted.

Article 20

67. Mr. FRANÇOIS, Special Rapporteur, said that the Government of the Union of South Africa had asked whether it should not be stipulated that a vessel which had repulsed the attack of a pirate might seize the pirate vessel pending the arrival of a warship. As he had stated in paragraph 140 of the addendum to his report (A/CN.4/97/Add.1), such a stipulation was unnecessary because provisional seizure of that kind was no more than legitimate self-defence.

68. Mr. SCELLE agreed with the Special Rapporteur. Moreover, the text as it now stood went further than the rules of municipal law concerning legitimate self-defence, since it allowed a vessel which had repulsed the attack of a pirate to exercise provisionally the police powers of a warship, a situation which concorded entirely with his theory that in the absence of public authorities their functions should be discharged by someone else who was in a position to do so.

69. The CHAIRMAN wondered whether, in view of the restriction imposed in article 20, it should not be made clear in the comment that private vessels were only authorized to effect provisional seizure in legitimate self-defence.

70. Sir Gerald FITZMAURICE agreed that the point could be covered in the comment and the article itself retained without change.

It was agreed that a sentence should be inserted in the comment on the lines of the statement in paragraph 140 of the addendum to the Special Rapporteur's report (A/CN.4/97/Add.1).

Article 20 was adopted without change.

Article 21: Right of visit

71. Mr. FRANÇOIS, Special Rapporteur, observed that the proposal of the Union of South Africa to extend the application of paragraph 1 (*b*) to the high seas generally, instead of limiting it to the maritime zones regarded as

suspect in connexion with the slave trade, had been rejected by the Commission after long discussion because such extended application would be open to abuse and might be used as a pretext for searching vessels in areas where there was no slave trading.[3] He proposed that the Commission should adhere to the decision taken at the previous session.

It was so agreed.

The Netherlands amendment substituting the words " on the high seas " for the words " at sea " in paragraph 1 was adopted.

72. Sir Gerald FITZMAURICE explained that the reason for the United Kingdom amendment substituting the words " any loss " for the words " the loss " in paragraph 3 was that there might in fact have been no loss.

73. Mr. PAL believed that the effect of the United Kingdom amendment would be nullified unless the word " sustained " were deleted.

74. Sir Gerald FITZMAURICE, while not believing that there was much force in that objection, wondered whether Mr. Pal would prefer the phrase " any loss that may have been sustained ".

Sir Gerald Fitzmaurice's wording was adopted.

75. Mr. AMADO asked whether the word " loss " in English was the precise equivalent of the word " dommage " in French, which he would have thought was wider in scope.

76. Mr. PADILLA-NERVO thought the text should be made more comprehensive by referring to both damage and loss.

77. Sir Gerald FITZMAURICE agreed that it would be desirable to refer to loss or damage in paragraph 3, particularly as an act of piracy might not necessarily cause damage, but could result in loss if a vessel were delayed.

It was agreed to insert the words " or damage " after the word " loss " in paragraph 3.

Article 21 as amended was adopted.

Article 22: Right of pursuit

78. Mr. FRANÇOIS, Special Rapporteur, said that there were a number of comments affecting the substance of article 22 which the Commission should examine in turn. First, there was the point raised by the Brazilian Government, which considered that for exercising the right of pursuit it was sufficient for the coastal State to have good reason to believe that an offence against its laws or regulations had been or was about to be committed. Perhaps it was not absolutely necessary to make an explicit statement to that effect, but he was prepared to amend the opening words of the article to read: " The pursuit of a foreign vessel, where the coastal State has good reason to believe that an offence has been committed against its laws or regulations."

79. Mr. PADILLA-NERVO agreed with the Brazilian Government's comment and supported the Special Rapporteur's amendment.

80. Sir Gerald FITZMAURICE wondered if the Brazilian Government's point might not be met by deleting from paragraph 1 the words " for an infringement of the laws and regulations of a coastal State ". Hot pursuit was legitimate only when an order to stop by a patrol vessel was not complied with. Otherwise, the foreign vessel could not know that it was being pursued. Presumably such an order would not be given unless the foreign vessel had been seen committing an offence, or because there was good reason for thinking that it had already done so.

81. The CHAIRMAN, speaking as a member of the Commission, thought that Sir Gerald Fitzmaurice's proposal to delete the clause stating the conditions on which the right of hot pursuit could be exercised, would give the coastal State far too much latitude.

82. Mr. SCELLE contended that hot pursuit could be undertaken only if a law of the coastal State had been violated. Evidently, the aim of Sir Gerald Fitzmaurice's amendment was to confine the article to procedural matters, without specifying the cases in which hot pursuit was allowed.

83. Mr. SANDSTRÖM believed it was important to retain the clause which Sir Gerald Fitzmaurice had suggested deleting.

84. Mr. PAL did not consider it appropriate to combine in one article the conditions justifying the exercise of the right of hot pursuit and technical details of how it should be carried out.

85. Mr. PADILLA-NERVO, agreeing with Mr. Pal, observed that his point would be met if Sir Gerald Fitzmaurice's amendment were adopted. In that event, the Commission might leave aside the point raised by the Brazilian Government.

86. Mr. SCELLE considered that the article should be confined to the procedure of hot pursuit; he would deprecate any attempt to draft a separate article listing the different cases in which it was permissible, because such a list could not be exhaustive and was bound to be unsatisfactory.

87. Mr. ZOUREK said the Commission would find it difficult to accept Sir Gerald Fitzmaurice's amendment, because it would give the coastal State too wide a right of pursuit.

88. Mr. AMADO said that he was not opposed to the amendment; the words in question were a mere ornament, and whether retained or removed would not affect the practice of States exercising the right of hot pursuit.

89. Mr. SCELLE emphasized that if the clause were retained it would mean that the coastal State could pursue and arrest a foreign vessel only if it could prove that its laws had been infringed; and that, in his view, would be incorrect, because the coastal State was entitled to pursue a foreign vessel for other reasons, for example, in defence of some international interest. If its action was unjusti-

[3] A/CN.4/SR.288, paras. 12-54; A/CN.4/SR.289, paras. 2-42 and 54-66.

fiable, the State of the vessel pursued could seek damages. He therefore reaffirmed his support for Sir Gerald Fitzmaurice's amendment.

90. Sir Gerald FITZMAURICE said, with apologies to Mr. Scelle, that he must withdraw his amendment because it now seemed to have wider implications than he had at first realized. He would accordingly support the Special Rapporteur's amendment.

91. Mr. SPIROPOULOS considered that the clause should be retained and that it was impossible to take other considerations, of the kind described by Mr. Scelle, into account: hot pursuit could only be justified if a foreign vessel had violated the laws of the coastal State.

92. The issue raised by the Brazilian Government was a delicate one, and he wondered whether it might not be preferable to leave the text as it stood.

Further discussion of article 22 was adjourned until the next meeting.

The meeting rose at 1.10 p.m.

344th MEETING

Friday, 11 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 22 (A/2934).

Article 22: Right of pursuit (continued)

2. Mr. PAL, reiterating his conviction that it was necessary to deal separately with the condition on which the right of hot pursuit could be exercised and the pursuit itself, proposed that the first sentence of paragraph 1 be replaced by the following text:

1. The pursuit of a foreign vessel may be undertaken when the coastal State has good reason to believe that an infringement of its laws and regulations has been made. Such pursuit may commence when the foreign vessel is within the internal waters or the territorial sea of the pursuing State and may be continued outside the territorial sea provided that the pursuit has not been interrupted.

That text which, members would note, involved no change of substance, incorporated the Brazilian Government's proposal (A/CN.4/97/Add.1).

3. Mr. FRANÇOIS, Special Rapporteur, had no objection to Mr. Pal's text.

4. Sir Gerald FITZMAURICE found Mr. Pal's proposal acceptable.

Mr. Pal's proposal was adopted.

5. Mr. FRANÇOIS, Special Rapporteur, passing on to the next comment on article 22, said that he failed to understand the Indian Government's observation. As he had pointed out in paragraph 152 of the addendum to his report (A/CN.4/97/Add.1), the right of pursuit in the contiguous zone was recognized in the last sentence of article 22, paragraph 1.

6. In that connexion he would remind members of Sir Gerald Fitzmaurice's argument at the previous session that, because of the essential difference between the territorial sea and the contiguous zone, the obligation on a foreign vessel to comply with an order to stop given in the territorial sea did not hold in the contiguous zone.[1] That view had also been put forward by the United Kingdom Government in its comment, but he found it unacceptable and therefore proposed that the Commission retain the last sentence of paragraph 1 as adopted at the previous session.

7. Sir Gerald FITZMAURICE wished to make clear at the outset that at the previous session he had expounded a personal view based on certain technical considerations. Perhaps members might find useful some passages in an article of his published in the *British Year Book of International Law, 1954*,[2] in which he had analysed the effects on maritime law of the judgment in the Anglo-Norwegian Fisheries Case.[3]

8. Neither he nor the United Kingdom Government had been convinced by the Commission's decision, and remained firmly of the opinion that in codifying maritime law a sharp distinction must be maintained between the territorial sea and the contiguous zone.

9. To stipulate that the powers of the coastal State in the contiguous zone should be limited to the exercise of certain special rights did not suffice to bring out clearly the fundamental difference between the status of the two belts. It was generally agreed that the contiguous

[1] A/CN.4/SR.291, paras. 41 and 48.

[2] Pp. 371-429. (The Law and Procedure of the International Court of Justice, 1951-1954: Point of Substantive Law I; Maritime Law (Territorial Waters, Internal Waters. The Norwegian Fisheries Case)).

[3] I.C.J. Report 1951, p. 116.

zone was part of the high seas, and that there the coastal State had not the sovereignty and exclusive jurisdiction it possessed in the territorial sea. In the latter, foreign ships and nationals were subject to the immediate and direct authority of the coastal State and were under an obligation to comply with any lawful order or request from the authorities of that State: not to do so would be a failure in due submission to local jurisdiction. That was the main ground for recognizing the right of hot pursuit.

10. If the foreign vessel were in the contiguous zone, the position was radically different, because the zone was not under the jurisdiction of the coastal State and the vessel had no obligation to comply with an order to stop. The position was simply that, if the coastal State was in a position to enforce its order, it could do so.

11. Another difference was that a foreign vessel could commit an infringement of the laws and regulations of a coastal State only when within its territorial sea, and that, according to Mr. Pal's text, was a pre-requisite for the exercise of the right of hot pursuit; but in the contiguous zone, where the laws of the coastal State did not apply, the vessel could only prepare to commit an offence eventually—for example, to violate the customs, fiscal or sanitary regulations.

12. For all those reasons he considered that the Commission, while recognizing the right to begin hot pursuit in the territorial sea, should decline to recognize that it could be exercised in the contiguous zone; otherwise the powers of the coastal State would be considerably extended in a manner that went far beyond what was necessary for the protection of its laws and regulations. He accordingly proposed the deletion of the last sentence in paragraph 1.

13. He also proposed that the title of the article be amended to read: " Right of hot pursuit ".

Sir Gerald Fitzmaurice's proposal to amend the title of the article to read " Right of hot pursuit " was adopted.

14. Mr. SPIROPOULOS said that in conferring on the coastal State certain rights in the contiguous zone, the Commission had recognized that the coastal State was entitled to promulgate certain regulations relating to the high seas, which meant that if foreign vessels in the contiguous zone infringed the laws of the coastal State, they would be liable to punishment. Notwithstanding, he was inclined to support Sir Gerald's conclusion that the Commission should not recognize the right to begin hot pursuit in the contiguous zone, because it was vitally important not to restrict freedom of navigation unless absolutely necessary, and clearly the interests of the coastal State did not require the same kind of protection in the contiguous zone as in the territorial sea itself.

15. Mr. PAL said that, in spite of the arguments adduced by Sir Gerald Fitzmaurice and Mr. Spiropoulos, he still favoured the provision in the last sentence in paragraph 1, because it was a logical and necessary consequence of the article concerning the contiguous zone, adopted at the fifth session.[4] The provision was quite innocuous and would not extend the rights of the coastal State, but would simply give it some remedy in cases of trespass against its rights, for the protection of which the contiguous zone had been created. The Commission had already, by its earlier decision, conferred certain positive rights on the coastal State in the contiguous zone, and the present provision did not constitute any further encroachment on the freedom of the high seas.

16. Turning to another question, he felt that there was some inconsistency in the Special Rapporteur's having accepted the Yugoslav amendment inserting the words " or contiguous zone " after the words " territorial sea " in paragraphs 1 and 2, after rejecting the Indian Government's observation on the ground that it had already been met in the text.

17. Mr. AMADO said that although he understood the reasons which had prompted the Commission to grant the coastal State certain rights for protecting its interests in the contiguous zone and appreciated that there must be some means of enforcing them, he was strongly opposed to the contiguous zone's being treated on the same footing as the territorial sea, at the limit of which the sovereignty of the coastal State ceased. Consequently, he still could not accept the proposition that hot pursuit could start in the contiguous zone, though he agreed that it could continue there provided it had started in the territorial sea. In his opinion, the interests which the coastal State was concerned to protect in the contiguous zone were not important enough to justify such a major and dangerous extension of its rights.

18. He had been particularly struck by the United Kingdom Government's point that in the contiguous zone there was no question of the coastal State's imposing penalties on foreign vessels, but only of preventing trespass against certain rights.

19. Mr. KRYLOV said that he adhered to the view adopted by the Commission at its previous session.

20. Mr. PADILLA-NERVO considered that the last sentence of paragraph 1 should be retained for the reasons given by the Special Rapporteur, which the Commission had found valid at the previous session.

21. Mr. FRANÇOIS, Special Rapporteur, replying to Mr. Spiropoulos, said that the provision in the last sentence of paragraph 1 would, indeed, restrict the freedom of the high seas to some extent, but that that was a logical consequence of a deliberate decision concerning the contiguous zone, taken by the Commission in an effort to combat the dangerous and increasing tendency on the part of States to claim wider belts of territorial sea. The Commission could not now stop half-way, but must face the consequences of that concession by giving the coastal State all the necessary rights for effective control in the contiguous zone. He therefore considered that the last sentence should stand.

22. Sir Gerald FITZMAURICE could not agree with the Special Rapporteur that the provision was the logical

[4] *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), para. 105.

consequence of the article on the contiguous zone, because the rights conferred upon the coastal State in that zone were different not only in extent but also in nature from those it enjoyed in its territorial sea. In the contiguous zone the coastal State was only entitled to take precautionary measures to prevent the infringement of certain regulations. In the territorial sea, it exercised sovereign rights. The logic of the case therefore lay in precisely the other direction, namely, that rights of enforcement in the contiguous zone were of a limited kind and must be so because they were an exception to the general rule that the coastal State had no authority on the high seas.

23. Mr. SPIROPOULOS agreed and drew the attention of members to the wording of the article concerning the contiguous zone,[5] from which it was clear that the rights exercised therein by the coastal State were only rights of control to be exercised in order to prevent the infringement in the territorial sea of certain regulations issued by the State. He again emphasized that the interests at stake were not such as to justify a derogation from the freedom of the high seas.

24. Mr. AMADO asked whether hot pursuit could be continued once the vessel had entered the contiguous zone of a third State.

25. Sir Gerald FITZMAURICE said that the very pertinent question raised by Mr. Amado helped to demonstrate the logic of the United Kingdom Government's case. Pursuit need not cease in the contiguous zone of another State, because that zone remained part of the high seas and was not under the jurisdiction of that State. Only when the vessel reached waters actually under the sovereignty of another State must pursuit stop. Conversely, therefore, why should pursuit be allowed to start in the contiguous zone of the coastal State when that zone was not subject to the sovereignty of that State?

26. Mr. AMADO suggested that there was some underlying confusion in the argument that the Commission had adopted the article on the contiguous zone in order to forestall further claims to a wider territorial sea. Those claims had originated in the concern of certain States over the need to conserve the living resources of the sea rather than in concern to ensure observance of customs, immigration, fiscal or sanitary regulations.

27. The CHAIRMAN, speaking as a member of the Commission, said that the point at issue could only be settled in the light of the Commission's final decision concerning the article on the contiguous zone, and the two texts must be brought into line.

28. Members should bear in mind that legal opinion and legislation on the subject of the rights to be exercised in the contiguous zone was not unanimous. Some authorities, such as Gidel, believed that the coastal State's penal and other powers should be extended to apply in the contiguous zone, and would presumably take the view that the Commission had not gone far enough in the text adopted at its fifth session. In their eyes, Sir Gerald Fitzmaurice's amendment would be unacceptable.

29. Mr. PADILLA-NERVO agreed with the Chairman.

30. Mr. SALAMANCA, also agreeing with the Chairman, observed that Sir Gerald Fitzmaurice's amendment might conflict with the article on the contiguous zone.

31. Mr. SCELLE confirmed the Chairman's remarks about Gidel's view. The doctrine, of which de Lapradelle was also an exponent, that the classical concept of sovereignty over the territorial sea should be replaced by the concept of special rights for the protection of particular interests such as defence, health, customs, etc., had been gaining ground in France for a long time.

32. He could not agree with the view taken by the United Kingdom Government, and still supported the text of paragraph 1 as adopted at the previous session. He agreed, however, that, in order to ensure consistency, it must be examined in the light of the article on the contiguous zone.

33. Mr. SANDSTRÖM said that paragraph 1 was a necessary consequence of the article on the contiguous zone. He believed there were sound reasons for retaining both that article and paragraph 1 of article 22.

34. The CHAIRMAN proposed that a decision on paragraph 1 be deferred until the Commission had considered the article on the contiguous zone.

It was so agreed.

35. Mr. FRANÇOIS, Special Rapporteur, said that the important question of the exercise of the right of pursuit by aircraft had been raised by the governments of Norway, Iceland and the United Kingdom. Sir Gerald Fitzmaurice had proposed the addition to paragraph 3 of a sentence reading: " The pursuing vessel must establish the position of the vessel pursued at the moment when the pursuit commences, and must, whenever possible, mark this position by phisical means—e.g., by the dropping of a buoy "; he had also proposed additional paragraphs 5 to 7 reading:

5. Subject to the following rules, pursuit may legitimately be affected by means of aircraft. The provisions of paragraphs 1-4 of the present article shall apply *mutatis mutandis* to any such pursuit.

6. It being essential to the proper exercise of the right of pursuit that the vessel pursued should, while still within the territorial sea, have been made aware that it is required to stop, an aircraft, acting by itself, must be capable of issuing a visible and comprehensible order to that effect, and must do so while the vessel is still in the territorial sea.

7. Since pursuit, to be legitimate, must follow immediately on the order to stop, and must be continuous, the aircraft giving the order must itself actively pursue the vessel until one of the coastal State's national vessels, summoned by the aircraft, arrives to take over the pursuit. It does not suffice to justify an arrest on the high seas that the vessel was merely sighted by the aircraft as an offender, or suspected offender, when within the territorial sea, if it was not both ordered to stop and pursued by the aircraft itself.

[5] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, (A/2456), p. 19.

36. He regretted that the proposed new paragraphs were not acceptable to him.

37. Sir Gerald FITZMAURICE said that, although neither he nor the United Kingdom Government was advocating the extension of the right of hot pursuit to aircraft, the fact had to be recognized that aircraft were being used by States in the protection of their rights within the territorial sea, and cases had occurred where aircraft had participated in the exercise of the right of hot pursuit. Since it was unlikely that States would forgo such a convenient method of protecting their interests, such use of aircraft was likely to increase. That being so, the Commission should recognize the right and make some attempt to regulate it.

38. His proposals were designed to make impossible the illegitimate use of aircraft in cases similar to some which had already occurred. What he had in mind was the sighting by an aircraft of the coastal State of a foreign vessel fishing within the territorial sea. Without making any contact whatever with the vessel, the aircraft would report it to the shore authorities, who would then order a government vessel to proceed to arrest the offender. In the meantime, however, the foreign vessel would have moved and would only be ordered to stop by the pursuing vessel when the foreign vessel was on the high seas some distance outside the limit. That practice was illegitimate because neither the aircraft, which might well have been at a high altitude, nor the surface ship would have ordered the foreign vessel to stop when within the limit of the territorial sea.

39. Mr. FRANÇOIS, Special Rapporteur, said that, even within the limits proposed by Sir Gerald Fitzmaurice, he could not see that there were sufficient grounds for extending the right of hot pursuit to aircraft. In the case of surface craft, the order to stop must be given at such a distance that the signal was clearly comprehensible by the foreign vessel, the use of W/T signals being excluded. If the offender refused to obey the order and made off, the difference in speed between the two vessels might lead to the foreign vessel's being some distance outside the territorial sea before the arrest could be made.

40. In the case of aircraft, the situation was quite different. As Sir Gerald Fitzmaurice had stated, the aircraft must issue a visible and comprehensible order to stop and, in order to do so, it must be fairly near the foreign vessel, at a distance, say, not greater than 10 cables. Given the speed of the aircraft, it was obvious that the offender could be arrested while still within the territorial sea, so that there was no need to extend the right of hot pursuit to the pursuing aircraft.

41. The case where the foreign vessel was such a short distance inside the limit as to be able to reach the high seas before being overhauled by the aircraft was so hypothetical as to be of academic interest only. Once it was accepted that the aircraft must give a clear order to stop, the question of the right of hot pursuit no longer arose. The extension of that right to aircraft would lead to abuse.

42. Sir Gerald FITZMAURICE said that the situation was by no means as simple as the Special Rapporteur had suggested. Cases of foreign vessels fishing just within the limit of the territorial sea were far from exceptional; on the contrary, most cases of fishing within the territorial sea were, either by accident or, naturally enough, by design, borderline cases. Even accepting the Special Rapporteur's premises, therefore, the offender might well have left the territorial sea before the coastal State aircraft could reach it.

43. Moreover, in practice it was not at all easy for an aircraft to arrest a surface craft without perhaps having to take extreme and distasteful measures. Where aircraft were used for fishery protection purposes, they were not normally employed to undertake the whole operation culminating in the arrest, their duties being more in the nature of spotting and reporting the presence of the foreign vessel. It was precisely that system of air and sea co-operation that had led to abuse and consequently, required regulation. It might meet the Special Rapporteur's point if the first sentence of his proposed new paragraph 5 were to run: " Subject to the following rules, aircraft may legitimately *participate* in the pursuit."

44. Since it was clear that States would not forgo the use of aircraft as aids to hot pursuit, he could see no possible objection to adopting provisions to regulate the practice.

45. Mr. PAL, concurring, said that in view of the existing situation of fact, the Commission must take a decision on the extension of the right of hot pursuit to aircraft. The alternative of withholding recognition of a practice that had grown up among States was hardly practicable. Subject to possible minor drafting changes, Sir Gerald Fitzmaurice's proposals were acceptable.

46. Mr. SANDSTRÖM, supporting Sir Gerald Fitzmaurice's view, said that he failed to see the force of the Special Rapporteur's argument, which in view of the limited manoeuvrability of aircraft, seemed somewhat exaggerated. It was essential to prevent abuse of the right of hot pursuit by aircraft and the practice should therefore be regulated.

47. Mr. FRANÇOIS, Special Rapporteur, maintained that since by the very provisions of Sir Gerald Fitzmaurice's proposed new paragraph 6 the aircraft must be very near the foreign vessel—which must itself be within the territorial sea—the interval between giving the order and making the arrest was bound to be so short that the aircraft would not need to continue the pursuit on the high seas.

48. Mr. KRYLOV said that the Commission's task was to codify maritime law. The question whether aircraft would be used in the circumstances described—and he was sure that they would—could be left to experts in aviation; in any case, it was no concern of the Commission. The question could be referred to, however, in the comment.

49. Sir Gerald FITZMAURICE agreed with Mr. Krylov that States would certainly use aircraft to protect their rights within the territorial sea. Regulation of the process was therefore necessary in order to avoid abuse. Cases had occurred of vessels being arrested on the high seas

without having received any order to stop while they were within the limits of the territorial sea.

50. In the case adduced by the Special Rapporteur, he would ask what was the aircraft to do if the foreign vessel ignored the order to stop and made off?

51. His own proposal ensured the giving of a genuine order and continuous hot pursuit, although not by the same craft throughout. There was not necessarily anything unreasonable in permitting the coastal State aircraft to call in a surface craft in order to make the arrest, provided the situation were regulated. But if it were not, the existing practices would continue, whereby the foreign vessel would not have been made aware that it was required to stop, there would have been no pursuit by the reporting aircraft, and the subsequent arrest of the foreign vessel on the high seas would be illegitimate.

52. Mr. SPIROPOULOS said that, without giving a firm opinion on a question that called for further study, he wished to draw attention to the fact that the article as drafted assumed that the vessel giving the order to stop was also the pursuing vessel. In Sir Gerald Fitzmaurice's case, however, one craft, airborne, would begin the pursuit, while another craft, seaborne, would take over.

53. Mr. PADILLA-NERVO wished to make two comments. The motive in granting a coastal State the right of hot pursuit was the protection of its rights within internal waters or the territorial sea. The means of exercising that right would naturally be influenced by technical progress; that, however, was a secondary question. The right to carry out pursuit was granted to the State as such, and not to the ship. That was the ma n point.

54. As Sir Gerald Fitzmaurice had pointed out, the use of aircraft in exercising the right of hot pursuit was a fact that could not be disregarded, especially as the practice was growing, particularly among small States. Mr. Pal was right in his contention that the Commission could not ignore the situation, which must be regulated.

55. He would support Sir Gerald Fitzmaurice's additional paragraphs 5-7. He proposed an amendment, however, which he considered important: Paragraph 7 could be improved by adding at the end of the first sentence the words, " unless the aircraft is itself able to seize the vessel or to escort it to a harbour of the coastal State." That addition would allow the aircraft not only to participate, or rather to collaborate with the State ships, in the seizure, but also to effect the seizure itself. Experiences of the last war, and others, showed that in certain cases an aircraft could carry out seizure. That applied especially to seaplanes, as they could come alongside a vessel and arrest the crew, which amounted to virtual seizure of the vessel. It was also possible for an aircraft, by means of its own resources, to force an offending vessel to put into a port of the coastal State.

56. Mr. SPIROPOULOS said that it must be realized that acceptance of Sir Gerald Fitzmaurice's proposal would involve the abandonment of the classic principle that the coastal State vessel, after beginning pursuit within the territorial sea, should continue it on the high seas. The collaboration of two instruments of pursuit, aircraft and surface craft introduced an entirely new element.

57. Mr. AMADO said that maritime States were legitimately interested in the existing situation, in which aircraft were used by States for the purpose of protecting their rights in the territorial sea. That did not mean, however, that the right of hot pursuit should necessarily be extended to the aircraft of a coastal State. In the exercise of hot pursuit there was an established link between the two vessels concerned that was lacking in the case of use of aircraft, which hardly came within the institution of the right of hot pursuit as he understood it. He could not support Sir Gerald Fitzmaurice's proposal.

58. Mr. EDMONDS said that the Commission should not lose sight of fundamental principles. It was accepted that the right of hot pursuit could be exercised if a vessel of the coastal State knew, or had reason to believe, that the laws of that State had been or were being violated. In such circumstances, the right of hot pursuit could be exercised from the moment of giving the order to stop. In view of the increasing use of aircraft as part of coastal States' policing forces, there was no reason why the order to stop should not be given by one kind of vessel—or an aircraft—and the pursuit continued by another kind of vessel. The important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which that right was exercised.

59. Mr. SANDSTRÖM, supported by Mr. SCELLE, saw no objection to the pursuit being started by one vessel and subsequently taken over by another.

60. Mr. PADILLA-NERVO, concurring, said that it was not provided in paragraph 1 that the pursuing vessel must be the same as the vessel giving the order to stop. The right of hot pursuit was granted to the State and not to the instrument used in the exercise of that right.

61. Sir Gerald FITZMAURICE said that it was not infrequent in such cases for one vessel to initiate the pursuit and for another subsequently to take it over. It had never been argued that such a practice was necessarily illegitimate, provided there was no break in continuity of pursuit.

Further consideration of article 22 was adjourned.

The meeting rose at 1.10 p.m.

345th MEETING

Monday, 14 May 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 22 in the light of the addendum (A/CN.4/97/Add.1) to the Special Rapporteur's report.

Article 22: Right of hot pursuit (continued)

2. Mr. FRANÇOIS, Special Rapporteur, said that, of the two Netherlands proposals in paragraphs 153 and 155, the first was really a drafting amendment to improve the last sentence of paragraph 3 of the article.

The Netherlands proposal in paragraph 153 was adopted.

3. Mr. FRANÇOIS, Special Rapporteur, said that the second Netherlands proposal was one of substance. The question had already been ventilated on previous occasions, and he hoped that the text proposed would meet with general agreement.

4. Sir Gerald FITZMAURICE said that the Netherlands proposal was dangerously vague. The granting of such a drastic right as that of hot pursuit should be clearly defined. He proposed amending the text to read: " The right of hot pursuit may be exercised only by warships and other public vessels specially authorized to that effect."

5. Mr. FRANÇOIS, Special Rapporteur, and Mr. SPIROPOULOS supported that proposal.

Sir Gerald Fitzmaurice's proposal was adopted.

6. The CHAIRMAN suggested that the Commission revert to its consideration of Sir Gerald Fitzmaurice's proposal for three additional paragraphs.[1]

7. Mr. AMADO, recalling his comments at the previous meeting,[2] said that he would abstain from voting both on the article on the contiguous zone and on Sir Gerald Fitzmaurice's proposal to extend the right of hot pursuit to aircraft.

8. Sir Gerald FITZMAURICE said that Mr. Padilla-Nervo's amendment[3] to his proposed new paragraph 7, concerning the possibility of the aircraft itself seizing the offending vessel, was acceptable to him.

9. With reference to the question whether the right of hot pursuit must be exercised throughout by the same vessel, although in practice the pursuit would normally be initiated and concluded by the same vessel, cases had occurred of the participation of more than one vessel. Provided there was no break in continuity of pursuit, it would be illogical to regard that practice as necessarily illegitimate. The authorities of the coastal State had the obligation of maintaining pursuit from the time of giving the order to stop. If they did that, there might well be no objection to a second vessel's taking over from the first.

10. If that principle were accepted in the case of surface craft, it must obviously be admissible in the case of aircraft. He doubted whether the argument against extending the right of hot pursuit to aircraft was well founded. The whole question centred on the agency for the application of an accepted principle of international law. As he had previously pointed out, it would be impossible in practice to exclude aircraft from participation in hot pursuit, and in order to avoid the abuse of which he had given an example at the previous meeting[4] it was logical that the right be recognized, but also regulated.

11. Mr. EDMONDS, after recalling his reference at the previous meeting to fundamental principles[5] and stressing the essential basis of the right of hot pursuit, pointed out that, if the offender made no attempt to escape, the arrest would be made within the territorial sea. Was it logical, therefore, to allow an offending vessel to escape simply because the coastal State vessel making the final arrest was not the same as the one that had given the order to stop? In that respect, an aircraft was in exactly the same position as a surface craft. Aircraft were already widely used in the various protection services of States, and when having the same qualifications as a surface vessel should not be excluded from participation in hot pursuit.

12. Mr. SPIROPOULOS said that the two questions—that of the use of aircraft in hot pursuit and that of the combination of vessels—must be kept distinct: the second was certainly fundamental. He wondered whether Sir Gerald Fitzmaurice could quote a single specific case of hot pursuit in which the vessel effecting the seizure had not been the vessel that had given the order to stop. Even if such cases existed, he doubted whether an arrest in such circumstances would be regarded as legitimate. He had in mind the case of an offending vessel being pursued on to the high seas by a coastal State's vessel that, not being fast enough to overhaul, made a signal to another vessel to take over the chase. Did the Commission really wish to authorize such a procedure? Before taking a decision, it should decide whether it wished to abide by existing international maritime law or to extend its traditional provisions. His own impression was that existing law would demand that the same vessel initiate and conclude the pursuit.

13. There was perhaps an analogy with terrestrial practice in which, under some treaties, it was permissible

[1] A/CN.4/SR.344, para. 35.
[2] *Ibid.*, paras. 17, 18 and 57.
[3] *Ibid.*, para. 55.
[4] A/CN.4/SR.344, para. 38.
[5] *Ibid.*, para. 58.

for the authorities of one State to pursue for a limited distance an offender who had entered the territory of the neighbouring State, the essential condition being that the pursuit must be carried out by the same individual agent.

14. Mr. FRANÇOIS, Special Rapporteur, said that to the best of his knowledge there had never been any recognition in international law of the participation of more than one vessel in hot pursuit. Following the principles adopted by The Hague Codification Conference in 1930, paragraph 3 referred to " the pursuing vessel ". Acceptance of the principle of legitimate pursuit by a combination of vessels would amount to an amplification of existing international law. Of course, if the right of hot pursuit were extended to aircraft, it would logically entail the authorization of collective pursuit by surface craft.

15. Mr. EDMONDS said that the fact that precedent for the legitimate use of more than one vessel in hot pursuit might be lacking was no reason for denying the principle. He would point to the analogy of a police officer who, in pursuit of a malefactor, for reasons of physical inadequacy called for the assistance of a comrade. In such a case, it could not be argued that the subsequent arrest was unlawful simply because the agent of the law had changed. Equally, it was both good law and good sense that an offending vessel should not be allowed to escape the consequences of an infringement of the law.

16. Mr. SPIROPOULOS, in reply to Mr. Edmonds, pointed out that the cases were not on a par, since the malefactor fleeing from the police officer remained in the national territory. So long as the offending vessel remained within the territorial sea, the pursuit could be taken up by any number of vessels. The whole situation changed, however, once the vessels entered the high seas, where international law specifically restricted the rights of hot pursuit. If the Commission really wished to extend existing international law by giving the coastal State further jurisdiction, he would not stand in its way. He would, however, abstain from voting on such a proposal.

17. Faris Bey el-KHOURI said that it might well be that, as the Special Rapporteur had said, there was no precedent for the authorization of a combined operation in hot pursuit. That, however, was no reason for condemning it: he could not conceive of any legislation being enacted, the effect of which would be to aid the escape of an offender. He supported Mr. Edmonds and urged the view that combined pursuit could not be prohibited in international law.

18. Mr. EDMONDS, replying to Mr. Spiropoulos, said that, theoretically, after failure to respond to an order to stop and the initiation of a continuous hot pursuit, for jurisdictional purposes the high seas would be regarded as part of the territorial sea and the coastal State could exercise the same authority therein.

19. Mr. PADILLA-NERVO, endorsing Mr. Edmonds' view, said that if a right were granted to the State, logically there could be no restriction of its application through the means used to exercise it. If a coastal State were to make an arrest on the high seas, using in the exercise of its right a vessel other than that initiating the pursuit, he could not conceive of any court's rejecting the legitimacy of such an arrest. In the cases that he recalled, the issue had always turned on the question of the position of the offending vessel; he could recollect no case of the question of the number of pursuing vessels employed by the coastal State having been raised. The Commission should not fetter itself by rigid adherence to a traditional absolutism. He reiterated that, provided the necessary conditions were fulfilled, the means by which the right of hot pursuit was exercised had no relevance and the question of the instrument utilized was purely secondary. He would support Sir Gerald Fitzmaurice's proposal.

20. Mr. ZOUREK said that if progress was to be made in the discussion, two points must be noted. First, the classic concept of pursuit was based on the use of ships and not of aircraft. Secondly, the aircraft of a coastal State had the right to arrest a foreign vessel for infringement of the laws of that State, when the offender was within the territorial sea. The only question to be decided at present was whether aircraft should be granted *de lege ferenda* the right to pursue and arrest a foreign vessel on the high seas or at least to take part in a pursuit carried out by a warship belonging to the same State.

21. The Special Rapporteur had adduced strong arguments to the effect that, owing to the difference in speed between the pursuer and the offender, there was no necessity to recognize such a right. Sir Gerald Fitzmaurice had stressed the practical difficulties of effecting a seizure by aircraft without endangering the lives of the crew of the offending vessel and had urged that international law must take account of technical progress. His impression was that in that respect there was no great difference between the use of aircraft and that of surface vessels: either the offender obeyed the order to stop or he did not. In the latter case, force might have to be used, and the question of whether it was applied by air or surface craft was irrelevant. The only example he could remember of a pursuit in which one pursuing vessel had been relieved by another was the very special case of the schooner *I'm Alone*.

22. In that connexion it was interesting to consider the case of seaplanes; they were a type of machine whose legal status in regard to the exercise of the right of pursuit should be defined.

23. The Commission was faced with a new theoretical concept. If it proposed to extend international law by enlarging the jurisdiction of the coastal State, it must state its intention clearly.

24. Mr. SCELLE said that the question was an essentially simple one. If an offending vessel came under hot pursuit, it was by virtue of a right in international law that was generally accepted. In exercising that right the coastal State had international jurisdiction, not because its interests had been violated, but as a result of the provisions of international law governing the protection of those interests. Since the coastal State had been granted that special jurisdiction by international law, it was essential that an effective result be achieved in the appli-

cation of that law, and it was consequently otiose to attempt to prohibit States from using aircraft as a means of exercising the right of hot pursuit. The combination of aircraft and surface vessels in such an operation could not be prevented; hence, if a combination of air and surface craft were recognized, a combination of surface vessels alone must likewise be acknowledged.

25. Further, aircraft might not be the only alternative to vessels in the operation of hot pursuit. At some future date, man might invent a ray which could incapacitate the offending vessel and prevent its escape. The developments of man's inventiveness could not be disregarded, and no one could impede the upholding of international law by the most appropriate means available. The fact that pursuit might be effected by more instruments than one was merely the reflection of the technical application of international law. The reason why the question had not been considered before was simply that the necessity for such consideration had not arisen. He supported Mr. Padilla-Nervo's view.

26. Mr. PAL, endorsing Sir Gerald Fitzmaurice's proposal, said that so far as he knew there was no authority for saying that hot pursuit must be continued and completed by the vessel initiating it. At least, in none of the cases had the question been raised and decided one way or the other. On the other hand, there were cases in which the pursuit had in fact been carried out by two or more vessels in succession; but the legitimacy of the pursuit had been questioned on that ground. In those circumstances, it was difficult to say that the law on the point was settled and that international law did not countenance pursuit by two or more vessels in succession. But even if the law was settled that way, he was willing to have the exercise of the right extended to two or more vessels in succession. The right of pursuit was really given to the coastal State and not to any particular vessel, as was made clear in paragraph 1 of the article. There was no logic in limiting its exercise to one vessel only. If the requisites for the right existed and the pursuit was properly initiated, he saw no reason why the pursuit should not be allowed to be continued and completed by any effective means in order to subdue the offender.

27. Mr. Spiropoulos's point was hardly applicable, for his territorial malefactor could cross the frontier into a foreign territory. An offending vessel entering the high seas, however, was entering on a part of the sea open to all. Analogy, in such a matter, was always likely to be misleading. If the right of pursuit could continue and could be exercised by several police officers so long as the malefactor remained in national territory, it could also continue if he entered no-man's-land. It might cease only when he entered a territory prohibited to the pursuing policemen.

28. Mr. LIANG, Secretary to the Commission, referring to the *I'm Alone* case, said that the judgment of the tribunal [6] provided no definite answer to the question, but that support for Sir Gerald Fitzmaurice's case might be deduced from its findings. The Canadian vessel *I'm Alone* had first been pursued by one United States coast-guard cutter, which was subsequently joined by a second, the pursuit being then undertaken jointly. The *I'm Alone* had finally been sunk by the second pursuing vessel in circumstances which were not stated. The tribunal had stated that the use of " necessary and reasonable force " by the pursuing vessel for making the required seizure was justifiable. Since the pursuing vessel was the second United States cutter, it might be inferred that the use of two vessels was also justifiable. That judgment did not finally settle the question, of course, but he had the impression that in the conduct of hot pursuit the coastal State could use as many vessels as were required.

29. Mr. ZOUREK did not think that the *I'm Alone* case could be cited in support of Sir Gerald Fitzmaurice's view. The diplomatic correspondence concerning the case showed that the Canadian Government had argued that the schooner *I'm Alone* had been sunk by a ship which had only joined in the pursuit two days after it began and which had come from an entirely different direction. The United States Government, far from rejecting that argument, had merely stressed that the first vessel had continued in pursuit throughout the whole operation, thereby complying with the rules of international law.

30. Mr. SPIROPOULOS cited the hypothetical case of an offending vessel which, owing to the technical incapacity of the original pursuing vessel, was on the high seas several hundred miles away from the scene of the offence before being arrested by the second vessel of the coastal State, which might also have been equally remote from the place of the offence at the time of its commission. If Sir Gerald Fitzmaurice's proposals were accepted, that would be a legitimate exercise of the right of hot pursuit. Before the Commission took such a decision, it should carefully weigh the dangers that lay ahead. He was not opposed to any necessary extension of international law, but would abstain from voting on that issue.

31. Mr. SANDSTRÖM said that the question of the continuity of pursuit would be decided in each particular case and was no concern of the Commission. The use of aircraft by States with long coastlines was inevitable; he supported the views of Sir Gerald Fitzmaurice and Mr. Padilla-Nervo.

32. Mr. SCELLE said that when there was a profound similarity between the basic principles of municipal and those of international law, the techniques of application should also be similar. If a police officer called on a comrade for assistance, such action was perfectly legal when performed on national territory. In the case of hot pursuit, parallel action was equally legitimate, because it was the implementation of a provision of international law. The high seas were assimilated for that particular purpose to the territorial sea, and the first pursuing vessel was therefore justified in calling upon the assistance of a second vessel of the coastal State.

33. Sir Gerald FITZMAURICE disagreed with the suggestion that the combined use of aircraft and surface

[6] Reports of International Arbitral Awards, Vol. III, pp. 1611 *et seq.*

vessels in the exercise of hot pursuit would necessarily be detrimental to the freedom of the seas. On the contrary, his proposals, by regulating it, would strengthen and preserve the freedom of the high seas.

34. The existing danger arose from the unregulated combined use of aircraft and surface craft. Even if the Commission were to reject his proposal, it could still do nothing to prevent the use, in practice, of aircraft in combination with surface vessels, in ways lending themselves to abuse, such as for reconnaissance purposes only. That abuse was a far greater danger to the freedom of the seas than the open recognition and regulation of the right of aircraft to participate in hot pursuit.

35. Mr. SCELLE said that there was no contradiction between requiring that the order to stop must be given in the territorial sea and recognizing that hot pursuit could be carried out by more than one vessel.

36. Mr. SANDSTRÖM observed that there was no definite proposal before the Commission that the article should authorize pursuit by more than one vessel.

37. Mr. AMADO remained convinced that acceptance of Sir Gerald Fitzmaurice's proposals would be a development and not a re-statement of international law for the purpose of codification. However, the discussion had been useful in airing opinion.

38. Mr. SCELLE emphasized that where a second vessel engaged in hot pursuit, there must have been no interruption.

39. The CHAIRMAN put to the vote the proposal that hot pursuit by more than one vessel be authorized.

The proposal was adopted by 10 votes to none with 4 abstentions.

40. Sir Gerald FITZMAURICE said that he had voted in favour of the proposal because it was a statement of existing law.

41. The CHAIRMAN put to the vote the question whether the statement should be incorporated in the text of the article itself or placed in the comment.

It was agreed by 13 votes to none with 1 abstention that the statement should be placed in the comment.

42. In reply to a question by the CHAIRMAN, Sir Gerald FITZMAURICE observed that although aircraft most commonly did not effect the actual arrest, but only assisted in the operation, it was theoretically possible for them to stop a vessel and direct it to port. However, as it was a matter of drafting, perhaps the Commission could vote on the principle that aircraft could be used in hot pursuit and leave the precise wording of the provisions and that of Mr. Padilla-Nervo's amendment to paragraph 7 to the Sub-Committee.

43. Mr. PADILLA-NERVO said that the purpose of his amendment to paragraph 7 of Sir Gerald Fitzmaurice's proposal was to make clear that the aircraft itself could effect the arrest and escort the vessel into port.

44. The CHAIRMAN, speaking as a member of the Commission, pointed out that by giving aircraft powers of arrest the Commission would have entered into the domain of air law, which to him seemed a very questionable course. Whether or not aircraft could participate in hot pursuit was an entirely separate issue. Consequently the two principles should be voted on separately.

45. He then put to the vote the principle that aircraft should be authorized to participate in hot pursuit.

The principle was adopted by 9 votes to 3 with 2 abstentions.

46. The CHAIRMAN put to the vote Mr. Padilla-Nervo's amendment to the effect that aircraft should be authorized to arrest a foreign vessel.

Mr. Padilla-Nervo's amendment was adopted by 7 votes to 3 with 4 abstentions.

Article 22 was referred to the Sub-Committee for re-drafting in the light of the foregoing decisions.

47. Mr. KRYLOV agreed with the CHAIRMAN that the Commission should not have entered the domain of air law. The decision to formulate a new rule of international law by authorizing aircraft to execute hot pursuit was not a progressive development, but a type of perfectionism which he deplored. He therefore remained resolutely opposed to the provision.

48. Mr. SCELLE said that his main reason for supporting the proposals just adopted had been that there was not a single government which would have been prepared to surrender its right to use aircraft for hot pursuit and for the arrest of the vessel pursued.

49. Mr. FRANÇOIS, Special Rapporteur, said that he had opposed Sir Gerald Fitzmaurice's proposals because he saw no point in allowing aircraft to pursue vessels out into the high seas subject to the conditions laid down in the proposals. When an aircraft was giving, in the three-mile zone, a " visible and comprehensible " signal to a ship, the distance between the aircraft and the ship would be so small that, in view of the speed of the aircraft, it would always be possible to arrest the ship before it left the territorial sea. That being so, Sir Gerald Fitzmaurice's provisions would only lead to the kind of abuse which, in the past, there had been a general effort to guard against.

50. Mr. ZOUREK said that he had opposed Sir Gerald Fitzmaurice's proposals largely for the same reasons as those given by Mr. Krylov and the Special Rapporteur.

51. The CHAIRMAN, pointing out that the remaining comments by Governments on article 22 related to questions connected with the contiguous zone, consideration of which the Commission had agreed to defer, invited the Commission to pass on to article 23.

Article 23: Pollution of the high seas

52. Mr. FRANÇOIS, Special Rapporteur, said that he was prepared to accept the amendment of the Union of South Africa (A/CN.4/97/Add.1) to substitute the words " pollution of the high seas " for the words " water pollution " and the suggestion by the Netherlands and United Kingdom Governments to refer to " oil " instead of " fuel oil ", for technical reasons.

53. The Netherlands Government had also proposed the insertion of two new provisions reading:

All States shall draw up regulations to prevent water pollution by oil, resulting from the exploitation of submarine areas.

All States shall co-operate in drawing up regulations to prevent water pollution from the dumping of radio-active waste.

54. Members might feel that the first of those provisions was unnecessary as the point was already covered in the existing text. In the second, however, the Netherlands Government had drawn attention to a new danger not covered by article 23.

55. Mr. PAL, pointing out that in its draft articles both on the high seas and on the territorial sea the Commission had dealt with the air space above, contended that in the present instance the provision should not be confined to water pollution only, but should also take contamination of the air into account. He had been prompted by the second proposal of the Netherlands Government to put forward a new text for article 23 reading:

1. All States shall draw up regulations to prevent pollution of the high seas by oil, ionizing radiation or radio-active fall-out or waste.

2. All States shall co-operate in drawing up regulations for the purposes above stated.

56. Owing to modern technical developments it was vitally necessary to forestall injurious and dangerous practices. The dangers of ionizing radiation and of radio-active fall-out and waste were well known, and States must be made responsible for drawing up the necessary regulations to prevent pollution by those agents also.

57. Mr. SANDSTRÖM doubted the wisdom of the amendment suggested by the Union of South Africa, because pollution must obviously be prevented in the territorial sea as well as in the high seas; he would therefore prefer that the text of article 23 should remain unchanged.

58. The CHAIRMAN observed that it was clear from the comment that the Commission had borne that point in mind.

59. Mr. SALAMANCA suggested that Mr. Sandström's preoccupation would be met by the deletion of the word " high " in paragraph 1 of Mr. Pal's text.

60. Mr. PAL accepted that amendment.

61. The CHAIRMAN, speaking as a member of the Commission, pointed out that the effect of Mr. Pal's text might be restrictive. Perhaps it should be made clear that there were other polluting agents. That would leave the door open for future agreement on international regulations.

62. Mr. PAL had no objection to such a modification.

63. Sir Gerald FITZMAURICE said that he could have accepted the second new provision proposed by the Netherlands Government, because States should be required to regulate the dumping of radio-active waste so as to prevent water pollution, but without scientific advice he was unable to form an opinion on the technical implications of Mr. Pal's text. It was a well-known fact that radio-active fall-out could occur in, and perhaps drift from, places many thousands of miles from the site of the original explosion, and therefore the only way to prevent such pollution would be to prohibit atomic experiments altogether which, as he had already emphasized in another connexion, would be outside the normal scope of a draft on the high seas. Therefore, though sympathizing with the reasons which underlay Mr. Pal's proposal, he would be unable to support it.

64. Mr. ZOUREK believed that Mr. Pal was correct in proposing that the scope of the article should be extended to the airspace above the high seas, because the effects, for example, of ionizing radiation were more dangerous to seafarers than radio-activity in the water. He also favoured Mr. Pal's text because it was more comprehensive. The Transport and Communications Commission of the United Nations had already taken up the question of water pollution from radio-active waste five years previously, and it would be surprising if the Commission were to omit any mention of the matter in its draft.

65. Mr. SALAMANCA reaffirmed his opinion that it did not come within the Commission's competence to prohibit atomic experiments.

66. Mr. SCELLE considered that the text should make express reference to pollution of the superjacent air.

67. Mr. SANDSTRÖM asked for a separate vote on the first clause of Mr. Pal's text ending at the words " high seas by oil ".

Further discussion of article 23 and the amendments thereto was adjourned until the next meeting.

The meeting rose at 6.15 p.m.

346th MEETING

Tuesday, 15 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-

KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 23 and the alternative wording proposed by Mr. Pal.[1]

Article 23: Pollution of the high seas (continued)

2. Mr. PAL said that perhaps Mr. Scelle's comment, at the end of the previous meeting, that the text should expressly refer to the air space above the high seas,[2] had been prompted by the French translation of his proposal, which referred to " les eaux de la haute mer " instead of simply " la haute mer ". However, he would have no objection to a clarification on the lines suggested by Mr. Scelle, either in the text of the article itself or in the comment.

3. With regard to Sir Gerald Fitzmaurice's objection,[3] he explained that the words " ionizing radiation or radio-active fall-out or waste " had been taken from General Assembly resolution 913 (X), so that their meaning was presumably clear to all Member States.

4. Sympathy with his aim was not enough. His proposal did not seek anybody's sympathy. It was a demand of justice, and justice demanded that States must be required either to regulate their action so as to prevent the mischief or to refrain from such acts altogether. If they said that the act in question was such as not to admit of any regulation to avoid any possible danger, they had better refrain from the act. They should not be allowed to handle such uncontrollably mischievous matters simply by warning people off the high seas.

5. Mr. SANDSTRÖM considered that the provision should be confined to water pollution, since pollution of the air was a far wider problem; it involved the question of a State's responsibility for acts performed within its territory, and that must be dealt with in some other draft.

6. Mr. SCELLE said that he could not agree with Mr. Sandström's rigid formalism. For example, when dealing with the continental shelf the Commission had also framed rules concerning the superjacent waters and the air space above. Had it not done so, the draft articles adopted would have been even more defective than they were at present. The same considerations must prevail in the present instance because if article 23 were restricted to water pollution, it would be totally ineffective. After all, the radio-active fall-out which had caused injury to Japanese fishermen had been carried by air and not by water. He accordingly believed that a reference to the airspace above should be inserted after the word " seas " in paragraph 1 of Mr. Pal's text. The freedoms listed in article 2 were eloquent proof of the impossibility of treating the different elements separately. Although the Commission was not entitled to prohibit atomic experiments, it should require States to draw up regulations to prevent such pollution of the water and air as might endanger navigation.

7. Mr. SANDSTRÖM remained unconvinced by Mr. Scelle's argument. The parallel with the draft articles on the continental shelf was inapt, since in the latter case the Commission had admitted certain sovereign rights which derogated from the principle of the freedom of the high seas. At present the Commission was discussing the responsibility of States for acts performed in their own territory as well as on the high seas, a matter which, he considered, belonged to another field.

8. Mr. ZOUREK disagreed with Mr. Sandström, since it was quite obvious that freedom of the high seas could not be enjoyed if either the water or the air were contaminated by radio-activity or if fish were poisoned by radio-active waste dumped in the sea. It followed that States must be required to enact the necessary regulations to protect seamen and travellers, whether on sea or land, from injury. As he had pointed out at the previous meeting,[4] the question was not a theoretical one and, as early as 1951 the Transport and Communications Commission of the United Nations had turned its attention to water pollution by radio-active waste from vessels propelled by atomic power. It would be absurd for the Commission to prohibit oil pollution, which was relatively localized, but to say nothing whatever about the incomparably more dangerous and extensive pollution from radio-active materials.

9. He agreed with Mr. Scelle that, for the purpose of the present article, water and air were inseparable and the Commission must also codify the rules relating to the air space above the high seas.

10. Sir Gerald FITZMAURICE said that, despite the arguments propounded by Mr. Scelle and Mr. Zourek, he continued to believe that the Commission should not include any provision concerning pollution by ionizing radiation or radio-active fall-out.

11. However, as he had stated at the previous meeting,[5] he had no objection to the Netherlands proposal regarding the dumping of radio-active waste (A/CN.4/97/Add.1 para.171).

12. It should be remembered that the Commission, when discussing article 2, had declined to accept Mr. Pal's proposal,[6] which, it had been agreed, was mainly concerned with atomic experiments, largely on the grounds that it was outside the Commission's terms of reference to prohibit such experiments and premature to take any stand on questions which were under active consideration by other United Nations bodies. Mr. Pal's present pro-

[1] A/CN.4/SR.345, para. 55.

[2] *Ibid.* para. 66.

[3] *Ibid.* para. 63.

[4] A/CN.4/SR.345, para. 64.

[5] *Ibid.*, para. 63.

[6] A/CN.4/SR.335, para. 36.

posal sought to achieve the same object by other means, but was obviously impossible to implement without entirely prohibiting atomic experiments, even for peaceful purposes, since it was very difficult to control radio-active fall-out, which was largely determined by winds and weather. Whatever the moral aspect of the problem, it would be going far beyond the Commission's competence to accept such a far-reaching proposal, which he would be compelled to oppose, though sympathizing with its aims.

13. Mr. SANDSTRÖM said he found the Netherlands proposal concerning the dumping of radio-active waste acceptable.

14. Mr. PAL pointed out that his proposal relating to article 2 had been withdrawn after the Commission had decided not to include a fifth freedom concerning scientific research,[7] so that Sir Gerald Fitzmaurice was wrong in saying that the Commission had declined to accept the proposal. The Commission had not taken any decision on it. Further, it was wrong to suggest that the present proposal was made with the same object. States desirous of manipulating such dangerous agents were now called upon only to regulate their use. A State could not have a simple right to warn people off the high seas, and a State which felt the need to harbour substances of such a dangerous and obnoxious character should not on any ground be permitted to avoid such regulation.

15. Mr. EDMONDS said that Mr. Pal's proposal went beyond the competence of the Commission and was unacceptable for the reasons given by Sir Gerald Fitzmaurice.

16. Mr. KRYLOV observed that Mr. Edmonds was perfectly free to vote against the proposal, but was surely wrong to argue that it was outside the Commission's competence: pollution was undoubtedly a question on which the Commission was entitled to pronounce. He himself had regretted the Commission's decision not to amend article 2, although Mr. Pal's point had in some measure been met by retaining the third sentence of the first paragraph of the comment on that article.[8]

17. He agreed that article 23 should also cover the air space above the high seas but doubted the wisdom of enumerating the various sources of pollution.

18. Faris Bey el-KHOURI said it would be unreasonable, in establishing rules for the high seas in general, not to extend article 23 to include pollution of the airspace above; for if the airspace were contaminated, freedom of navigation, freedom of fishing and freedom to fly over the high seas would all be endangered. He therefore supported Mr. Pal's proposal.

19. Mr. SPIROPOULOS said he had some difficulty in deciding what attitude to adopt, because he did not understand precisely what was meant by " ionizing radiation ". Perhaps Mr. Pal's text could be modified by ending paragraph 1 at the word " oil " and, in paragraph 2, substituting the words " in order to prevent pollution by oil, ionizing radiation or radio-active fall-out or waste " for the words " for the purposes above stated ".

20. Sir Gerald FITZMAURICE and Mr. SANDSTRÖM found Mr. Spiropoulos' amendment acceptable.

21. Mr. ZOUREK considered that it would be a retrograde step to accept Mr. Spiropoulos' wording after the Commission had decided to retain the third sentence in the first paragraph of the comment on article 2, which read " States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States ". The Commission would be unduly timorous if it did not impose an obligation on States to prevent practices liable to produce effects that violated the freedom of the high seas.

22. Mr. PADILLA-NERVO said that a general prohibition of the kind Mr. Zourek had in mind had already been included in the third sentence of the first paragraph of the comment on article 2, and could be enforced only by means of an international agreement, since national regulations would not suffice. He would therefore be prepared to accept a provision to the effect that States should co-operate in drawing up regulations to prevent pollution of the water and air by ionizing radiation or radio-active fall-out or waste, but he could not subscribe to the Commission's adoption of a provision prohibiting atomic experiments when the subject was under consideration in other United Nations bodies and when no general agreement had yet been reached on the use of atomic weapons.

23. On the other hand, he found the Netherlands proposal concerning the dumping of radio-active waste acceptable.

24. Mr. AMADO said that he would vote in favour of the original text of article 23 with the additions proposed by the Netherlands Government, because existing international law enjoined States to prevent pollution by oil. He could not, however, go as far as was proposed by Mr. Pal, because at the present stage all that could be hoped for was that States would reach agreement on regulations to control atomic experiments.

25. Mr. SALAMANCA said that the danger of pollution could not be averted in piecemeal fashion, and some general provision was necessary. It could be stated in the comment that the Commission, after considering Mr. Pal's proposal, had decided that the decisions of other United Nations bodies dealing with the effects of radiation must not be anticipated.

26. In the meantime, perhaps Mr. Spiropoulos' amendment offered the best solution because, though general, it took into account the technical considerations put forward by certain members. The Commission should prepare the ground for multilateral agreement.

27. Faris Bey el-KHOURI said that although the Commission could not enter into scientific questions it must not remain silent about pollution from other sources than oil. He therefore proposed a general text which would not anticipate future developments, reading:

[7] A/CN.4/SR.340, para. 1.

[8] *Ibid.*, para. 45.

States shall co-operate in drawing up regulations for the purpose of preventing the pollution of the high seas or atmosphere thereabove in any such way as to impede or endanger the enjoyment of the freedoms of the high seas.

28. Mr. PAL pointed out that Faris Bey el-Khouri's text would be even more limited in scope than the present article 23, which, over and above the danger to navigation, sought to prevent pollution of ports and beaches. Consequently, he could not accept it.

29. Nor could he withdraw his own text in favour of the wording suggested by Mr. Spiropoulos.

30. Mr. SCELLE observed that article 23, which in French opened with the words " Tous les Etats seront tenus d'édicter des règles visant à éviter ", was not as great a menace to the freedom of States as Sir Gerald Fitzmaurice seemed to think. Mr. Pal's wording was very restrained; it would not have the effect of prohibiting atomic experiments, and was not open to such categorical objections as those raised by Sir Gerald Fitzmaurice.

31. Sir Gerald FITZMAURICE observed that the English text of article 23 was more forceful than the French.

32. The CHAIRMAN said that the Commission would have to vote on Mr. Pal's text first, as the furthest removed from the original, because it imposed a direct obligation on States to draw up regulations to prevent pollution from a number of specified sources. Mr. Padilla-Nervo's proposal would impose that obligation only in the case of oil and the dumping of radio-active waste.

33. Mr. AMADO was anxious to preserve the original text of article 23, which made it mandatory on States to prevent oil pollution.

34. Sir Gerald FITZMAURICE agreed that it was important to retain article 23, particularly since it referred to existing treaty provisions concerning the prevention of water pollution by oil.

35. Faris Bey el-KHOURI considered that the Commission should proceed by voting first on the principle whether article 23 should also cover the airspace above the high seas, and secondly on whether certain types of pollution should be named.

36. He added that if his own text were rejected he would support Mr. Pal's proposal.

37. Sir Gerald FITZMAURICE said that such a procedure might place some members in difficulties because they would be unable to vote on the first principle mentioned by Faris Bey el-Khouri without knowing whether it would form part of a mandatory provision. He therefore favoured the procedure outlined by the Chairman.

38. Mr. SANDSTRÖM, agreeing with Sir Gerald Fitzmaurice, pointed out that if the article were restricted to pollution by oil it could not apply to the airspace above.

39. Mr. AMADO thought that the Commission should first take a decision on article 23 as it stood, since it embodied a traditional rule of international law; the English and French texts would, of course, be brought into line. Then it should decide the controversial issue whether or not States were to be requested to co-operate in drawing up regulations to prevent other forms of pollution.

40. The CHAIRMAN put to the vote paragraph 1 of Mr. Pal's text, with the amendments accepted by the author, reading:

All States shall draw up regulations with a view to preventing pollution of the seas and airspace above by oil, ionizing radiation, radio-active fall-out or waste or other polluting agents.

Mr. Pal's text was not adopted, 6 votes being cast in favour and 6 against, with 2 abstentions.

41. Mr. PADILLA-NERVO proposed that a second paragraph be added to article 23 reading:

All States shall draw up regulations to prevent pollution of the seas from the dumping of radio-active waste.

42. Mr. ZOUREK proposed the addition at the end of that text of the words " and other harmful agents ".

43. Mr. SANDSTRÖM was unable to support Mr. Zourek's amendment because it was too imprecise.

44. Mr. SCELLE observed that another dangerous source of pollution, namely ruptured pipelines on the continental shelf, should be taken into consideration. He therefore proposed the deletion from article 23 of the words " discharged from ships ".

45. Mr. FRANÇOIS, Special Rapporteur, suggested that the point raised by Mr. Scelle, which concerned pipelines in general and was already covered in the comment, could be referred to the Sub-Committee.

It was so agreed.

46. The CHAIRMAN put to the vote Mr. Padilla-Nervo's text for a new paragraph 2 of article 23.

Mr. Padilla-Nervo's proposal was adopted by 12 votes to none, with 1 abstention.

47. Mr. SCELLE considered that the provision was not entirely satisfactory but was better than nothing.

48. Mr. ZOUREK observed that his amendment still stood and might go some way towards meeting the views of those members who favoured a general provision and had been opposed to the enumeration of contaminating agents in Mr. Pal's text, on the ground that it was too technical.

49. The CHAIRMAN, speaking as a member of the Commission, expressed the view that by adopting Mr. Padilla-Nervo's text the Commission had implicitly rejected Mr. Zourek's amendment.

50. Mr. EDMONDS asked whether Mr. Zourek's object was to prevent pollution from the dumping of other polluting agents.

51. Mr. PADILLA-NERVO said that Mr. Zourek's amendment was not appropriate to the new paragraph 2, which dealt with the dumping of radio-active waste. He

intended to propose a new paragraph 3 which would require States to co-operate in drawing up regulations to prevent pollution as a result of technical and scientific experiments with radio-active materials. Perhaps Mr. Zourek's amendment would more appropriately apply to that text.

52. The CHAIRMAN observed that Mr. Zourek's object was to impose a direct obligation on governments to prevent pollution by other harmful agents.

53. Sir Gerald FITZMAURICE said that if that were so, Mr. Zourek was seeking to reopen the whole issue which had already been decided by the rejection of Mr. Pal's text. He therefore questioned whether it would be in order to put Mr. Zourek's amendment to the vote. Furthermore, it would entirely alter Mr. Padilla-Nervo's text.

54. The CHAIRMAN, speaking as a member of the Commission, expressed his agreement with Sir Gerald Fitzmaurice.

55. Mr. AMADO also held that the Commission would be reversing its earlier decision if it accepted Mr. Zourek's amendment.

56. Faris Bey el-KHOURI said that he had abstained from voting on Mr. Pal's amendment because it referred to specific agents of pollution. He was opposed to the introduction of matters of detail into the provisional articles, because such technical aspects were not the concern of the Commission, which should confine itself to the formulation of general principles. He had felt unable to vote for Mr. Padilla-Nervo's proposal for the same reason. He hoped, however, that his abstention, which had turned the scale in the vote on Mr. Pal's amendment, would not entail the abandonment of the basic idea of the proposal, for it was commendable.

57. Mr. ZOUREK explained that he had put forward his amendment to ensure that the Commission's vote was not interpreted as a rejection of the principle underlying Mr. Pal's proposal. Although his amendment to Mr. Padilla-Nervo's proposal had not been put to the vote, it was clear that a majority of members considered that that proposal should cover pollution not only by radio-active waste, but also by other harmful agents.

58. Sir Gerald FITZMAURICE said that Mr. Zourek's amendment, by imposing a direct obligation on governments to prevent pollution, not only by radio-active waste but by any other polluting agent as well, introduced an entirely fresh element that had not even been discussed. The obligation would, in fact, be impossibly wide and its recommendation would not exclude situations of manifest absurdity. It required only a little imagination to appreciate that the term " pollution " might be stretched to include essential activities of hygiene on board merchant or any other vessels. The term " harmful agent " required definition in relation to the seas, a question, however, which was one for scientists to decide. The Commission was competent to recognize scientifically established facts only, such as the pollution of water by oil discharged from ships, which had been made the subject of treaty provisions. Radio-active matter, on the other hand, had not yet been firmly established in the category of polluting agents in all circumstances. As an amendment to paragraph 2, Mr. Zourek's proposal was unacceptable. Its inclusion in Mr. Padilla-Nervo's proposed paragraph 3 was, of course, a different matter.

59. *The CHAIRMAN ruled that the adoption of Mr. Padilla-Nervo's proposed new paragraph 2 had effectively disposed of the mandatory aspect of the proposed article.*

60. Mr. Zourek's point, however, might be met by a slight modification of the text of Mr. Padilla-Nervo's proposed new paragraph 3.

61. Mr. PADILLA-NERVO then proposed the addition of a new paragraph 3 to read:

All States shall co-operate in drawing up regulations with a view to the prevention of pollution of the seas or airspace above, resulting from experiments or activities with radio-active materials or other harmful agents.

62. Mr. FRANÇOIS, Special Rapporteur, in reply to Mr. ZOUREK, said that the question raised in the Netherlands proposal for article 23 *a*, quoted in paragraph 171 of document A/CN.4/97/Add.1, did not relate to the continental shelf only. The point would be borne in mind by the Sub-Committee.

63. The CHAIRMAN put to the vote Mr. Padilla-Nervo's proposed new paragraph 3.

Mr. Padilla-Nervo's proposal was unanimously adopted.

64. The CHAIRMAN put to the vote paragraph 1 of article 23 as amended.[9]

Paragraph 1 of article 23, as amended, was unanimously adopted.

Article 23 as a whole, as amended, was unanimously adopted.

65. The CHAIRMAN invited the Commission to turn to Chapter III: Submarine cables and pipelines. Chapter II, of which articles 25-33 were covered by a separate addendum (A/CN.4/97/Add.3) to the Special Rapporteur's report, would be dealt with later.

Article 34

66. Mr. FRANÇOIS, Special Rapporteur, said that his amendment proposed in paragraph 180 (A/CN.4/97/Add.1) was more appropriate as an addition to article 34 than to the third freedom of the seas listed in article 2, as had been suggested by Mr. Krylov.

The Special Rapporteur's amendment was adopted.

67. The CHAIRMAN pointed out that the addition of the words " high-tension power cables " would entail consequential amendments to other articles in Chapter III, a matter which could be left to the Sub-Committee, however.

Article 35

68. Mr. FRANÇOIS, Special Rapporteur, said that the Netherlands amendment in paragraph 182 related to drafting points only.

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[9] A/CN.4/SR.343, para. 52.

Article 35 was adopted, subject to drafting changes.

Article 36

69. Mr. FRANÇOIS, Special Rapporteur, said that there were no comments from governments on the article.

Article 36 was adopted.

Article 37

70. Mr. FRANÇOIS, Special Rapporteur, hoped that the Commission would retain the text as drafted. He saw no reason for weakening the provision, which would be the effect of the United States amendment referred to in paragraph 186.

71. Mr. ZOUREK and Mr. SPIROPOULOS concurred.

Article 37 was adopted.

Article 38

72. Mr. FRANÇOIS, Special Rapporteur, said that the Yugoslav amendment in paragraph 190, though by no means necessary, was acceptable.

It was so agreed.

Article 38, as amended, was adopted.

The meeting rose at 1.05 p.m.

347th MEETING

Wednesday, 16 May 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6, A/CN.4/103) (*continued*)

Article 4: Status of ships (resumed from the 341st meeting)

Right of international organizations to sail vessels under their own flags

1. The CHAIRMAN invited the Commission to resume its consideration of article 4 of the provisional articles concerning the regime of the high seas (A/2934), and drew attention to the Special Rapporteur's supplementary report on the right of international organizations to sail vessels under their flags (A/CN.4/103).

2. Mr. FRANÇOIS, Special Rapporteur, introducing his supplementary report, said that the proposal submitted therein was not as complicated as might appear at first sight. Under paragraph 9, sub-paragraph (*b*) the Secretary-General would be given wide discretion in his selection of the State or States with which special agreements might be concluded permitting vessels to fly the flag of the State in combination with the United Nations flag. Sub-paragraphs (*c*) and (*d*) would entail some modification of national legislation, and ships flying the United Nations flag might claim most-favoured-nation privileges to which their own national flag would not entitle them.

3. Mr. Pal had submitted a proposal, broadly similar to his own, which read:

> " Notwithstanding anything to the contrary, either expressly or by necessary implication, contained in these articles or in the laws and regulations of States concerning ships and shipping and concerning the nationality, registration, rights, obligations and immunities of ships, it shall be perfectly legitimate for the United Nations and other recognized international organizations to own, possess and/or operate ships required for the effective discharge of the functions entrusted to them by their respective constitutions, and the United Nations and other such international organizations shall have the right to sail such ships on the high seas under their respective flags. Such ships shall be entitled to be registered in any of the States Members of the United Nations at the request in writing of the executive head of the United Nations or other international organization as the case may be, and when so registered in any such State shall for all purposes be assimilated to a ship of the nationality of that State owned and/or operated by that State and used on its government's service."

If it was a question of inserting that proposal either in the form of an article or in a condensed version in the comment on the article, he would favour the latter course. The question was hardly one of codification; it was rather a measure of organization, and the choice of means of implementing the provision could be left to States.

4. Mr. KRYLOV shared the Special Rapporteur's opinion. The fact that a minor incident had caused Mr. Stavropoulos to send a letter to the Commission[1] did not necessarily call for any action by the Commission. The case of the late Count Bernadotte and the subsequent advisory opinion of the International Court of Justice[2] could not be regarded as a precedent for the Commission.

5. Mr. PAL explained that he had had no intention of proposing the insertion of an article. His purpose

[1] A/CN.4/SR.320, para. 68.

[2] I.C.J. Reports 1949, p. 174.

had been rather to suggest a form that the Special Rapporteur's proposals might take if it were decided to add an article on the subject.

6. Mr. SANDSTRÖM said that, although there was no sign of any intention on the part of the United Nations to operate a merchant fleet, that remained a possibility. The question might arise in future over, for instance, the provision of relief by the United Nations Children's Fund (UNICEF). Hence the Commission could not disregard the question, and he would support the Special Rapporteur's proposal.

7. Mr. AMADO said that international law was made by States and embodied in conventions. The Commission's task was to take existing law and codify it with the maximum clarity. It should beware of introducing innovations for which there was no clearly established necessity. In the case in point, a reply must certainly be made, but care should be taken to avoid any commitment. In that respect, the Commission might well take Fabius Cunctator as its model.

8. Mr. LIANG, Secretary to the Commission, thought it advisable for the Commission to reach a conclusion on the matter at the present session as it had apparently intended, according to its comment on article 4.[3] The Special Rapporteur's report constituted part of the further study referred to in the comment. There was no attempt to press for the establishment of a rigid system of regulation on behalf of the international organizations. His personal view had been explicitly stated at the previous session.[4]

9. Mr. ZOUREK said that the question, however interesting theoretically, had little practical relevance, for the United Nations was not a State; consequently its flag could not be substituted for a national flag. He could hardly conceive of the United Nations owning a fleet of merchant vessels. Should such a situation ever arise, however, it could always be dealt with under Article 104 of the Charter.

10. In the case quoted by Mr. Stavropoulos, it would have been perfectly possible under South Korean legislation for the vessels concerned to have been registered in that country. The reasons given in the second paragraph of the letter[5] clearly showed that an irregular procedure had been adopted in order to avoid sailing under the flag of South Korea vessels built at Hong Kong. A case of that kind could not justify the creation of a special United Nations registry. Existing law was perfectly adequate for all practical purposes. The best solution would be to state in the comment on the article that, after consideration, the Commission did not regard the introduction of international legislation on the subject as necessary.

11. Mr. SPIROPOULOS thought there was no divergence of views on the issue and that a simple reference to it in the report would suffice.

12. Faris Bey el-KHOURI pointed out that although the United Nations was not a State, in the fulfilment of its purposes it could call upon the services of Members. For vessels to fly the United Nations flag alone would carry implications far beyond the scope of the Organization. To give one instance only, the United Nations had no legislation covering the several aspects of shipping and had no court of justice to enforce legislation. He would support the Special Rapporteur's proposal.

13. Mr. LIANG, Secretary to the Commission, said that there was no question of seeking a specific solution of the problems arising out of any particular incident.

14. His view was that, of the four points in the Special Rapporteur's proposal, the first three, in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 9, did not constitute legislation in the sense of establishing new law. The United Nations had an undoubted right to own ships. The question was whether United Nations registration would be exclusive of registration by a State; that had never been claimed. Sub-paragraph (*b*) of the Special Rapporteur's proposal contemplated the flying of two flags. The proposition that a vessel might fly only the United Nations flag had been discussed at the previous session; it had met with the criticism that the United Nations had no juridical regime to which the vessel would be subject. He thought the Special Rapporteur had clarified the legal situation and that the proposals in sub-paragraphs (*a*), (*b*) and (*c*) all fell within the scope of positive international law. The proposal in sub-paragraph (*d*) might raise difficulties, for it would affect the application of existing international agreements on navigation.

15. He repeated that it was not contemplated and no one had suggested that an article should be inserted in the draft.

16. Mr. SANDSTRÖM said that the Commission had certainly not shelved the question; in his opinion the time had come to undertake the further study referred to in the comment on article 4. The matter could not be disregarded in drafting the Commission's final report.

17. Mr. SPIROPOULOS suggested that a statement be added to the comment on article 4, to the effect that the Special Rapporteur had submitted proposals concerning the right of international organizations to sail vessels under their own flags and that the Commission, having taken note of them, regarded the question as one for consideration by governments.

18. Mr. ZOUREK said that while there was no essential disagreement on principle, in sub-paragraph (*a*) of the proposal stress was laid on the idea of a special United Nations registration entailing the right to fly the United Nations flag. That was an innovation.

19. He could not accept sub-paragraph (*b*), because vessels were already entitled by State legislation to fly the flag of their State, and there could therefore be no question of that right's being extended under a special agreement between the Secretary-General and a member of the United Nations. The essential basis was the right

[3] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), page 4.

[4] A/CN.4/SR.320, paras. 84-87.

[5] *Ibid.*, para. 68.

to fly the national flag conferred by the legislation of the State and not any special registration of the United Nations. He could not approve any derogation from that classic principle. It would be sufficient simply to say in sub-paragraph (*a*) that the Charter of the United Nations authorized registration by the United Nations of a vessel in the territory of a member State, as required for the exercise of its functions and the fulfilment of its purposes.

20. Mr. LIANG, Secretary to the Commission, thought that once the Secretary-General had received authorization from the General Assembly, he would certainly be competent to conclude a special agreement of the kind contemplated.

21. With regard to the question of presentation, Mr. Spiropoulos's proposal was acceptable.

22. Mr. FRANÇOIS, Special Rapporteur, said that he could not accept Mr. Zourek's statement that registration of a vessel by the United Nations in the territory of a Member State was always possible. When the national legislation prescribed the existence of a genuine link between the State and the ship—and that was just what the Commission aimed at—it would not be possible to register a United Nations vessel without amending the legislation.

23. Mr. ZOUREK replied that many States regarded registration as such a link.

24. Mr. FRANÇOIS, Special Rapporteur, said that that did not meet the Commission's intentions.

25. Faris Bey el-KHOURI pointed out that, although not specifically defined, there was an adequate link between State and ship provided by the flag of the Member State.

26. Mr. KRYLOV urged the adoption of Mr. Spiropoulos's proposal.

27. Mr. PAL said that, in reviewing articles already drafted, the Commission should keep in mind Mr. Stavropoulos's view that the possibility of registration of its own ships by an international organization should not be excluded.

28. Mr. SALAMANCA said that Mr. Pal had made one of the points that he himself had in mind.

29. With regard to the question of including a formal provision, he would support the Special Rapporteur's proposal to deal with the matter in the comment. The problem was really a simple one—should the Commission reply to the Legal Counsel's proposal or not? It would be discourteous to disregard it, and in any event the question must be settled at that session. The three, or if desired, four points contained in the proposal should be touched upon in the comment.

30. Mr. LIANG, Secretary to the Commission, said that all four points must certainly be mentioned in the comment. The Legal Counsel had desired the Commission to examine the question, and the present discussion, together with the proposal of the Special Rapporteur, constituted a reply.

31. Mr. AMADO thought the only practicable solution was to include a statement in the report to the effect that the Commission had studied the question, that the Special Rapporteur had formulated four proposals, and that the Commission, not yet being in a position to take a decision upon a question involving such complex problems, had taken note of the Special Rapporteur's proposals.

32. The CHAIRMAN said that the consensus of opinion was against the inclusion of an article dealing with the right of international organizations to sail vessels under their flags. With regard to the formula to be included in the comment on article 4, it should be basically the proposal of the Special Rapporteur, which might, however, be broadened by the addition of Mr. Pal's reference to the right of international organizations other than the United Nations to sail ships on the high seas under their own flags and by any other items that Mr. Pal and the Special Rapporteur might judge appropriate. Subject to a decision at a subsequent reading, the Commission would not vote on the proposal at that stage, but would simply take note of it.

It was so agreed.

33. The CHAIRMAN invited the Commission to consider the re-drafts of articles 4, 5, 6 and 9 prepared by the Sub-Committee set up at the 341st meeting.[6]

Re-drafts of articles 4, 5, 6 and 9 proposed by the Sub-Committee

34. Mr. ZOUREK, Chairman of the Sub-Committee, introduced the proposed re-drafts for articles 4, 5, 6 and 9, which read as follows:

Article 4

1. Ships shall have the nationality of the State whose flag they are entitled to fly. They shall sail under its flag and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.

2. The nationality of merchant ships, and hence their right to the flag of the State of which they are nationals, shall be established by documents issued by the authorities of the State under whose flag they sail.

Article 5

Each State shall fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.

Article 6

A ship which sails under the flags of two or more States, using them as convenient, may not claim any of the nationalities in question with respect to any other State and may be assimilated to a ship without nationality.

Article 9

States shall issue for their ships regulations to ensure safety at sea, *inter alia*, with regard to:

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[6] A/CN.4/SR.341, para. 41.

1. Adequacy of the crew and reasonable labour conditions;
2. The construction, equipment and seaworthiness of the ship;
3. The use of signals, the maintenance of communications and the prevention of collisions.

In issuing such regulations the States shall observe internationally accepted standards; they shall take the necessary measures to guarantee the observance of the said regulations.

Article 4

35. He reminded the Commission that, as drafted at the previous session, the article linking the nationality of the vessel to registration had been based on existing regulations for aircraft. The Secretariat's publication on laws concerning the nationality of ships,[7] however, had revealed great variations in practice. Nevertheless, the idea of linking the nationality of the vessel with the flag flown, which was common to all legislations, provided a solid basis for the first sentence of paragraph 1. The second part of that paragraph remained unchanged.

36. Paragraph 2 was an addition to cover the case of vessels that were not warships, which must be able to establish by appropriate documents their right to fly the flag of their State.

Article 5

37. Article 5 had given rise to a prolonged discussion in the Sub-Committee, as a result of the Commission's directive that it should be redrafted on the basis of formulation of a general principle. Of the several proposals by governments, the Sub-Committee had accepted the Netherlands proposal for article 5 *a* (A/CN.4/97/Add.1, para. 50) stressing the necessity for a genuine link between the State and the ship as a condition for the State's recognizing the right to fly its flag. That concept had met with criticism, particularly from Mr. Salamanca,[8] and admittedly did not overcome all difficulties. It did, however, express the principle that a State could not afford any ship a means of escaping the jurisdiction of the State under which it had previously been registered. That was an important principle, and in view of the wide divergence in national practice it was impossible to devise a formula which would embrace all links between the State and the ship. Different States stressed the aspect of property, of nationality—or of registry. Several States insisted on the ship's company, either all or in part, being nationals of the State. Some members of the Sub-Committee had stressed the need to define the term " genuine link ", a task that the Special Rapporteur might undertake in the comment on the article.

Article 6

38. The Sub-Committee had adopted both the Netherlands and the United Kingdom amendments (A/CN.4/97/Add.1 paras. 62 and 63). While the new article was certainly an improvement on the previous text, he himself still had doubts regarding it, but would not ventilate them at that moment.

Article 9

39. The Sub-Committee had adopted the Netherlands proposal for article 5 *b* (A/CN.4/97/Add.1, para.50), thereby supplementing the provisions of the article as drafted, which had dealt only with regulations concerning the use of signals and the prevention of collisions on the high seas.

40. Mr. ZOUREK, speaking as a member of the Commission, deplored the complete absence of provisions making dual nationality of ships impossible.

41. Sir Gerald FITZMAURICE said that in the Sub-Committee he had reserved the right to make some general observations about the draft now before the Commission. Although perhaps it was the best that could be achieved in the absence of expert advice on the extremely complicated problems of nationality and registration, the articles as now drafted contained many obscurities. What, for example, was the criterion for determining which flag ships were entitled to fly when, in consequence of certain legislations, they might be entitled to fly more than one? It was largely due to the existence of that problem that the United Kingdom Government had proposed that article 4, paragraph 1, should not deal with the question of nationality, but with the question of the jurisdiction to which ships were subject when on the high seas.

42. Article 4, paragraph 2, though innocuous, suffered from the same defect, inasmuch as it was theoretically possible for more than one State to furnish documentary evidence proving that the ship was entitled to fly its flag.

43. In his opinion, since it would probably prove impossible to deal with the question of double nationality in a simple way and without going into lengthy and intricate detail, a provision concerning the jurisdiction to which ships were subject on the high seas, coupled with the provision contained in article 6, would have sufficed.

44. Mr. Zourek had argued that ships must not be allowed to give up one nationality and assume another, but surely it was equally undesirable for States to veto any change of nationality as was the practice of some.

45. Mr. SANDSTRÖM said that the order followed in article 4, paragraph 1, which took nationality as its starting-point, seemed to have been reversed in paragraph 2.

46. Mr. SCELLE considered that the whole draft was unsatisfactory and gave rise to many doubts. Article 4, paragraph 2, which referred solely to merchant vessels, conflicted with paragraph 1 by making the right to a flag depend upon nationality.

47. Another objection was that it was not clear whether more than one nationality could be recognized under article 4; if so there would be flagrant contradiction of article 6.

48. Mr. ZOUREK thought that considerable progress would be achieved and numerous difficulties removed if dual nationality were prohibited. He therefore favoured a provision on the following lines:

[7] ST/LEG/SER.B/5.

[8] A/CN.4/SR.341, para. 25.

1. A ship cannot be validly registered in more than one State.

2. In order to prevent cases of dual nationality of ships, States shall be required to oblige shipowners to declare in writing, when the right to the flag is granted or before registry, that they have not required and do not intend to require registry of the vessel in another State.

3. A ship previously registered in another State shall not be entered in the register of ships until it is proved by a certificate in due form that the said ship has been removed from the register of that State or will be so removed *ipso facto* when the new registry takes place.

49. With regard to the objection raised by Mr. Sandström and Mr. Scelle, he explained in defence of the text presented by the Sub-Committee that the primary criterion was nationality.

50. Article 4, paragraph 2, referred only to merchant ships because of the special situation of warships with regard to proof of nationality: that might be explained in the comment.

51. Mr. AMADO questioned the purpose of the words " using them as convenient " in article 6, which seemed to give ships a pretext for changing flags.

52. Mr. KRYLOV said that the Commission was being unduly hasty. The whole draft should be reviewed again by the Sub-Committee, some of whose members had now expressed grave doubts about its text.

53. Mr. SCELLE considered that one of the reasons why the draft was so defective was that the Sub-Committee had hesitated between allowing dual nationality and prohibiting it altogether.

54. Sir Gerald FITZMAURICE felt that many of the difficulties to which article 4 and, indeed, the whole of the Sub-Committee's draft, had given rise would be removed if the first sentence of paragraph 1 of that article were omitted and the second sentence amended by substituting the words " Ships shall sail under the flag of one State only " for the words " They shall sail under its flag ", and by re-wording the last phrase to read " shall be subject to the exclusive jurisdiction of that State on the high seas ". The text would then enunciate the essential condition that, whatever the ship's nationality or the flags it was entitled to fly, it could sail under one flag only and would be exclusively subject to the jurisdiction of the State of that flag. The provision would thus be entirely consistent with article 6.

55. Article 5 seemed harmless and was acceptable, although there could exist a genuine link between the ship and more than one State. However, he saw no way of overcoming that difficulty, except by adopting the United Kingdom criterion of effective control.

56. He considered Mr. Zourek's provision quite inoperable because it would give the State of registration the power of absolute veto on any change of registration.

57. Mr. KRYLOV said that despite the argument advanced by Sir Gerald Fitzmaurice, both in the Sub-Committee and the Commission itself, he remained firmly convinced that the question of nationality must be dealt with. The Netherlands Government, in insisting that there should be a genuine link between the State of registration and the ship, had provided a basis for a solution. Accordingly, the first sentence of article 4, though perhaps faulty in drafting, must be retained.

58. He considered dual nationality just as undesirable for ships as for individuals.

59. Mr. SPIROPOULOS agreed with Mr. Krylov that the Commission must make some pronouncement on the important question of nationality.

60. It must also decide whether or not dual nationality of ships, which at present did exist, should be prohibited. Members would have noted that when the question of dual nationality of individuals had been discussed at the Hague Conference for the Codification of International Law in 1930, no sanctions had been applied of the kind proposed in article 6.

61. Mr. PAL considered that articles 4, 5 and 6 should be restricted to merchant ships, in the light of the decisions taken on articles 7 and 8.

62. Sir Gerald FITZMAURICE believed that Mr. Pal's point was largely a matter of drafting and could be referred to the Sub-Committee.

63. He added that, if his own amendment to article 4, paragraph 1,[9] were adopted, paragraph 2 could be transposed to form a second paragraph in article 5, the rest of which would remain unchanged. The subject of nationality would then be dealt with, in so far as that was possible, in article 5, and the two questions of nationality and jurisdiction would have been separated, thus making the whole scheme much clearer.

64. Mr. SCELLE asked whether the effect of Sir Gerald Fitzmaurice's amendment to paragraph 1 would be that once a merchant ship had chosen the flag under which it would sail, that decision was final.

65. Sir Gerald FITZMAURICE said that it would be enough to ensure that, when sailing on the high seas, merchant ships used the flag of only one State, to whose exclusive jurisdiction they would be subject. The question of nationality, unlike the question of the jurisdiction to which the vessel was subject, was not of primary importance to the law of the high seas.

66. Mr. SCELLE said that in that case article 4 would be altogether useless, because a ship would be subject to the jurisdiction of the flag State only when flying its flag, and could place itself outside that jurisdiction in the course of the voyage by hoisting another flag: a situation which was in total contradiction with article 6. Surely the aim must be to eliminate the fictitious system of flags of convenience practised by vessels claiming, for example, Panamanian or Liberian registry.

67. Sir Gerald FITZMAURICE observed that the objection, whether valid or not, applied equally to the original text of article 4.

68. Mr. SCELLE, acknowledging that that was correct, explained that the purpose of his question had been

[9] See para. 57 above.

precisely to establish whether Sir Gerald's amendment had altered the import of the original text of that point.

69. Mr. ZOUREK observed that at the previous session the Commission had adopted an article dealing with the nationality of ships, and he had not heard a single convincing argument in favour of reversing that decision. In spite of Sir Gerald Fitzmaurice's advocacy, he remained convinced that the fundamentally important question of nationality, which was intimately linked with the freedom of the high seas, must be dealt with in the draft, since otherwise ships would be free to change flags even during a single voyage. A provision of the kind adopted at the previous session had given some guarantee against such abuse, and it would be difficult to justify its omission.

70. Mr. SALAMANCA said that in the present state of international law and with the present lack of uniformity in State regulations, he did not think the Commission could go further than the general provision contained in article 5.

71. With regard to dual nationality, he found the analogy between ships and persons inappropriate because the nationality of the latter was determined by *jus sanguinis* and *jus soli*. For shipowners on the other hand choice of nationality was often based on economic considerations and some might wish to change the registration of their ships in order to avoid taxation.

72. Mr. AMADO did not think that Sir Gerald Fitzmaurice had offered any real reason for omitting a provision concerning nationality.

73. He also wondered what the genuine link between the State and the ship would be if Sir Gerald Fitzmaurice's amendment to article 4, paragraph 1, were adopted. Perhaps the very change of flag itself might constitute a link.

74. Mr. SALAMANCA said it would be extremely difficult to determine what was a genuine link between a ship and its State of registry; perhaps the introduction of such a concept would go further than was required and would raise certain problems of ownership. States, particularly those with small merchant fleets, which had to follow a fairly liberal policy, might be apprehensive of transfers of registry—a point which the Commission should take into account.

75. It was not clear whether the provisions of article 9 applied to article 5. If they did, some specific reference was required in the text of the articles themselves.

76. Mr. PADILLA-NERVO said he had concluded from the discussion that there was no real difference of opinion in the Commission. He noted from the comment on article 4 that the main purpose of that article had been to prevent the chaos resulting from the absence of any authority over ships sailing the high seas. He believed that much of the confusion had sprung from dealing in one article with both nationality and the jurisdiction to which the ship was subject. He therefore agreed with Sir Gerald Fitzmaurice that article 4 should define the jurisdiction to which the ship was subject and that article 5 should be entirely devoted to the question of nationality. He accordingly proposed that the first sentence of article 4 be transferred to form the second sentence of article 5 and that paragraph 2 of article 4 become paragraph 2 of article 5. Article 4 would then consist of the second sentence of paragraph 1, as amended by Sir Gerald Fitzmaurice.

77. Sir Gerald FITZMAURICE, accepting Mr. Padilla-Nervo's proposal, pointed out that he had never wished to suggest that the subject of nationality should be omitted altogether, but had only sought to ensure that it was treated separately from the question of jurisdiction.

78. Mr. SPIROPOULOS said that if the Commission's intention was to allow only one nationality, he saw no reason for departing from the text adopted at the previous session and the criteria laid down in the original text of article 5. At present there seemed to be some contradiction in the Sub-Committee's text, which in article 4 appeared to countenance dual nationality, while in article 6 it imposed heavy penalties against a ship sailing under more than one flag.

79. Mr. ZOUREK failed to see the utility of Mr. Padilla-Nervo's proposal.

80. Mr. SANDSTRÖM believed that the original text of articles 4 and 5 was preferable, but could not express any final opinion until he had studied Mr. Padilla-Nervo's proposal in writing.

81. Mr. SCELLE was also unable to vote on Mr. Padilla-Nervo's proposal until the text had been circulated.

82. He repeated his view that the articles as at present drafted would lead to precisely the opposite result to that intended, by enabling ships to evade the jurisdiction of the flag State by changing flags.

83. Mr. AMADO observed that under Mr. Padilla-Nervo's proposal ships were entitled to sail under only one flag.

84. Mr. KRYLOV suggested that the vote be postponed until the following meeting. He considered that article 5, as amended, should precede the revised article 4, so that the primary question of nationality would be dealt with first.

85. Faris Bey el-KHOURI proposed the deletion of the second sentence of article 5 reading " Nevertheless, for purposes . . . between the State and the ship ", because only States themselves could decide whether a genuine link existed and only they could lay down the conditions for the registration of ships. The Commission must not seek to impose such control or sanctions in the present draft.

It was agreed to defer the vote on Mr. Padilla-Nervo's proposal until the next meeting.

The meeting rose at 1 p.m.

348th MEETING

Thursday, 17 May 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) (*continued*)

Re-drafts of articles 4, 5, 6 and 9 proposed by the Sub-Committee[1] (continued)

Article 4: Status of ships

Article 5: Right to a flag

1. The CHAIRMAN invited the Commission to continue its consideration of the re-drafted articles proposed by the Sub-Committee. Articles 4 and 5 as amended by Mr. Padilla-Nervo at the previous meeting would read:

Article 4

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.

Article 5

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for the national character of the ship to be recognized by other States, there must exist a genuine link between the State and the ship.

2. The nationality of merchant ships, and hence their right to a flag, shall be established by documents issued by the authorities of the State of the flag.

2. Mr. PADILLA-NERVO said that at the previous meeting he had been mainly concerned to find the best way of separating and clarifying the provisions on nationality, the right to a flag and the jurisdiction of the flag State.

3. He wished to make clear, however, that he was not wholeheartedly in favour of retaining the third sentence of article 5, paragraph 1, because he considered that the link between the State of registration and the ship was created precisely by the grant of nationality. The effect of substituting the condition proposed by the Netherlands Government for the criteria originally laid down by the Commission in article 5, which had been devised after a study of the widely divergent laws concerning registration, would be to create difficulties, because it was not made clear on whom lay the burden of proving that the link was genuine. The requirement that there must be such a link before other States were bound to recognize the nationality of the vessel was not justified by international practice. There were fourteen treaties between the United States and other countries and thirty-eight between the United Kingdom and other countries, by virtue of which the signatory States recognized the nationality of vessels of the other signatory States as granted under the municipal law of the flag State. There were also seventy-three treaties which laid down that the nationality of ships was determined by the laws of the State to which they belonged. Consequently the third sentence in article 5, paragraph 1, was not only useless, but might conflict with international practice.

4. He found the requirement in article 4, that ships could sail under the flag of one State only, implying as it did that the flag could not be changed on the high seas, acceptable.

5. Mr. SCELLE said that the amended text of article 4 was a considerable improvement on the Sub-Committee's version, because it brought out that the right to fly a flag was conferred by the grant of nationality. However, he would like the conditions implied to be set out explicitly in a second paragraph reading:

> A ship may not, therefore, change its flag during a voyage or while stopping in a port of call; such a change may only be made after the formalities have been completed both in the State of its present nationality and in the State of its new nationality.

His purpose was to prevent ships from changing flags on the high seas so as to escape the jurisdiction of one of the flag States, particularly when seeking to avoid punishment for an act contravening the laws of that State. It was essential that all merchant ships should possess one nationality only, which could be easily identified, especially by ships performing police duties, and that any change of nationality should be effected in a regular and overt manner.

6. Sir Gerald FITZMAURICE said that Mr. Scelle's proposed addition would be a logical consequence of the provision contained in the first paragraph. He fully agreed that ships must not be allowed fraudulently to change flags during a voyage or in a port of call, but he wondered whether the latter part of Mr. Scelle's text might not be omitted, since it would give the flag State a complete power of veto on any transfer of registration. That was

[1] A/CN.4/SR.347, para. 37.

something which must be avoided at all costs, because it would be contrary to the interests of shipping and international communications. He believed that Mr. Scelle's purpose would be achieved if his text ended at the words " port of call ".

7. Mr. SPIROPOULOS suggested that Mr. Scelle's wording was not entirely satisfactory, because it seemed to preclude the possibility of a change of registration altogether.

8. Sir Gerald FITZMAURICE agreed that the term " port of call " gave rise to ambiguity. Mr. Scelle's purpose, no doubt, was to ensure that a change of registration could be made only either in the vessel's home port or in its port of destination.

9. Mr. SCELLE confirmed that that interpretation was correct.

10. Observing that Sir Gerald Fitzmaurice's objection to the latter part of his text was pertinent, he explained that it had certainly not been his intention to suggest that the shipowner or captain must obtain the authorization of the State of registry before a change could be made, but only that the necessary steps to obtain a transfer should be taken. Otherwise nothing could be done if the State of registry refused to remove the ship from its register.

11. It would be for third States to decide whether a genuine link existed between the ship and the State of new registration and consequently whether the ship was entitled to fly its flag. The situation was analogous to a disagreement between two States over the nationality of an individual.

12. He was ready to amend his text to meet Sir Gerald Fitzmaurice's objection.

13. Mr. SPIROPOULOS considered that the danger of abuse had been greatly exaggerated. He had never heard of a single example of a ship improperly changing flags on the high seas. That being so he questioned whether it was appropriate for the Commission to adopt a provision which might threaten the legitimate interests of shipowners wishing to sell a vessel during its voyage, though he agreed, of course, that other States could only be required to recognize one flag.

14. The third sentence of the amended article 5 [2] could be retained, but members should note that it was rather less stringent than the requirements laid down in the original text of article 5.

15. Mr. SCELLE, in reply to Mr. Spiropoulos' contention that there was little abuse of the right to fly a flag, asked how otherwise the prodigious increase in the fleets of some small countries was to be explained.

16. As for Mr. Spiropoulos' second argument, he would like to emphasize that the Commission's primary concern was the public interest and not the interests of shipowners, though the latter, of course, must not be overlooked. Hence it was essential for article 4 to be drafted as explicitly as possible, so that it would be clear to whose jurisdiction a ship on the high seas was subject.

17. Mr. SANDSTRÖM still maintained that the order followed in articles 4 and 5 was unsatisfactory: it seemed preferable first to establish the principle of nationality. The provision that ships should sail under one flag could be incorporated in article 6. Those points could usefully be referred to the Sub-Committee.

18. Faris Bey el-KHOURI believed that the point at issue was not whether ships could change flags on the high seas, but whether ships were entitled to be registered in more than one State. He accordingly considered that the requirement laid down in the first sentence of article 4 as adopted at the previous session was entirely adequate, and that there was no need to go into further detail.

19. He also confirmed the view he had expressed at the previous meeting [3] that the third sentence in article 5, paragraph 1, should be omitted, because it was for States themselves to establish whether there was a genuine link between them and the ship whose owner was seeking registration. States should not be suspected of fraudulent practice in that regard.

20. The CHAIRMAN put to the vote the text for article 4 as amended by Mr. Padilla-Nervo.[4]

Mr. Padilla-Nervo's text for article 4 was adopted by 14 votes to none, with 1 abstention.

21. Mr. PADILLA-NERVO asked that Mr. Scelle's text for a second paragraph to article 4 be put to the vote in two parts, the first ending with the words " a port of call ", because, as he had argued at the previous meeting,[5] it would be preferable in article 4 to refer only to the questions of flag and jurisdiction. His objections would be met if the latter part of Mr. Scelle's text were redrafted so as to omit any reference to the question of nationality; otherwise it would prohibit a legitimate change of flag in the course of a voyage.

22. Sir Gerald FITZMAURICE asked whether Mr. Scelle would be prepared to amend the latter part of his text to read " such a change may only be made if the necessary steps have been taken both . . ."

23. Mr. SCELLE said that he was unwilling to omit the reference to " formalities."

24. Mr. FRANÇOIS, Special Rapporteur, asked precisely what Mr. Scelle had in mind in referring to " formalities ". Surely, in view of the refusal of some States to allow ships to withdraw from their register, it would be rather strange to stipulate that an application for a change of registration must have been made.

25. Mr. SCELLE insisted that the shipowner or master must be required to give notice to the authorities of the State of registry of his desire to transfer to the registry of another State and to make the proper application to the latter; otherwise it would be easy for shipowners to abandon one flag and hoist another as it suited them.

26. Mr. LIANG, Secretary to the Commission, was unable to understand the force of the word " therefore "

[2] See para. 1 above.

[3] A/CN.4/SR.347, para. 88.

[4] See para. 1 above.

[5] A/CN.4/SR.347, para. 79.

in Mr. Scelle's text since, according to the first paragraph of article 4, a ship could sail under only one flag and would continue to do so after it had changed flags.

27. Mr. SCELLE observed that article 4 was imprecise regarding the duration of that requirement.

28. Mr. LIANG, Secretary to the Commission, saw no objection to a ship changing its flag during a voyage once the necessary formalities for transfer of registry had been duly completed. He believed that such cases were fairly common.

29. Mr. SCELLE pointed out that with such a system it would be impossible to establish which jurisdiction the ship was subject to.

30. Mr. SANDSTRÖM asked whether, since some States prohibited the sale of ships on their register to foreigners, it would be enough to require that the shipowner or master must make an application for transfer of registry.

31. Mr. SCELLE presumed that in such instances the vessels would be taken to another country where sale was allowed. It was then that dual nationality was so useful to shipowners and allowed them to change registry perfectly legitimately.

32. The CHAIRMAN put Mr. Scelle's proposed second paragraph for article 4 [6] to the vote in two parts: first, up to the words " a port of call "; secondly, the remainder.

The first part of Mr. Scelle's text was adopted by 8 votes to none, with 7 abstentions.

The remainder of Mr. Scelle's text was rejected by 6 votes to 3, with 6 abstentions.

33. At Mr. PAL's request the CHAIRMAN put the amended text of article 5,[7] to the vote sentence by sentence and then as a whole.

The first sentence was adopted unanimously.

The second sentence was adopted by 14 votes to none, with 1 abstention.

The third sentence was adopted by 9 votes to 3, with 3 abstentions.

The second paragraph was adopted unanimously.

Article 5 as a whole was adopted by 11 votes to none, with 4 abstentions.

34. Mr. PADILLA-NERVO, explaining his vote on the third sentence, said that he agreed with Faris Bey el-Khouri that it should have been omitted because it was contrary to international practice. Many treaties recognized no link between the State of registry and the ship, other than that of nationality.

35. Sir Gerald FITZMAURICE said that he had voted in favour of the article because, though far from perfect, it was the best that could be achieved at present. Although the principle laid down in article 5 was both valid and necessary, he would have preferred the Commission to have adopted the criterion of the ability of the flag State to exercise effective control over ships on the high seas, as proposed by the United Kingdom Government, the more so since some States tended to grant the right to fly their flag without being able to exercise control over the ships in question or assume international responsibility for them.

36. Mr. SALAMANCA reiterated the view that nothing had been gained by adopting the third sentence of paragraph 1, because the requirement that there must be a genuine link between the State and the ship was altogether too vague and imprecise.

37. Faris Bey el-KHOURI, explaining his vote, pointed out that there was a further objection to the criterion contained in the third sentence of paragraph 1; it might make it impossible for ships owned by the United Nations to fly the flag of a Member State because, membership of the United Nations apart, there might be no possibility of establishing a link between the ship and the State in question.

38. Mr. ZOUREK asked that the order of articles 4 and 5 be reversed so that the provision concerning the fundamental principle of nationality came first, as suggested by Mr. Krylov at the previous meeting.[8]

It was so agreed.

Article 6: Ships sailing under two flags

39. The CHAIRMAN put to the vote the Sub-Committee's draft of article 6.

Article 6 as re-drafted by the Sub-Committee was adopted by 12 votes to none with 3 abstentions.

Article 9: Signals and rules for the prevention of collisions

40. Mr. SALAMANCA said that it must be made clear in the comment that sub-paragraph 1 of the Sub-Committee's draft, which need not itself be amended, referred to the minimum international standards laid down by the International Labour Organization.

It was so agreed.

41. Mr. SPIROPOULOS saw no reason for dealing with a whole series of questions such as those enumerated in sub-paragraphs 1 and 2, which were entirely outside the scope of the present work of codification. He therefore favoured the original text of the article, which dealt solely with signals and rules for the prevention of collisions.

42. Mr. FRANÇOIS, Special Rapporteur, pointed out that the matters referred to in sub-paragraphs 1 and 2 were equally vital to the safety of life and property at sea. The Sub-Committee had simply filled certain gaps in the original article.

43. Mr. ZOUREK, observing that the inclusion of the words " *inter alia* " made it clear that the enumeration in the three sub-paragraphs was not exhaustive, agreed with the Special Rapporteur that it would not suffice to deal solely with signals and rules for the prevention of collisions.

[6] See para. 5, above.

[7] See para. 1, above.

[8] A/CN.4/SR.347, para. 87.

44. Mr. AMADO considered that the original text of article 9 was preferable. It was unnecessary to require States to issue regulations on the matters referred to in sub-paragraphs 1 and 2 of the Sub-Committee's text, since they would do so in their own interests in any case.

45. The CHAIRMAN then put the Sub-Committee's draft of article 9 to the vote, taking the three sub-paragraphs separately.

Sub-paragraph 1 was adopted by 13 votes to none, with 2 abstentions.

Sub-paragraph 2 was adopted by 11 votes to 1, with 3 abstentions.

Sub-paragraph 3 was adopted unanimously.

Article 9 as a whole, as re-drafted by the Sub-Committee, was adopted unanimously.

46. Mr. AMADO explained that he had abstained from voting on sub-paragraph 1. He proposed that, as sub-paragraph 3 was the most important, it should be placed first.

It was so agreed.

Single article on the contiguous zone

47. The CHAIRMAN invited the Commission to consider the draft single article on the contiguous zone adopted at the fifth session.[9] He drew attention to a proposal submitted by Sir Gerald Fitzmaurice to amend the article as follows:

Line 3

Delete the words " and punish ".

Line 5

Delete the word " immigration ".

Add new paragraphs 2 and 3 reading:

2. The faculty recognized in the preceding paragraph shall not affect the status of the waters in which it is exercised, as being and remaining high seas, nor shall it entitle the coastal State to claim or exercise any general jurisdiction over, or exclusive rights in, such waters.

3. In sea areas situated off the junction of two or more adjacent States, and where the establishment of a contiguous zone by one of these States would produce the effect that shipping could have access to ports in another only by passing through this zone, no contiguous zone may be established by any of the countries concerned until agreement has been reached between them on the delimitation of their respective zones.

48. Mr. FRANÇOIS, Special Rapporteur, recalled that the Commission had had doubts as to the precise scope of the text adopted at the fifth session, certain aspects of which called for comment—in particular, the juridical character of the measures of control that might be taken by the coastal State within the contiguous zone. Of course, the juridical character of the contiguous zone itself raised no problem, for it was clearly a part of the high seas. There was some divergence between the view of the United Kingdom and that of various members of the Commission. The matter had been raised at a previous meeting in connection with article 22, when the right to start hot pursuit in the contiguous zone had been contested by Sir Gerald Fitzmaurice.[10] The Commission had then deferred consideration of the question pending discussion of the article on the contiguous zone.

49. Sir Gerald Fitzmaurice's proposal closely followed the comment of the United Kingdom Government (A/CN.4/99/Add.1, page 74), which was the only government to comment on that subject. With regard to the proposal to delete the words " and punish ", he pointed out that those words were not in the text prepared at the third session, but had been added at the fifth session (A/2456, paras. 105 and 106). The amendment was unacceptable because the words completed the competence of the coastal State. In the case of a vessel approaching the coast, the coastal State might take necessary steps to prevent infringement, but in the case of a vessel leaving the territorial sea after committing an infringement, it was necessary to give the coastal State the right to punish the offender.

50. Sir Gerald Fitzmaurice would doubtless explain the reasons for his proposal to delete the word " immigration " in the fifth line.

51. The questions raised by the United Kingdom Government were the only questions that called for discussion at that time. Other aspects of the matter, such as the relation between the contiguous zone and the territorial sea and—Mr. Scelle's point[11]—the relation between the contiguous zone and the continental shelf, could best be discussed under those particular items. Consideration of them should therefore be deferred, and the discussion restricted to Sir Gerald Fitzmaurice's proposal.

52. The CHAIRMAN, recalling the discussion on the contiguous zone in connection with the right of hot pursuit,[12] said that there were two major problems involved. First, the important question of the juridical consequences of the existence of a contiguous zone with regard to the right of hot pursuit. Did the juridical nature of the contiguous zone imply the right of control by the coastal State to prevent and punish an infringement of particular regulations, or should the contiguous zone, despite its being part of the high seas, be subject to the whole of the legislation of the coastal State? The right of hot pursuit would obviously be affected by the answers to those questions.

53. Secondly, could the coastal State protect its rights in the contiguous zone, in particular, in regard to customs, immigration, fiscal or sanitary regulations, by measures in any way different from those that it could take for that purpose within the territorial sea?

54. Mr. KRYLOV said that the Chairman had made it clear that the question was much more complex than

[9] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), para. 105.

[10] A/CN.4/SR.344, paras. 22 and 25.

[11] A/CN.4/97, para. 35.

[12] A/CN.4/SR.344, paras 5-34.

would appear from Sir Gerald Fitzmaurice's proposal. He would add that the question of the conservation of the living resources of the high seas was also involved. The contiguous zone, moreover, was referred to in certain of the draft articles and also in the Indian Government's proposal concerning article 22.[13] Even if the question of the territorial sea and continental shelf were disregarded, there were obviously many aspects of the subject calling for consideration. With regard to fisheries, for instance, the Norwegian and Icelandic Governments had proposed the establishment of an institution somewhat similar to the contiguous zone.[14] The concept should be broadened rather than narrowed, as Sir Gerald Fitzmaurice's proposal seemed to imply. He did not attach any importance to the juridical nature of the zone from the theoretical point of view. The important aspect was the economic one, in particular the question of fisheries, which it was time to consider more fully. The contiguous zone should be considered in relation to the territorial sea; other aspects, such as immigration, were of minor importance.

55. Mr. HSU said that the Special Rapporteur's report (A/CN.4/97) gave the impression that the question of the contiguous zone was confined to matters of customs and the like. That might have been true in the past, but it was so no longer. He doubted whether the text was an adequate basis for a full discussion on the contiguous zone, a definition of the principles of which would be of assistance in tackling other problems. By ignoring important aspects of the question, such as the three-mile limit and security, the Commission would merely be promoting disorder in international maritime law.

56. Mr. SALAMANCA, supporting Mr. Krylov's view, said that to make a well-balanced report, the question of the contiguous zone must be subordinated to decisions on conservation of the living resources of the sea and on the territorial sea, which were extremely important subjects. There was no objection to dealing immediately with the first two amendments in Sir Gerald Fitzmaurice's proposal. Consideration of his proposed new paragraphs, however, should be deferred. The extra-legal aspect of the question was of importance and it must not be forgotten that the General Assembly might wish to amend the Commission's report for subsequent reference to a diplomatic conference. Deferment should not be indefinite, however.

57. Mr. PAL said he had expected that the discussion would be of a more restricted character. The word " contiguous " seemed to have given rise to difficulties. At the Commission's third session the contiguous zone had been taken to be an area outside the territorial sea twelve miles in breadth, within which certain rights for specific purposes of control were granted to the coastal State. At the fifth session, after consideration of comments by Governments—in particular, the Netherlands Government—the words " punish " and " immigration " had been added. The limit of the zone, however, had remained at twelve miles. Subsequently, consideration of the right of hot pursuit, which was related to the question of the contiguous zone, had been deferred, pending a review of that question.[15] It had never been suggested that the breadth of the zone should be extended beyond twelve miles or that the rights of the coastal State within it should go beyond those contemplated at the fifth session. The discussion, therefore, should properly be restricted to the question of the contiguous zone in its technical sense only.

58. In the articles on fisheries the use of the word " contiguous " was quite different, and that was not the immediate concern of the Commission now. The present question, which should be discussed within the 1953 definition, was whether to retain the article as drafted or to accept Sir Gerald Fitzmaurice's proposal.

59. Mr. SPIROPOULOS said that he was not convinced by the arguments of those speakers who doubted the wisdom of considering the question of the contiguous zone there and then. The text of the article did not include any provision concerning fishing in the territorial sea. The Commission's task was to define the legal status of the contiguous zone and the rights of the coastal State within it. The problem was remote from that of fisheries, and could therefore be appropriately discussed. There was admittedly a relation with the question of the territorial sea, but it was of little importance which was discussed first.

60. With regard to Mr. Pal's suggestion that the choice lay between the article as drafted and Sir Gerald Fitzmaurice's proposal, he pointed out that General Assembly resolutions 798 (VIII) and 899 (IX) empowered the Commission to review its articles if necessary.

61. Sir Gerald FITZMAURICE agreed with the views expressed by Mr. Pal and Mr. Spiropoulos. The question was essentially one of codification. From the purely juristic point of view, the question of exclusive jurisdiction over fisheries was bound up with that of the territorial sea, in the sense that no exclusive jurisdiction could be asserted except within its limits. That principle was generally acknowledged and the question could be discussed only in connexion with the subject of the territorial sea. If the Commission were to approve it in connexion with the question of the contiguous zone, it would be going far towards abolishing the essential distinction between the contiguous zone and the territorial sea, reflected in the fact that the basic conception of the contiguous zone—although by no means generally accepted—was that the rights of the coastal State within it should be restricted to certain matters involving the interest of the coastal State in its public capacity. No question of private rights, as in the case of fisheries, arose.

62. He had been surprised at Mr. Krylov's proposal, for, unless the Commission were to countenance a departure from existing law, the question of exclusive jurisdiction over fisheries was not a subject for discussion in relation to the contiguous zone.

63. Subject to reverting to that matter, and turning to

[13] A/CN.4/97/Add.1, para. 151.

[14] A/CN.4/99/Add.1, pp. 47-49; A/CN.4/99/Add.2, pp. 5-10.

[15] A/CN.4/SR.344, para. 34.

his first two amendments, he pointed out that the distinction between an incoming and an outgoing ship explained by the Special Rapporteur was not made clear in the present text of the article. The idea behind his first proposal was that an incoming ship had not reached the zone in which it could commit an offence and that punishment therefore did not arise. If that point could be made clear, he would withdraw his proposal.

64. With regard to the second amendment, to delete the word " immigration ", the reasons behind the United Kingdom Government's comment (A/CN.4/99/Add.1, page 74), though indirect, were worth consideration. The Commission had interpreted immigration as including emigration (A/2456. para. 111). While it would be reasonable to control the former, regulation of the latter might lead to abuse—for example, to the arrest, outside the territorial sea, of political refugees leaving a country on a foreign ship. There was, moreover, no need to extend such rights to the coastal State within the contiguous zone, for it would have no difficulty in controlling immigration in its internal waters or the territorial sea. If, however, some other means of meeting the underlying point of his proposal could be found, he would not press the amendment.

65. Mr. HSU supported Mr. Spiropoulos in his contention that the definition of the contiguous zone as drafted was not hard and fast. The General Assembly had asked the Commission to harmonize the draft articles, a process which must inevitably entail some modification of texts.

66. With regard to the order of discussion of the various questions involved, without having any strong views on the matter, he would suggest that the contiguous zone be taken last.

67. The CHAIRMAN said that the Commission was perfectly entitled to modify any decision it had taken, but before it did so, he wished to draw attention to certain aspects of the problem.

68. In the first place, the question of the extension of the contiguous zone did not affect the draft article. It was true that the definition of the contiguous zone, limiting it to a distance of 12 miles from the base-line from which the width of the territorial sea was measured, did lay down a definite figure. In adopting the article, however, the Commission had had in mind a breadth of the territorial sea of less than twelve miles. In any event, the distance adopted at the fifth session had been regarded as provisional and subject to modification in the light of the decision on the breadth of the territorial sea.

69. He could see no advantage in deferring consideration of the contiguous zone, which was connected with problems such as customs regulations and the like arising outside the territorial sea. Those problems were not linked with problems of fisheries, which would have to be dealt with in the articles on conservation of the living resources of the high seas.

70. Mr. SALAMANCA pointed out that consideration of one special aspect was inevitably linked with that of others. Deferment did not imply pre-judging the issue.

71. Mr. SPIROPOULOS wondered whether, if the breadth of the territorial sea were extended to twelve miles and the contiguous zone consequently eliminated, States would be obliged to accept that situation. Some States might well prefer a three-mile or six-mile limit, in which case the question of the contiguous zone was of considerable interest. Independently of the question of the territorial sea, he could not agree to the limit of twelve miles being mandatory. It was a question, not of fulfilling an obligation, but of exercising a right. The other aspects of the subject referred to had no relevance to the question of the contiguous zone.

72. Mr. ZOUREK said that his original preference had been to take the territorial sea first. He had abandoned that idea, however, for technical reasons. Subject to establishing its breadth, the contiguous zone could be properly discussed there and then. As had been pointed out, the fundamental issue was the definition of the nature of the contiguous zone, for its existence was not in dispute, and that issue embraced the question whether the coastal State had the right to extend the application of its legislation to a point on the high seas or merely the right to prevent infringement of its laws. That distinction was essential and was reflected in the differences between the texts of the third and fifth sessions, the latter of which embodied the extension of certain rights. Another question was the corpus of interests involved. Both those questions could be discussed, and he would oppose any proposal to defer consideration of them.

73. Mr. KRYLOV maintained his opinion that it would be advisable to deal first with the question of conservation, which was extremely important, and to defer consideration of the more theoretical legal aspects put forward by the Special Rapporteur and dealt with in Sir Gerald Fitzmaurice's proposal. He would not press the point, however.

74. Mr. SPIROPOULOS, in reply to Mr. Krylov, pointed out that the question of the contiguous zone could not prejudice any right of the coastal State to regulate fisheries outside the territorial sea, since once that right was acknowledged on the high seas in front of its coast, it went without saying that the contiguous zone was included.

The meeting rose at 1.10 p.m.

349th MEETING

Friday, 18 May 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456 and A/2934) (*continued*)

Single article on the contiguous zone (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft single article on the contiguous zone, to be found in paragraph 105 of document A/2456.

2. Mr. ZOUREK, referring to the juridical character of the contiguous zone, recalled that at the previous meeting[1] he had pointed out that the concept of the contiguous zone raised two questions: had the coastal State the right to extend the application of its laws to a point in the high seas, or had it merely the right to prevent infringement of its laws? In his opinion the Commission, at its second session, had been correct in maintaining that a " State might exercise such control as was required for the application of its fiscal, customs and health laws, over a zone of the high seas extending for such a limited distance beyond its territorial waters as was necessary for such application ".[2]

3. An appropriate choice between those alternatives depended on reconciliation of the legitimate interests of the coastal State with the principle of the freedom of the high seas. From that point of view, it would be sufficient to recognize certain rights of control of the coastal State in the contiguous zone. The idea that the coastal State could also apply its legislation in the contiguous zone would entail the practical consequence that infringement of legislation in the contiguous zone could be followed by appropriate sanctions in that zone. If, however, the exercise of the right of control were recognized only for offences committed in the territorial sea, the situation would be different; and if, say, a vessel were arrested on suspicion of smuggling, the only action that could be taken in the contiguous zone would be that of prevention. Confiscation of goods would not be legitimate. To safeguard the legitimate interests of the coastal State, it would be sufficient to recognize its rights of control in the contiguous zone without going so far as to allow the application of its laws to be extended to that zone. He could not accept the argument that the coastal State had partial jurisdiction—i.e., sovereign powers in the contiguous zone or zones.

4. Mr. SANDSTRÖM, concurring with Mr. ZOUREK, added that the position taken up at the second session with regard to the conception of the contiguous zone had been maintained at the fifth session.

5. With regard to the question of immigration, the identification of the terms " immigration " and " emigration " in the comment on the article adopted at the fifth session (A/2456, para. 111) was wrong. In the case of immigration, any conflict between the individual and the State must be settled in favour of the State. In the case of emigration, however, what was involved was the liberty of the individual, whose right to leave his country as he wished should not be infringed, as was clearly stated in Article 13 of the Universal Declaration of Human Rights. He would support Sir Gerald Fitzmaurice's proposal to delete the word " immigration ".

6. Mr. AMADO wondered how the inclusion of the idea of emigration in the term " immigration " had ever received recognition. It was equitable that a coastal State should exercise control in the contiguous zone in order to protect certain specific interests; he had in mind, in particular, sanitary regulations and the prevention of the introduction of disease into Brazil, with its vast coastline. Control of immigration, however, did not call for the exercise of rights over such a wide area of the high seas, and a distinction should be drawn between immigration proper and protection against disease. The whole question was admittedly complex, but the specific aspects should be considered separately. The introduction of extraneous elements was liable to destroy the whole idea of the contiguous zone. He would support Sir Gerald Fitzmaurice's proposal to delete the word " immigration ".

7. Mr. HSU, endorsing Mr. Amado's view, said that the risks of disease through immigration could perfectly well be covered by sanitary regulations. To assimilate emigration to immigration would certainly involve a violation of human rights. In view of the disturbed state of the world, the question could not yet be finally settled, however. At some future date immigration might come to be accepted as a normal and acceptable practice. The doors should not be closed on that possibility, for it had to be remembered that international relations could not be governed by force alone; humanity also had a voice in the conduct of affairs and in the codification of law.

8. Mr. PADILLA-NERVO said that there were two problems connected with the contiguous zone; the nature of the rights of the coastal State and the number of those rights. With regard to the first, the essential difference between the juridical nature of the territorial sea and that of the contiguous zone had been recognized: over the former the State exercised all the powers inherent in the concept of sovereignty, whereas over the latter it had only limited and specific powers of control. That was Gidel's approach to the problem.

9. But the distinction as to juridical nature did not necessarily imply any difference in the quality of the rights enjoyed by the State. There were differences in the number of rights enjoyed, but as to their quality there was no difference between the rights enjoyed in the territorial sea and those enjoyed in the contiguous zone. That identity of rights was not affected by a difference in

[1] A/CN.4/SR.348, para. 72.

[2] *Official Records of the General Assembly, Fifth session, Supplement No. 12* (A/1316), para. 195.

their origin. The right to prevent smuggling in the territorial sea, for instance, derived from the idea of sovereignty, whereas in the contiguous zone it was authorized by international law; in both cases, however, the right was complete, and not merely partial, with the implication of the right to prevent an infringement of the recognized interests of the coastal State and to take sanctions against offenders. Those considerations led to the conclusion that to deny the coastal State its right to punish infringements of its laws amounted to the simple abrogation of the right in question and, in fact, to the disappearance of the contiguous zone.

10. With regard to the number of interests and, consequently, of rights covered by the contiguous zone, his general attitude was that the traditional concept of a contiguous zone to protect rights of customs and the like had a merely historical and circumstantial character, and that there was no basic legal reason why that concept should not be broadened.

11. He had in mind, in particular, the question of fisheries. He was far from suggesting that there should be a fishery area and that the contiguous zone should be exclusively reserved for the nationals of the coastal State. But independently of the decision taken with regard to the provisions of fishing in Chapter II of the provisional articles concerning the regime of the high seas, it was probable that the Commission would recognize a zone in which the coastal State had special jurisdiction in respect of conservation of the living resources of the high seas. He could not see any great difference in kind between such a special competence for the conservation of the living resources of the sea and the other traditional specific powers in respect of the contiguous zone.

12. Sir Gerald Fitzmaurice's point that the interests to be safeguarded in the contiguous zone were of a public nature [3] was surely covered by the fact that any action undertaken by the coastal State in respect of conservation was obviously undertaken in the public interest.

13. Whatever the decision taken on his suggestion that the concept of the contiguous zone should be broadened, that idea had already been translated into reality. In any case, the principle of the rights of the coastal State would not be affected, even if it was not covered by the concept of the contiguous zone, since it was already recognized by the provisions of Chapter II. The problem might perhaps be solved by the addition at the end of the first sentence of the article of some such words as " or for the conservation of the living resources of the high seas within the framework of the provisions of Chapter II of this convention ".

14. Faris Bey el-KHOURI said that the concept of the contiguous zone had been adopted in order to grant the coastal State the exercise of certain rights withheld from other States. The rights specified in the article were consistent with that concept, except for the reference to immigration, which should be deleted. The question of conservation would be considered subsequently; in that matter, the coastal State should not be granted any rights in the contiguous zone that were not shared by other States.

15. Mr. PAL thought that the only subject under consideration was Sir Gerald Fitzmaurice's proposal to delete the word " immigration ", which he would support. The concept of the contiguous zone was well defined in the draft, and its introduction was for certain well-defined purposes. If there were any suggestion of enlarging the connotation of that concept by extending it to cover rights other than those specified in the existing article, it should not be considered until a formal proposal was put before the Commission.

16. The term " contiguous zone " should be confined to the meaning given to it by the article and should be used for the purposes specified therein. If contiguity to the coast had to be expressed for other purposes, such as conservation of the living resources of the sea or fishing in the high seas, another more appropriate word or set of words might have to be found.

17. Sir Gerald FITZMAURICE observed that there seemed to be wide support for his proposal to delete the word " immigration ".

18. With regard to the proposal to delete the words " and punish ", a careful re-reading of the article had convinced him that the right to punish an infringement of specific regulations did in fact relate only to an offence committed within the territorial sea. If the point could be made clear in the comment, he would withdraw his amendment.

19. Mr. ZOUREK asked whether the question of immigration had not, in fact, been introduced on the proposal of a government, as he believed.

20. Mr. FRANÇOIS, Special Rapporteur, said that its introduction had probably been inspired by some government comment. He could see no objection to including immigration, and the criticisms voiced might be met by deleting the reference to emigration in the comment on the article.

21. Mr. KRYLOV, agreeing to that proposal, said that, in that respect, Mr. Sandström's argument had considerable force.

22. Mr. LIANG said that the insertion of the word " immigration " in the article might have been inspired by a comment by the Netherlands Government to the effect that it should be clearly understood that immigration and emigration were covered by the reference in the article to customs regulations (A/2456, p. 62, article 4).

23. Mr. AMADO, dissenting from the Special Rapporteur's view, said that no argument in favour of retaining the word " immigration " in the text had been put forward. He entirely failed to see any valid reason for a coastal State needing to exercise rights of immigration control in the contiguous zone.

24. Mr. FRANÇOIS, Special Rapporteur, said that " immigration " included the general policing of aliens and it was quite natural that a State should wish to exclude undesirable aliens from its territory, for which purpose a three-mile limit to the territorial sea was

[3] A/CN.4/SR.348, para. 61.

inadequate. The same considerations would apply to the admittance of persons suffering from certain diseases.

25. Sir Gerald FITZMAURICE said that the discussion confirmed his view that the word " immigration " should be deleted. If a coastal State could exercise customs control over the import of merchandise, it could equally well ascertain the particulars of the passengers in the same ship, and an extension of rights was therefore not called for. He agreed with Mr. Amado that the rights of sanitary control indirectly covered the case of immigration. The only possibility of evasion of immigration laws was by surreptitious landing, but in view of existing measures of control that possibility was extremely remote.

26. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal to delete the word " immigration " from line 5 of the draft single article on the contiguous zone.

The proposal was adopted by 10 votes to 3, with 1 abstention.

27. The CHAIRMAN, referring to the juridical nature of the contiguous zone, said that he had some doubts as to its relationship with the right of hot pursuit, and whether it was a question of prevention and punishment of infringements committed within the territorial sea or whether—a point not covered by the article—there was a zone of the sea where certain laws were applicable. His doubts had been provoked both by the discussions at the Hague Codification Conference of 1930 and by existing national practice. At the Hague Conference, the concept of the contiguous zone had derived from the extension, for certain specific purposes, of the application of coastal States' legislation, with a consequential extension of the three-mile limit. The draft single article was on similar lines to a recommendation adopted by the Conference.

28. There was also, however, the question of penal jurisdiction, for in penal matters the zone of jurisdiction for purposes either of prevention or of punishment was greater than the breadth of the territorial sea. The territorial sea thus varied in extent according to the particular interest and right involved; and some States were claiming an extension of rights. The point might be merely academic, but it was not clear—and the article as drafted gave no assistance—whether the area concerned was territorial sea or contiguous zone.

29. There was one interest—namely, that of security—that had been included in the draft recommendation of the Preparatory Committee of the Hague Conference, and a provision on security should be inserted in the draft single article. Many legislations included provisions on security and the problem of the contiguous zone had shifted from the stage of individual to that of collective action. He had in mind the Panama Zone Declaration [4] and the establishment of a permanent security zone by the Rio de Janeiro Conference in 1947.[5] In view of those facts that aspect should not be overlooked. If a provision on security were included, the number of rights covered would be broadly three, customs and fiscal control being grouped together.

30. Mr. Padilla-Nervo had suggested the inclusion in the article of a provision covering fishing, on the ground that Gidel's concept had received general recognition. Nevertheless, he wished to point out that practice had not developed as had been anticipated in 1930, when admittedly the idea was premature; of the eight or ten States that had embodied the concept in their laws, at least half had not sought to establish a unilateral right. The reason why Gidel's concept had not taken firmer root was simply that the idea of the contiguous zone implied an exclusive interest of the coastal State, and that the exercise of rights therein would therefore not infringe upon the interests of any third party. Conservation of the living resources of the high seas, however, concerned a *res communis*, which was a very different matter. He had been an ardent supporter of the concept of the special interest of the coastal State in the contiguous zone, which special interest entailed special rights. Those rights, however, were never exclusive, for the interests of the international community must be safeguarded.

31. Although Mr. Padilla-Nervo had not proposed the establishment of a contiguous zone for fishing purposes, with exclusive rights for the coastal State, he (the Chairman) doubted the wisdom of referring in the text of the article to a right which had been dealt with elsewhere. The point might be only a technical one, but it seemed advisable to state, in the comment on the contiguous zone, that in respect of conservation the Commission had adopted a procedure detailed elsewhere.

32. Mr. SPIROPOULOS shared the Chairman's view with regard to Mr. Padilla-Nervo's suggestion. While he appreciated the latter's concern over the problem of conservation in the contiguous zone, it must be remembered that it was not a question of an exclusive, but rather of a collective, right. Article 5 of the draft articles relating to the conservation of the living resources of the sea (A/2934, p. 14) provided that a coastal State might adopt measures of conservation unilaterally, provided that negotiations with the other States concerned had not led to agreement. That right, however, was subject to certain conditions. At the previous meeting, he had pointed out that the provisions on conservation applied also to the contiguous zone.[6] Admittedly, he was not thinking of such remote areas as Mr. Pal had in mind, but if a State had the right to take measures of conservation far from its coast, it was obvious that it enjoyed similar rights within the contiguous zone.

33. There was one important problem to which attention should be drawn. Mr. Padilla-Nervo had proposed that the coastal State should have the right to apply sanctions against an offender, whereas the articles on conservation referred to measures of regulation only. In the case of an infringement of regulations, the question arose, who would apply sanctions in the contiguous zone? Would it

[4] Meeting of Foreign Ministers of the American Republics, Panama City; Final Act, Declaration No. 14: Declaration of Panama.

[5] Inter-American Conference for the Maintenance of Continental Peace and Security: Rio de Janeiro, 1947.

[6] A/CN.4/SR.348, para. 74.

be only the coastal State, or would it be any other State exercising jurisdiction on the high seas? Under article 5, the coastal State could take unilateral action subject to international regulation. Mr. Padilla-Nervo's proposal would grant an exclusive prerogative to the legislation of the coastal State. He doubted the wisdom of that principle.

34. Mr. SANDSTRÖM said that Mr. Spiropoulos' point was a useful reminder of the complexity of the relationship between the contiguous zone and the question of fishing. The question of the enforcement of measures of conservation, raised by the United Kingdom Government, was an important one, but it would be better to take that point after consideration of the articles on fishing.

35. Mr. PAL said that the term " contiguous zone " was used almost in a technical sense, as meaning an area required for the purpose of making effective any remedial measure relating to infringement, within the territorial sea, of certain substantive rights also available in the territorial sea. The contiguous zone was really an extension of the territorial sea for that limited purpose. Mr. Padilla-Nervo had referred to the right of conservation outside the territorial sea. Any infringement of that right would also take place outside the territorial sea, and sanctions might have to be applied in that same area, where, however, the remedy might not be adequate. It would be better to confine the text of the article adopted at the fifth session to the substantive rights contained therein. Consideration of other rights would arise later. He suggested the hypothetical case of a contiguous zone of, say, 100 miles off the coast of India. If that were accepted for the purposes of infringement, would remedial action be restricted to a twelve-mile limit or would the remedy be co-existive with the right? The logical procedure should be, first, to establish the substantive right and then the corresponding remedial right.

36. Mr. SPIROPOULOS, while appreciating Mr. Pal's point, thought it advisable to defer consideration of sanctions until the articles on fisheries were taken up.

37. Sir Gerald FITZMAURICE wondered whether Mr. Padilla-Nervo's proposal was really in the best interests of those coastal States he had in mind, for they were hardly consistent with measures of conservation that would be taken on the high seas. There was a general consensus of expert opinion that because of the habits of fish the notion of particular zones had little relevance to the idea of conservation. In that respect, therefore, no geographical limitations could apply. Mr. Padilla-Nervo's point was of more general interest and more properly related to the articles on fishing.

38. With regard to the Chairman's reference to security, he would point out that no subsequent action was taken on the idea mooted at the Hague Conference on the ground that it was unnecessary, because all States enjoyed the inherent right of self-defence, even on the high seas. There was considerable danger in the use of the word " security ", which had vague and wide implications. Its introduction might, in fact, negative the prevention of infringements of other specific rights.

39. Mr. PADILLA-NERVO explained that he had not submitted a formal proposal, but had merely raised certain implications of the question that seemed deserving of consideration. The Chairman's suggestion to refer to the point he had raised in the comment on the article was acceptable. Consideration of the question might perhaps be deferred. It was clear that there were broader aspects, touched upon by Mr. Spiropoulos and Mr. Pal, that called for thorough examination.

40. The CHAIRMAN said that it seemed to be generally agreed that a decision on the question of including a reference to conservation rights in the article or the comment should be deferred pending definite adoption of the articles on conservation, in particular, the provisions concerning the rights of the coastal State. A decision on the last sentence of the article should also be deferred until a decision had been taken on the breadth of the territorial sea.

It was so agreed.

41. Mr. SALAMANCA was opposed to the Chairman's suggestion that a reference to security should be included in the article on the contiguous zone, because there were provisions concerning regional defence agreements in the Charter of the United Nations. Furthermore, since the establishment of the United Nations, security questions had become an international rather than a national issue and Member States had assumed various obligations in regard to the maintenance of peace.

42. Faris Bey el-KHOURI said that the Chairman's suggestion was imprudent, since States might feel themselves free to invoke security considerations as a justification for seemingly unjustifiable acts.

43. Mr. EDMONDS also thought that such an addition was not only liable to abuse but was unnecessary, as the coastal State already possessed certain legitimate rights of self-defence.

44. Turning to the question of procedure, he said that the Commission should conclude its discussion on the contiguous zone before taking up the draft articles on the conservation of the living resources of the sea, because the conservation measures would also apply to other areas of the high seas.

45. Mr. AMADO found the Chairman's suggestion unacceptable, because a provision conferring exclusive rights on the coastal State must be drafted with the greatest precision.

46. Mr. PAL shared the doubts of other members regarding the wisdom of the Chairman's suggestion.

47. Mr. HSU said that provision for protecting the general security interests of States was already made in international law. He failed to grasp precisely what considerations the Chairman had in mind in the present instance.

48. The CHAIRMAN, speaking as a member of the Commission, said that, in view of the objections of members, he would not insist on a reference to security—a concept which might have become more difficult to define since the 1930 Conference for the Codification of International Law. He only wished to point out in passing

that the Preparatory Committee of the Conference had suggested referring to the question in response to the comments of certain governments. Perhaps some reference might nevertheless be made to it in the report, to show that it had not been ignored and to save the Commission from criticism by scholars familiar with the work of the 1930 Conference.

49. He did not believe that Mr. Hsu's objection was any more valid for the question of security than for any other question of importance to international law.

50. Mr. SALAMANCA considered that if any mention of the question were to be made in the report, a statement must also be included to the effect that, with the signature of the United Nations Charter, the freedom of Member States to take action in defence of their national security had been circumscribed.

51. The CHAIRMAN, speaking as a member of the Commission, observed that Mr. Salamanca seemed to have overlooked the Covenant of the League of Nations.

52. Mr. HSU reserved the right to propose the insertion in the draft article of a reference to regulations for combating subversive activities, after the breadth of the territorial sea had been discussed. That need might arise if a belt of twelve miles were not admitted to be in conformity with international law, because States might then claim certain rights in a contiguous zone for security purposes.

53. The CHAIRMAN suggested that subject to the decision on the draft articles relating to the conservation of the living resources of the sea, the Commission might approve the first sentence of the draft article on the contiguous zone as adopted at its fifth session, with the deletion of the word " immigration ". The decision on the second sentence should be deferred until the discussion of article 3—breadth—of the draft on the territorial sea had been concluded.

It was so agreed.

54. The CHAIRMAN then called for comments on the proposal [7] by Sir Gerald Fitzmaurice to add two new paragraphs to the draft article.

55. Sir Gerald FITZMAURICE said that, in the light of the views expressed during the discussion and the Commission's decision to leave the existing draft article substantially unchanged, he found it unnecessary to press for the adoption of the first new paragraph, the purpose of which had been to explain clearly the status of the contiguous zone.

56. On the other hand, he believed that there should be a provision on the purely technical point dealt with in the second proposed new paragraph, because, though infrequent, there were cases where, owing to the geographical conformation of the coast line, if one State instituted a contiguous zone without the agreement of its neighbours, vessels making for a port in another State might be unable to do so without passing through that zone. It was essential also for coastal States to have direct access from their ports through their territorial sea to the high seas. For those two reasons he believed that where the situation was as he had described, the States concerned should not be allowed to establish a contiguous zone without the agreement of all the countries interested.

57. Mr. KRYLOV, after observing that the provision contained in the first new paragraph might, if necessary, be examined after the Commission had dealt with the draft articles on conservation, said that the second new paragraph was unnecessary because, on Sir Gerald Fitzmaurice's own admission, it dealt with cases which were infrequent. In performing a work of codification, the Commission could not provide for all eventualities.

58. Mr. AMADO welcomed Sir Gerald Fitzmaurice's decision to withdraw the first new paragraph, which was only illustrative of the general proposition stated in the draft article already approved.

59. He was opposed to the inclusion of the second new paragraph, which had no place in a code of the law of the high seas. Furthermore, he had some objections to the wording, more particularly to the phrase " no contiguous zone may be established ", since there was no question of establishing a zone, but only of exercising rights within a prescribed area.

60. Mr. SANDSTRÖM, while feeling that there was no necessity to raise the question of access to ports, saw some value in the second paragraph because of the need to ensure that the contiguous zones of adjacent States did not overlap.

61. Mr. PAL thought that the Commission would be showing excessive caution if it adopted Sir Gerald Fitzmaurice's second paragraph, since the rights conferred on the coastal State in the contiguous zone would in no circumstances hamper navigation of the kind suggested in his proposal. That proposal contemplated passage through the contiguous zone of one State for the purpose of reaching a port in another State. Obviously, a ship proceeding in that manner would neither be going to the territorial waters of the State whose contiguous zone it was traversing, nor coming out of those territorial waters. Consequently, there would be no occasion for the operation of the contiguous zone. He could not endorse the insertion of such a provision.

62. Faris Bey el-KHOURI suggested that the question could be dealt with in the comment. It was unnecessary to insert a specific provision in the article itself because navigation in the contiguous zone, which was part of the high seas, was free.

63. Mr. FRANÇOIS, Special Rapporteur, joined Mr. Amado in welcoming the withdrawal by Sir Gerald Fitzmaurice of his first paragraph, particularly in view of the uncertainty of the precise meaning of the expression " exclusive rights ".

64. On the other hand, he considered that the second paragraph deserved close study and would provide a useful rule, because although it had been described as unnecessary on the ground that the contiguous zone remained a part of the high seas, nevertheless in that area

[7] A/CN.4/SR.348, para. 47.

navigation was subject to a type of control by the coastal State which did not exist anywhere else on the high seas. Consequently it would be possible for the coastal State to hamper the commerce of another State if access to the ports of the latter lay through the contiguous zone of the former—a possibility which most States would be very reluctant to accept.

65. Sir Gerald FITZMAURICE observed that, when the draft article on the contiguous zone had been drawn up, the Commission had not yet examined the problem of the delimitation of the territorial sea of two States the coasts of which were opposite each other, or of two adjacent States, and had therefore perhaps not contemplated the special and very limited cases with which his proposed new paragraphs were concerned.

66. In reply to Mr. Amado, he pointed out that contiguous zones were " established " in the sense that States made claims to exercise certain rights within a specific area.

67. He maintained that there was a possibility of conflict over the delimitation of the contiguous zone in certain places, which could be avoided if, in those cases, States were required to reach agreement before exercising their rights.

68. He would be content if his proposed paragraph, coupled with a statement on those lines, were inserted in the comment and would not press for the addition of a specific provision in the article itself.

69. Mr. KRYLOV and Mr. SANDSTRÖM supported that solution.

70. Mr. ZOUREK had no objection to a statement of that kind in the comment and pointed out that the principles laid down in articles 14 and 15 of the draft on the territorial sea could be applied to the delimitation of the contiguous zone in the cases referred to by Sir Gerald Fitzmaurice.

It was agreed to include in the comment the point raised by Sir Gerald Fitzmaurice in the second paragraph of his amendment, and to recommend that in such cases States should not exercise their rights in the contiguous zone until agreement had been reached between them over the delimitation of their respective zones.

Article 22: Right of hot pursuit (resumed from the 345th meeting)

71. The CHAIRMAN, recalling that the Commission had deferred [8] taking a decision on article 22 until it had examined the draft article on the contiguous zone, proposed that it now revert to that article, and to Sir Gerald Fitzmaurice's proposal to delete the last sentence of paragraph 1.[9]

72. Sir Gerald FITZMAURICE said that the logic of his amendment had been confirmed by the Commission's decision to limit the rights of the coastal State in the contiguous zone to the prevention of infringement in the territorial sea of certain specific regulations. Clearly an infringement of the laws and regulations of the coastal State could not be committed by an incoming vessel while in the contiguous zone. If the vessel had the intention of committing an infringement in the territorial sea, that could be established only by boarding the vessel in the contiguous zone. Consequently, there was no need to grant the right of hot pursuit in the contiguous zone.

73. Mr. FRANÇOIS, Special Rapporteur, said that Sir Gerald Fitzmaurice had taken into account only some of the instances in which the right of hot pursuit was recognized. One of the most important was where a contravention of the laws and regulations of the coastal State was discovered after the vessel had left the territorial sea. Once it had been recognized that the rights exercised in the territorial sea did not suffice for the protection of certain interests, he saw no reason for prohibiting hot pursuit in the contiguous zone.

74. Mr. AMADO maintained that it was inadmissible for hot pursuit to start in the contiguous zone, the inside limit of which formed the frontier between the territorial sea and the high seas.

75. He was also categorically opposed to the Special Rapporteur's tendency to assimilate rights exercised in the contiguous zone to rights exercised in the territorial sea, which were those exercised by the State on land. The Commission could not go farther than to allow the coastal State to punish the infringement of its laws within the limits laid down by international law.

76. Mr. SANDSTRÖM argued that, once the Commission had laid down in the article on the contiguous zone that the coastal State was entitled to punish infringements of regulations, the provision contained in the third sentence of article 22, paragraph 1, followed logically, the more so as the Commission did not lay down that the pursuit must begin at the scene of the offence. He therefore saw no grounds for prohibiting hot pursuit starting in the contiguous zone.

77. Sir Gerald FITZMAURICE said that the Special Rapporteur and Mr. Sandström were right to draw attention to the difference between a vessel leaving port after committing an offence and a vessel entering the contiguous zone of a coastal State with the intention of committing an offence. In the latter case it would be irregular to allow hot pursuit in the contiguous zone; indeed, he agreed with Mr. Amado that it would be inadmissible. It might also encourage attempts to start hot pursuit on the high seas, even outside the contiguous zone.

78. Furthermore, there must be some limitation of the exercise of the right of hot pursuit, and the juridical basis for such a limitation was the inherent difference of status between the territorial sea and the contiguous zone. He therefore persisted in his conviction that hot pursuit could not begin in the contiguous zone, where the coastal State did not exercise sovereignty.

79. Mr. HSU wondered whether the powers of control conferred on the coastal State in the article relating to the contiguous zone might not become illusory if Sir Gerald Fitzmaurice's view were accepted.

[8] A/CN.4/SR.344, para. 34.

[9] *Ibid.* para. 12.

80. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's amendment to delete the third sentence of article 22, paragraph 1.

The amendment was rejected by 7 votes to 3, with 4 abstentions.

81. Mr. ZOUREK believed that those who had opposed the amendment had done so on the understanding that the right of hot pursuit could be invoked only for infringements of the laws and regulations of the coastal State committed in its territorial sea or inland waters. Perhaps that should be stated more explicitly in the text in order to obviate the possibility of misunderstanding.

82. Mr. SANDSTRÖM, pointing out the need for consistency, observed that in the draft articles on conservation the term " contiguous " was used in a different sense.

83. Mr. PAL observed that the term " contiguous zone " should be confined to its technical sense and should not be used in any other.

84. Mr. ZOUREK agreed with Mr. Sandström, but said that the term " contiguous zone " had now acquired a technical connotation and should be maintained. Some other term should be used in the draft articles on conservation so as to eliminate all possibility of confusion.

The meeting rose at 1 p.m.

350th MEETING

Tuesday, 22 May 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Welcome to the representative of the Pan-American Union

1. The CHAIRMAN welcomed Mr. Canyes, who was to attend the Commission's meetings as representative of the Pan-American Union. He said that members would be interested to hear that the Inter-American Council of Jurists, at its third meeting, held in Mexico City in January-February 1956, had reached a decision very similar to that of the Commission itself concerning co-operation with inter-American bodies in the interests of better co-ordination on matters of common interest.

2. Mr. LIANG, Secretary to the Commission, speaking on behalf of the Secretary-General of the United Nations, associated himself with the Chairman's welcome. In accordance with the Commission's decision at its previous session he had attended the third meeting of the Inter-American Council of Jurists and had enjoyed various facilities accorded him by the Secretariat of the Organization of American States as well as by the host Government.

3. Mr. CANYES, thanking the Chairman for his kind words, said that he was honoured to have the opportunity of attending the discussions of such an eminent group of lawyers presided over by a man who had played an important part in promoting co-operation amongst inter-regional organizations. He would be pleased to furnish any information members might wish to have.

Appointment of a drafting committee

4. The CHAIRMAN proposed that a drafting committee be appointed consisting of Sir Gerald Fitzmaurice, Mr. François, Mr. Padilla-Nervo and Mr. Scelle, with Mr. Zourek as Chairman.

It was so agreed.

5. Mr. SCELLE said that for reasons of health he might be unable to attend all the meetings of the Committee.

6. The CHAIRMAN replied that in that eventuality certain questions, particularly those affecting the French text, could be referred to Mr. Scelle privately.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add. 1-6) (*continued*)

Conservation of the living resources of the high seas (resumed from the 338th meeting)

7. The CHAIRMAN invited the Commission to revert to the draft articles relating to conservation of the living resources of the high seas (A/2934). Most members had already expressed their views in the general discussion, and he believed that the Commission could now proceed with the detailed examination of each article. The proposals of some governments would entirely alter the whole nature of the scheme; others were directed to points of detail.

Article 24: Right to fish

8. Mr. FRANÇOIS, Special Rapporteur, said that both the United States and the United Kingdom Government

had proposed a definition of conservation for insertion in article 24. The two texts, which were substantially on the lines of the definition adopted at the International Technical Conference on the Conservation of the Living Resources of the Sea,[1] had been reproduced in paragraphs 4 and 6 respectively of the addendum to his report (A/CN.4/97/Add.3). Perhaps the Commission might reach agreement on the principle and refer the drafting of the definition to the Drafting Committee.

9. Mr. EDMONDS, observing that the Commission's text of article 24 had not been challenged by any government, said that at the 338th meeting[2] he had proposed another text. He had done that first, in order to have the draft explicitly recognize a right, rather than a claim to a right; a claim to a right might not be capable of enforcement or might have no legal foundation. His second purpose was to make clear, by the insertion of the words " to applicable principles of international law ", that the right to fish was subject to principles of international law not mentioned in the draft articles.

10. He would now also propose the addition of a paragraph 2 reading:

For the purpose of these articles, conservation of the living resources of the sea is defined as making possible the optimum sustainable yield from these resources so as to secure a maximum supply of food and other marine products.

11. The CHAIRMAN wondered whether, in the interests of orderly discussion, it might not be preferable to postpone consideration of article 24, which was in the nature of an introduction, until the end.

12. Mr. SALAMANCA said that, as Mr. Edmonds' first amendment to the existing article had entailed no change in the Spanish text, it was presumably one of drafting only and could be referred to the Drafting Committee.

13. Mr. SANDSTRÖM agreed that the amendment related solely to a matter of interpretation. The French version of the text adopted the previous year was perfectly clear. He noted that Mr. Edmonds had departed somewhat from that text by referring to the right of States to engage in fishing, instead of to the right of their nationals.

14. Mr. SCELLE endorsed Mr. Sandström's remarks.

15. Mr. ZOUREK preferred the French text adopted at the previous session after a prolonged and detailed discussion on wording. Mr. Edmonds' text was misleading in suggesting that it was only States which had the right to engage in fishing.

16. The CHAIRMAN suggested that the Drafting Committee was competent to decide whether any change of substance was involved in Mr. Edmonds' first amendment. If it decided in the affirmative, the question could be referred back to the Commisison.

17. Mr. SPIROPOULOS considered that article 24, as adopted at the previous session, the text of which in all three languages was identical, should be retained, because the reasons for the particular wording chosen still held good.

18. Sir Gerald FITZMAURICE pointed out that there was a real difference between the English text, which contained the word " claim ", and the French and Spanish texts; but that inconsistency could be removed by the Drafting Committee.

19. Mr. PADILLA-NERVO observed that the Spanish translation of Mr. Edmonds' proposal still referred to nationals of States.

20. Mr. LIANG, Secretary to the Commission, said that—unlike the French translation—the Spanish was incorrect.

21. Personally he considered that Mr. Edmonds' first amendment was not merely one of wording, because, if the Commission retained the phrase " All States may claim for their nationals ", adopted the previous year, that implied that States would protect the rights of their nationals.

22. Mr. SCELLE observed that he had always interpreted article 24 to mean that States could claim for their nationals and for themselves the right to engage in fishing on the high seas.

23. The CHAIRMAN inferred from the discussion that it was the general view that Mr. Edmonds' first amendment, substituting the words " All States have the right " for the words " All States may claim for their nationals the right ", was a matter of drafting which, he suggested, should be referred to the Drafting Committee.

It was so agreed.

24. Mr. SALAMANCA did not consider that Mr. Edmonds' second amendment inserting the words " to applicable principles of international law " after the words " treaty obligations " was a drafting matter. He preferred the original text, because all rules concerning fishing rights were matters *de lege ferenda.*

25. The CHAIRMAN reiterated his opinion that consideration of that amendment, together with the United States and United Kingdom proposals for the insertion of a definition in article 24, should be postponed until consideration of the chapter on fishing had been completed.

26. Sir Gerald FITZMAURICE said that while he would not oppose that procedure, he must make the reservation that the final decision on the definition might affect the attitude of certain members to the remaining articles in the draft, so that if the definitions proposed by the United States and the United Kingdom Governments were substantially altered or rejected, some members might find it necessary to modify the stand they had already taken on the subsequent provisions and to ask for the discussion to be reopened.

27. Mr. SPIROPOULOS had serious doubts about the wisdom of deferring the decision on the definition and

[1] Hereinafter referred to as the " Rome Conference ".

[2] A/CN.4/SR.338, para. 3.

said that he would deplore the Commission's having to reopen discussion on the other articles.

28. The CHAIRMAN suggested that the Commission defer consideration of Mr. Edmonds' second amendment, for the insertion of the words " to applicable principles of international law ", until the end of the discussion on the other draft articles, and as regards his proposed second paragraph, approve for the time being a definition of conservation on the lines of that adopted at the Rome Conference.

It was so agreed.

Article 25

29. Mr. FRANÇOIS, Special Rapporteur, said that by inadvertence he had omitted to mention in the addendum to his report the Chinese Government's comment (A/CN. 4/99) that articles 25 and 26 appeared to favour States whose nationals were already engaged in fishing in certain areas, and took no account of the interests of States whose nationals might start fishing in those areas at some future time. The Government of India had also raised the same objection, but he felt, in view of the safeguards provided in article 27, which had perhaps been overlooked, there was no need to modify the existing text.

30. The Indian Government had not made it clear whether its proposal that for the purposes of article 26 the coastal State should be recognized to have special rights in an area contiguous to its coast 100 miles in breadth, also applied to article 25.

31. The Yugoslav Government had proposed that the zone in which the coastal State was entitled to exercise certain rights for the protection of living resources should be restricted to twelve miles; but that was unlikely to obtain support, since it was generally agreed that conservation measures within such a limited belt would be totally inadequate.

32. In order to meet the objection by the Executive Secretary of the International Commission for the Northwest Atlantic Fisheries [3] that the word " conservation " might inhibit efforts to develop fisheries, which was the aim of certain international organizations, he would suggest that the necessary clarification be inserted in the comment, while retaining the term in the draft articles since it had already gained currency in technical discussions.

33. Mr. PAL said that, as he understood it, the purpose of the Indian Government's proposal was twofold: to confer on the coastal State the right to take conservation measures in the area contiguous to its coast, and to exclude other States from taking such measures in that area. Article 25, as amended by the Indian Government's proposal, if read together with article 27 and article 29, would serve that twofold purpose. The proposal was very moderate—namely, that when only nationals of the coastal State were engaged in fishing in the area contiguous to its coast, that State alone should be entitled to initiate conservation measures which would be binding on the nationals of other States should they come to fish there.

34. He then boserved that the scheme of the articles as they now stood disclosed an anxiety to raise the principle of vested interest to one of definitive justice. Articles 25, 26 and 29, paragraph 1, equally affected the freedom of fishing in the high seas. Under article 25, certain States were empowered to make regulations rendered binding on others by article 27, without such regulations being expressly subjected to any of the conditions laid down in article 29, paragraph 2. That seemed also to affect the principle of freedom of fishing in the high seas, but the interference with that freedom was by developed States having acquired, as it were, some sort of vested interest, whereas article 29 contemplated interference by a coastal State perhaps still undeveloped with regard to fishing. In short, under articles 25 and 26, certain States having vested interests could take unilateral action to the prejudice of others, unhampered by the provisions of article 29, whereas under that article itself, a coastal State contemplating such action, perhaps in view of its own pressing need, had to comply with the conditions laid down in paragraph 2. He failed to understand why the safeguards of article 29, paragraph 2, if they were necessary safeguards, should not be made expressly applicable to all conservation measures by whomsoever taken, unless and until they were taken in co-operation by all concerned. While making that comment, he was not overlooking the provisions of article 32, paragraph 1; but those provisions were made applicable only for the purposes of that article. In any case, if the intention was to make them generally applicable to all cases, why should it not be clearly and explicitly stated ?

35. He then proposed that articles 25 and 29 be combined into three paragraphs, to read as follows:

1. A State whose nationals are engaged in fishing in any area of the high seas contiguous to its coasts 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.

2. A State whose nationals are engaged in fishing in any area of the high seas other than the area contiguous to its coast or to the coast of any other State 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.

3. In any area of the high seas contiguous to its coast a State may adopt unilaterally whatever measures of conservation are deemed appropriate, irrespective of the question whether it is or is not engaged in fishing in that area or whether any other State is or is not engaged in fishing in such an area, provided only that a State whose nationals are engaged or may hereafter be engaged in that area may request the coastal State to enter into negotiations with it in respect of these measures.

36. With regard to paragraphs 1 and 2, however, he admitted that a simpler solution would perhaps be to add to article 25 as it stood the words " unless the area in question is contiguous to the coast of another State ", as suggested in the Special Rapporteur's comment (A/CN. 4/97/Add.3, para. 3).

[3] A/CN.4/100.

37. Mr. SANDSTRÖM pointed out the close relationship between article 25 and articles 28 and 29. Under the provisions of the last two articles, the coastal State was given every right that it could reasonably claim. It might be possible to apply the conditions of article 29, paragraph 2, to article 25, but they would inevitably be restricted by the fact that the nationals of only one State would be affected. Taking the articles as a whole, they were a satisfactory solution of the problem, for they gave full weight to the fundamental conception that fishing should be regulated in the interests of conservation of the living resources of the high seas. If the nationals of one State only were engaged in fishing in a certain area, it was only logical that conservation measures should be taken by that State. It would be quite unjustifiable to give the coastal State an exaggerated prerogative in the matter.

38. Mr. PAL, in reply to Mr. FRANÇOIS, Special Rapporteur, who had suggested that there was a contradiction between paragraphs 1 and 3 of his (Mr. Pal's) proposal, observed that there was no contradiction, though there was overlapping. He explained that in so drafting his paragraphs he had intended to place paragraph 1 on the same footing as article 25 of the present draft—that was to say, to make it exempt from the conditions laid down in article 25, paragraph 2, whereas his paragraph 3 might be made subject to those conditions.

39. Sir Gerald FITZMAURICE said that he might be prepared to accept Mr. Pal's suggestion that the same criteria as were prescribed in article 29, paragraph 2, be inserted in article 25. They would have to take a different form, however, and certain incidental points would call for clarification.

40. As he saw it, the proposals of the Government of India were based on a misunderstanding of both the purpose and the effect of the draft articles. The criteria in article 29, paragraph 2, would apply only in the case of a coastal State finding it necessary and imperative to put into immediate force certain measures of conservation, as was made clear by sub-paragraph (*a*), and those measures would be subject to the conditions in sub-paragraph (*c*). The case envisaged in article 25 was quite different, for one State alone was involved and, *prima facie*, there was no reason to subject it to any particular provisions, because any measures it would take would, in the first place, apply only to its own nationals. The Commission had realized that other States might subsequently engage in fishing in the same area; article 27 had been drafted, therefore, to cover such a case, with the provision in paragraph 2 for arbitration in cases of disagreement. Mr. Pal would doubtless agree that, although article 25 did not actually specify criteria, as did article 29, the ultimate effect would be the same. But it was reasonable to draw an initial distinction between a State making regulations applicable to its own nationals and a coastal State adopting unilateral measures of conservation applicable also to non-nationals. That had been the basis of the Commission's decision, and he considered that a fair balance had been struck by the provision in article 27, paragraph 2.

41. If criteria having the same effect as those in article 29, paragraph 2, were to be inserted in article 25, certain points would have to be borne in mind. In article 25, the State in question was legislating *prima facie* for its own nationals, and such legislation could therefore not be restricted; nor could the State be bound to restrict its legislation to measures of conservation. It must therefore be made clear that the provisions of the article did not limit the right of the State to legislate in other respects for its own nationals.

42. It would also be necessary to amend the texts of article 29, sub-paragraphs (*a*), (*b*) and (*c*) because of the different circumstances that might prevail—e.g., there would be no need for the requirement of urgency in the case of measures applicable to nationals. Subject to those drafting considerations, however, such a proposal might be acceptable.

43. He assumed that, if adopted, such amendments would meet Mr. Pal's point and that he would not press for the extensive re-drafting he had proposed. He (Sir Gerald Fitzmaurice) would deprecate the re-casting of the article in such a form, because he was convinced that Mr. Pal's proposal and that of the Indian Government were based on an erroneous conception of conservation, in that they introduced the idea of zones. Conservation, in fact, as he had previously pointed out,[4] was concerned only with the behaviour of fish, which were no respecters of the concept of geographical limitation.

44. Mr. Pal's suggestion of a hundred-mile belt and the point made in his proposal were covered by the provisions of article 29. In fact, they went further than Mr. Pal's paragraphs 1 and 3, since it was not even required that nationals of the coastal State should be actively engaged in fishing in the area. But Mr. Pal's paragraph 2 would prevent a non-coastal State from taking measures of conservation within a hundred-mile belt. That would not be in the interests of conservation. Under the present text, the coastal State would have the right to take such measures. If it did not do so, what possible reason could there be for its seeking to prevent other States whose nationals were engaged in fishing in that area from adopting measures for regulating and controlling such fishing? In any event, those States could not be prevented from fishing in that zone, which was *ex hypothesi* high seas, and the only effect of the Indian proposal would be to prevent them from taking measures of conservation. That could benefit no one, least of all the coastal State.

45. Mr. PAL said that he appreciated Sir Gerald Fitzmaurice's point that the insertion in article 25 of the provisions of article 29, paragraph 2, would call for some re-drafting. His aim had been simply to establish a point of principle. A possible solution might be to introduce the provisions of article 29, paragraph 2, into article 27. Articles 25 and 26, as they might be adopted by the Commission with or without the proposed amendments, would, by themselves, remain applicable only to the nationals of the regulating States, and, if subsequently, nationals of other States took to fishing in the same area, the provisions of article 29, paragraph 2, as thus trans-

[4] A/CN.4/SR.349, para. 37.

ferred to article 27, would come into effect to test the validity of the measures taken before they would bind such newcomers. If that solution were adopted, he would accept, as he had already stated, instead of his redraft of article 25, simply the addition of the words suggested by the Special Rapporteur: " unless the area in question is contiguous to the coast of another State ".

46. The reasons for the concern felt by the Government of India were fully set forth on page 25 of document A/CN.4/99.

47. He would reserve his comments on the question of the special interests of the coastal State, pending consideration of articles 28 and 29.

48. The CHAIRMAN said that the six hypothetical cases posited in articles 25 to 30 should be taken separately, starting with the simplest case—that in article 25 —and proceeding towards the more complex ones. Questions of formulation should be deferred until agreement had been reached on the substantive issues.

49. Sir Gerald FITZMAURICE pointed out that Mr. Pal had adhered to his proposal to amend article 25 without, however, attempting to reply to his (Sir Gerald Fitzmaurice's) criticisms. He wondered whether underlying Mr. Pal's and the Indian Government's proposal was the idea that prohibition of measures of conservation would imply prohibition of fishing in the areas also. If so, that idea was entirely erroneous. Under existing law, the nationals of any State could engage in fishing in any area of the high seas. The Indian proposal would effectively prohibit States from taking measures which would apply to their own nationals for the regulation of fishing. Was it not obviously in the interests both of conservation and of the coastal State itself that that should not be done? If it were done, a very serious gap might be left; for if the coastal State took no steps in the matter and other States were prohibited from doing so, no conservation measures whatever would be taken. He pointed out that there was nothing to prevent the coastal State from challenging any measures taken by another State, in which case the arbitration procedure laid down would come into operation.

50. Mr. PAL replied that he could add nothing by way of explanation of the attitude of the Government of India, which was clearly expressed on page 25 of document A/CN.4/99. Neither he nor the Government of India, however, proposed to exclude anyone from fishing, except when conservation itself required prohibition of fishing.

51. Mr. PADILLA-NERVO said that he had already stressed the desirability of recognizing the special interest of a coastal State in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts.[5] The anxiety of a coastal State at the prospect of another State's regulating fishing activities in areas off its coast was perfectly justifiable. In view of the necessity for regulating the situation between the coastal State and other States—and it could not be denied that the interests of the former were predominant—and of the fact that the Indian Government's view aroused great interest in many other States, he could not see any possible objection to accepting the addition to article 25 proposed by Mr. Pal.

52. The CHAIRMAN pointed out that, if a coastal State had a special interest in the area—irrespective of whether its own nationals were engaged in fishing there —its rights were safeguarded under article 29. There was no reason, if a coastal State had no special interest or adopted an attitude of indifference, why it should be entitled to prevent other States whose nationals were engaged in fishing in that area from applying conservation measures. Such a course could serve only the interests of the coastal State itself. That issue, however, was covered by articles 28 and 29. It would be advisable to restrict the discussion to article 25.

53. Mr. SPIROPOULOS said that Mr. Padilla-Nervo had referred to the anxiety felt by a coastal State at the measures of conservation taken by another State in areas off its coast. That contingency, however, precisely reflected the existing legal situation. It should not be overlooked by those who were stressing the disadvantageous position given to the coastal State in the draft articles that the Commission, far from discriminating against the coastal State, was in fact aiming to extend its existing rights.

54. Mr. PAL said that the " existing legal situation " referred to by Mr. Spiropoulos would not help the Commission much. Existing international law would make the regulations contemplated in articles 25 and 26 binding only on the nationals of the regulating States. As had been pointed out in several government comments, there was no question of a State in such a position enacting legislation which could bind the nationals of another State. He would suggest that the Commission should take first the question of conservation in the high seas other than in the area contiguous to the coastal State and, subsequently, under articles 28 and 29, conservation in that area itself.

55. Mr. ZOUREK pointed out that, under article 25, a State had the option, but not the duty, of adopting measures for regulating and controlling fishing activities in certain areas of the high seas. Bearing in mind the powerful resources of modern, industrialized fishing fleets, it was clear that that formula was inadequate. The threat to the living resources of the high seas was a real one. He proposed the substitution of the word " shall " for the word " may " in the third line.

56. With regard to the interests of the coastal State, there was much force in the argument for adding the phrase proposed by Mr. Pal. The case of a coastal State being so indifferent as to take no conservation measures whatever, although possible, was surely rare. In any event, a formula could be devised to cover the point.

57. After Mr. SANDSTRÖM had drawn attention to the reference in article 32, paragraph 1, to the criteria listed in article 29, paragraph 2, Mr. PAL recalled that, in that connexion, he had stressed that it was only logical to apply those criteria also to article 25.

[5] A/CN.4/SR.338, paras. 8-16.

58. Sir Gerald FITZMAURICE said that Mr. Zourek's first point was much more in harmony with the spirit of conservation than Mr. Pal's proposal. His second point, however, seemed hardly consistent with his first.

59. He still failed to follow Mr. Padilla-Nervo's argument as to the anxiety of the coastal State regarding conservation measures taken by another State in an area of the high seas contiguous to its coasts. If the coastal State had any special interest, its rights were fully safeguarded under articles 28 and 29. If, on the other hand, it professed no interest—and, *pace* Mr. Zourek's comments, it was a fact that many coastal States had not displayed any interest whatever in areas outside their own territorial sea—other States, whose nationals were engaged in fishing in that area, did have such an interest. No real case had been made out for a principle which would prevent the taking of measures of conservation merely because an area happened to be somewhere near the coast of a coastal State.

60. Mr. PAL, in reply to Sir Gerald Fitzmaurice, said that the anxiety of certain coastal States might not be that foreign fishermen would operate near their coasts, but that conservation measures instituted by countries with powerful and well-established fishing fleets might exclude coastal nationals from fishing in areas near their coasts.

61. Mr. PADILLA-NERVO pointed out that, in spite of the remedies available, coastal States felt concern at being obliged to submit to conservation measures adopted by distant States. It must be borne in mind that many coastal States did not yet possess large fishing fleets, or for one reason or another had been prevented hitherto from exploiting the resources of the sea contiguous to their coasts. Accordingly, the Commission must recognize their special interest, and that could be done without prejudice to the general aim, which was conservation.

62. In that connexion, he agreed with Mr. Zourek that conservation measures should be made obligatory for States.

63. The CHAIRMAN observed that article 25 referred to a very limited case, and that any measures taken under that article would not affect the coastal State, even if it had a special interest. The Commission had not yet come to grips with the crucial issue, which was the special interest of the coastal State. In framing the present articles, it must look to the future, while not disregarding the interests of those States which had a long-established fishing industry.

The meeting rose at 6.10 p.m.

351st MEETING

Wednesday, 23 May 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add.1-7) (*continued*).

Conservation of the living resources of the high seas (continued)

Article 25 (continued)

1. The CHAIRMAN, inviting the Commission to continue its consideration of the draft articles relating to the conservation of the living resources of the high seas, recalled the amendment to articles 25-29 proposed at the previous meeting by Mr. Pal[1] and the amendment to article 25 proposed by Mr. Zourek.[2] With regard to the latter, he would point out that the exercise of the right recognized in article 30 carried a mandatory implication in respect of article 25.

2. Mr. SPIROPOULOS said he was convinced that the differences of opinion revealed by the discussion were not as profound as they might seem, and that by a determined effort agreement could be reached. Those differences reflected the two opposing points of view expressed, on the one hand, in article 25, covering States' rights of regulating fishing in the high seas, and, on the other hand, in the proposals of some members—in particular Mr. Pal and Mr. Padilla-Nervo—who had urged that priority be given to the coastal State in the regulation of fishing. He was sure that, if the order were reversed —i.e., if the rights of the coastal State were established first, everything else would fall into place.

[1] A/CN.4/SR.350, para. 35.

[2] *Ibid.*, para. 55.

3. He fully appreciated Mr. Padilla-Nervo's views on the concern of a coastal State at the spectacle of other States taking conservation measures in areas off its own coasts, for the idea of a powerful fishing fleet operating in waters close to a coast did constitute something of a bogey. As he had pointed out at the previous meeting, however, that was the existing legal situation.[3] Agreement, therefore, would call for concessions from the partisans both of the coastal State and of the fishing State.

4. The articles as a whole gave the coastal State rights that it had not previously enjoyed, and indeed almost all the rights it could claim, for they were limited only by the conditions of the establishment of special interest under article 29. That limitation was perfectly logical, because the provisions of international law could protect only interests that actually existed. If, however, the element of special interest were eliminated no great loss would be suffered, and satisfaction would have been given to the coastal State.

5. He would therefore propose, as an attempt at a compromise solution, the following text for an article combining the provisions of articles 28 and 29:

1. Any coastal State (may) (shall) adopt unilaterally measures for the maintenance of the productivity of the living resources (in any area) of the high seas contiguous to its coast, provided that negotiations to this effect with the other States concerned have not led to an agreement within a reasonable period of time.

2. Any measure which the coastal State adopts under the first paragraph of this article must be based on appropriate scientific findings, and must not discriminate against foreign fishermen.

6. He had inserted the word " may " in parentheses in view of Mr. Zourek's proposal. His own proposal, while giving priority to the coastal State in matters of conservation, did not really change the situation. It merely created a presumption in favour of the coastal State. The only aspect that he had excluded was that of special interest. Even where there was no special interest, the coastal State would still enjoy its prerogative. That, however, was not of great importance, because in case of disagreement the final decision would always be taken by the arbitral commission. His proposal obviously implied the adoption of the articles dealing with arbitration.

7. Mr. SANDSTRÖM said that he had arrived at the same conclusions as Mr. Spiropoulos, although by a somewhat different reasoning. He had pointed out at the previous meeting that, under articles 28 and 29, the coastal State had been given every right that it could reasonably claim.[4] Subsequently, he had come to the conclusion that the special interest of the coastal State was the circumstance of contiguity, and since that was also a general circumstance, the articles should be redrafted in order to make the right of the coastal State independent of the showing of a special interest.

8. His arguments were confirmed by the Canadian Government's comment on article 28 (A/CN.4/99/Add.7, p. 2) that: " A coastal State always has an interest in the resources of the high seas contiguous to its coast by the mere fact of contiguity." Acceptance of the Canadian Government's view would achieve the same result as Mr. Spiropoulos' proposal.

9. Mr. HSU, endorsing Mr. Spiropoulos' proposal, said that in theory Mr. Pal's proposal had much to recommend it. Conservation was of vital importance and the coastal State obviously had a special interest in the matter. Looked at from the practical standpoint, however, the question was already amply covered by the provisions of the draft articles. He pointed out that legal rights also entailed obligations: if in practice a coastal State shrank from accepting its obligations, then the rights became illusory.

10. Mr. Pal might perhaps agree not to press his proposal until the questions of the contiguous zone and the breadth of the territorial sea had been settled; in the meantime, Mr. Spiropoulos' proposal should be acceptable.

11. Mr. SPIROPOULOS, in reply to Mr. EDMONDS, who had asked whether his proposal amounted to replacing article 29 by his new text, without any reference to a special interest, said that he did not attach great importance to that point, but would follow the wishes of the Commission. All he had aimed at was to lay slightly greater stress on the rights of the coastal State without in any way altering the basic situation. He had kept the possibility of recourse to the arbitral commission constantly in mind. His proposal, though not necessarily ideal, had been an attempt, on the basis of fundamental principles, to produce a text that would secure general agreement among all States engaged in fishing on the high seas.

12. Mr. PAL said that, subject to certain modifications, Mr. Spiropoulos' proposal was acceptable. In view, however, of the disagreement revealed by the comments of governments, agreement within the Commission would not necessarily decide the question. The Commission, after all, was not the community of nations.

13. As to Mr. Hsu's suggestion, whatever might have been his personal attitude, as he did not represent the Government of India, his acceptance could hardly affect the issue.

14. With regard to the deletion of the factor of special interest, he had from the outset stressed that articles 28 and 29, as drafted, would never satisfy the claims of coastal States, and in that connexion would recall that the Rome Conference had—although by a narrow majority—specifically recognized the special interest of the coastal State in the field of conservation of living resources. Any solution devised should not be based merely on the past and on so-called vested interests. Many coastal States were still under-developed and had no fishing fleets, yet their special interest in areas of the high seas contiguous to their coasts was beyond question, though still only potential. While bearing in mind that agreement in the Commission would not necessarily

[3] *Ibid.*, para. 53.

[4] *Ibid.*, para. 37.

command general support from governments, he would endorse Mr. Spiropoulos' proposal.

15. Mr. PADILLA-NERVO said that, in general, he could accept Mr. Spiropoulos' proposal, and that the statements of Mr. Sandström and Mr. Pal confirmed the view he had expressed during the general discussion of the subject, that the fundamental issue in the whole question was the recognition of the special interest of the coastal State in conservation of the living resources of the high seas.[5]

16. There was no denying that that principle had been accepted by the Rome Conference, which had defined the principal objective of conservation of the living resources of the seas as being " to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products ".[6] The same paragraph continued: " When formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast." Further, the Inter-American Specialized Conference on the Conservation of Natural Resources of the Submarine Shelf and Oceanic Waters, held at Ciudad Trujillo in 1956, had unanimously confirmed that principle in paragraph 5 of the operative part of its final resolution.[7] He was convinced that that view would be endorsed by a large majority when the question came to be considered by the General Assembly of the United Nations at its forthcoming eleventh regular session.

17. The recognition of the special interest of the coastal State, although acknowledged in the draft articles, was not expressly stated. The wording of article 29, paragraph 1, was unduly restrictive, and that provision should be broadened. It was essential to recognize that the special interest of the coastal State existed merely by virtue of its position, and that it should not be given a limitative interpretation—e.g., by a restrictive condition that nationals of the coastal State should be actually engaged in fishing in the area concerned.

18. He welcomed the approach of the Canadian Government to the question, which was very similar to his own, for it dealt with the special interest of the coastal State on the objective basis of the mere fact of contiguity.

19. His own suggestions for amending article 29 would follow much the same lines as Mr. Spiropoulos's proposal, except that in the first sentence of paragraph 1, he would prefer to state in so many words that the coastal State had a special interest. Moreover, he would have preferred to have Mr. Spiropoulos's paragraph 1 prefaced by a phrase to the effect that, in consequence of its special interest, the coastal State might adopt unilaterally whatever measures of conservation were appropriate. He would reserve the right, however, to revert to those points when articles 28 and 29 came up for consideration.

20. Mr. SALAMANCA, while agreeing that the right of the coastal State in matters of conservation should not be conditional, pointed out that the discussion was veering away from article 25 towards an examination of article 29. If, as it seemed, the main interest of the Commission was to define the rights of the coastal State, it would be better, in the context of Mr. Spiropoulos' proposal, to take up article 29 forthwith.

21. Mr. EDMONDS said that Mr. Padilla-Nervo's fundamental proposition, that every coastal State had an inherent special interest in the living resources of the sea, did not provide the entire solution of the problem. It might be conceded that a coastal State indeed had a special interest, but such a State was not always willing to take action. That was the situation which the draft articles as a whole attempted to cover by recognizing the interests of other States in cases where the coastal State did not take conservation measures.

22. The aim of the Commission—as of the Rome Conference—was to codify provisions for ensuring the optimum sustainable yield from the living resources of the sea and for the regulation of measures taken to that end. Conservation measures must have a twofold basis: a programme based upon scientific findings, and rules for effective enforcement. Any conservation programme was always expensive, especially when carried out at sea, and many coastal States were unwilling to undertake such a burden. In view, therefore, of the wide variety of attitude and practice among coastal States, there was no reason for introducing mandatory provisions.

23. Admittedly the draft articles did not constitute an ideal text—though his own proposal [8] would both clarify and simplify them—but on the whole they formed a consistent pattern of provisions safeguarding the interests of all States concerned. In articles 25 to 33, they covered all the possibilities that might arise. In article 28, for instance, the coastal State was given a considerable extension of existing rights not enjoyed by non-coastal States. Article 29 went even farther, in meeting the unusual situation of a coincidence of failure to reach agreement and the circumstance of urgency.

24. As a whole, the draft articles were sound and practical and ensured that appropriate conservation measures based on scientific findings could be enforced, a point which, as had been stressed at the Rome Conference, was of vital importance. The Commission was, in fact, implementing the fundamental principles that had been enunciated at the Rome Conference, and instead of making up a patchwork of isolated provisions, the articles taken as a whole would be seen to form a consistent pattern. Even if it were conceded that a coastal State had theoretically a special interest in conservation, the Commission should not place upon it the obligation of embarking upon a conservation programme which might be too heavy for it to bear. In all cases where a coastal State was prepared to take conservation measures, the Commission had provided adequate machinery for doing so, and had fully safeguarded its rights.

25. Mr. PAL pointed out that the origin of the claim of the coastal State to a special interest in conservation

[5] A/CN.4/SR.338, para. 9.

[6] A/Conf.10/6, para. 18.

[7] A/CN.4/102/Add. 1.

[8] A/CN.4/SR.338, para. 3.

measures in any area of the high seas contiguous to its coasts was to be found in the new doctrine formulated on 28 September 1945 by the President of the United States of America, in the proclamation declaring the right of his country " to establish fisheries conservation zones in the high seas areas contiguous to the coasts of the United States, either exclusively or in agreement with other States concerned ".[9] That principle had been confirmed at the Rome Conference and, more recently, in paragraph 5 of the operative part of the Ciudad Trujillo resolution, which had again recognized the special interest of the coastal State in the continued productivity of the living resources of the high seas adjacent to its territorial sea. There were ample grounds, therefore, for supporting the viewpoint of the Canadian Government, referred to by Mr. Sandström, and for accepting Mr. Spiropoulos' proposal.

26. The CHAIRMAN said that Mr. Spiropoulos had attempted to cover in one article the two cases covered by articles 28 and 29. As he had pointed out at the previous meeting,[10] each of the six articles in the series 25-30 dealt with a separate case. In view of the wider application of article 29, it would be hardly appropriate to combine in one article two so disparate cases as those covered by articles 28 and 29. In fact, Mr. Spiropoulos' proposal dealt with article 29. In any event, the provision in paragraph 2 (*a*) of that article, which had been one of the provisions of a joint Cuban-Mexican proposal submitted at the Rome Conference, was of importance and should be retained. As to paragraph 3, he was not sure whether Mr. Spiropoulos wished to delete it or to retain the provisions on arbitration.

27. With regard to the Ciudad Trujillo resolution referred to by Mr. Padilla-Nervo and Mr. Pal, they had quoted paragraph 5 of the operative part, but paragraph 6 pointed out that there was no agreement among the States represented at the Conference, either concerning the nature and scope of the special interest of the coastal State or as to how the economic and social factors which that State or other interested States might invoke should be taken into account in assessing the objectives of conservation programmes.[11] The special interest of the coastal State had been conceded in principle; the interests of other States, however, including non-coastal States, had also been stressed.

28. Reference had also been made in the Commission to the case of the coastal State that had no special interest in the area concerned, whereas other non-coastal States had historic interests. On that point, the Ciudad Trujillo Conference had restricted itself to recognition in principle of the special interest of the coastal State in the conservation of the living resources of the high seas adjacent to its territorial sea. Paragraph 4 of the preamble to the draft articles (A/2934, page 14), however, recognized that special interest unconditionally.

29. In reality, the question of the special interest of the coastal State was not of major importance. That interest existed in principle and had received recognition in the preamble to the draft articles. It was not essential to introduce into the criteria of the draft articles a concept already formulated in the preamble.

30. He could not help observing that the major contributions to the discussion so far had been in the sense of extending the rights of the coastal State. There were other, and contrary views, however, among the comments by Governments, and in order to arrive at a balanced decision the Commission must take account of all the opinions expressed. The important issues to be settled were the rights of the coastal State, subject to the limitations of article 29, paragraph 2, and the question of arbitration.

31. Mr. SPIROPOULOS was in general agreement with the Chairman. He wished to reassure those who feared that acceptance of his proposal by the Commission would have little effect on the attitude of Governments. Despite the fact that members sat in their individual capacities, he was convinced that any agreement arrived at round that table would carry considerable weight in other circles.

32. He had restricted his proposal to the provisions of the first two paragraphs of article 29, as raising the most controversial issue. Arbitration must be compulsory, of course, otherwise the whole series of draft articles would be inoperable, because no State would ever voluntarily abandon its rights to fish and take conservation measures. He had not included the provision of paragraph 2 (*a*) because of the limitation it imposed on the rights of the coastal State. If the Commission wished, however, he would be perfectly willing to reinsert that provision. Changes would naturally be called for in other articles, for instance, article 25.

33. As Mr. Edmonds had pointed out, indifference on the part of a coastal State to the taking of conservation measures could not mean that other States would lose their rights in the areas concerned. The insertion in line 3 of paragraph 25, between the words " may " and " adopt ", of some phrase such as " provided the coastal State has not adopted any measures " would meet that case, and the opportunity would have been given to the coastal State to take appropriate action.

34. The Chairman's point that the special interest of the coastal State was only of secondary importance raised the question whether it was necessary to specify such an interest. In view of the fact that an objective solution to any disagreement would always be at hand in the shape of arbitration, he would be ready to delete the reference to the special interest.

35. Mr. SANDSTRÖM agreed with Mr. Edmonds that, in their general lines, the draft articles adopted at the previous session were satisfactory and that the Commission should not depart from them substantially. It had been laid down in the draft articles that agreement should first be sought on conservation measures, and that only in the event of failure could unilateral action be taken. His objection to inserting the text proposed by

[9] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), p. 45.

[10] A/CN.4/SR.350, para. 48.

[11] A/CN.4/102/Add.1.

Mr. Spiropoulos at the beginning of the whole draft, as he understood that Mr. Spiropoulos intended, was that it made no reference to the necessity of first trying to obtain agreement between the States concerned. The Commission should take as its basic text the draft articles adopted at the previous session and should not deal first with the urgent measures to be taken by the coastal State.

36. Sir Gerald FITZMAURICE, believing that Mr. Spiropoulos had offered a possible compromise, drew the Commission's attention to certain considerations. First, a distinction must be made between a special interest and an *exclusive* special interest, and in that connexion he had been struck by the Chairman's comments concerning the special interest of the coastal State. It was important to bear in mind that, although normally the coastal State did have a special interest in fisheries contiguous to its coast by virtue of its geographical position, other States might also have a special interest in such fisheries for entirely different reasons, such as that their nationals had fished there for many years and that the catch was important to the economy of the country. It was quite unrealistic to consider the coastal State as being the only one capable of claiming a special interest in that particular area. Once that fact was recognized many of the difficulties encountered by the Commission would be overcome.

37. Secondly, there was a question of presentation involved. Governments had to take into account the impact the draft articles would make on fishing circles and it might be advisable to avoid making too explicit or too exclusive a reference to the special interest of the coastal State, lest it made the draft unacceptable in certain quarters.

38. Thirdly, the Commission had perhaps overlooked the fact that there were two kinds of coastal State, those facing a large unbounded stretch of sea and those grouped round a portion of the high seas or a gulf. In the latter instance all the coastal States concerned might claim rights over the same waters, and if they all invoked the provisions of article 29 chaos might easily ensue.

39. Fourthly, the Commission should bear in mind Mr. Edmonds' point that many coastal States were either not in a position to regulate fisheries or had no desire to do so, and that it was in the common interest for conservation measures in the areas contiguous to their coasts to be instituted, if they were needed, by the States which fished there.

40. If Mr. Spiropoulos' text were adopted, the Commission must carefully examine the consequences of that decision for article 25. It must also reject Mr. Pal's proposal to add a provision in that article preventing States other than the coastal State from introducing conservation measures in the areas contiguous to its coast, which would be allowed under Mr. Spiropoulos' text if the coastal State failed to take the necessary action.

41. He considered that the provision contained in article 29, paragraph 2 (*a*), should be retained, since the whole object of the draft was to prevent stocks of fish from being unduly depleted. If there was no danger of that, then conservation was not necessary.

42. Although Mr. Padilla-Nervo's suggestions might give more or less the same results as Mr. Spiropoulos' text, he preferred the latter because it stipulated more clearly that the coastal State must first try to reach agreement with other interested States on conservation measures, and that only if it were unsuccessful could it act unilaterally. Nor did he favour, as proposed by Mr Padilla-Nervo, the emphasis being placed exclusively on the special interest of the coastal State in conservation in the area contiguous to its coast, since it was by no means always the case that the coastal State's special interest was the only one.

43. An alternative solution might be for the Commission to adopt a provision more or less on the same lines as the existing article 29, but defining the special interest of the coastal State rather more precisely by explaining that it could be either a latent or a potential interest, and keeping the reference to the existence of a special interest as being an essential condition for the exercise of the right to take unilateral action. On the other hand, he would have no objection to omitting all reference to the special interest of the coastal State provided that the conditions stated in paragraph 2 (*a*) were preserved and that article 25 were not modified.

44. The CHAIRMAN wondered whether, in the interests of orderly discussion, it would not be preferable for the Commission to take as its basic text the articles in the order adopted at the previous session, together with the comments of governments.

45. Mr. SPIROPOULOS contended that once a decision had been reached on articles 28 and 29 the others would give no difficulty.

46. He agreed with Sir Gerald Fitzmaurice that it would be absurd to prevent other States from instituting conservation measures if the coastal State failed to do so.

47. He had not included in his text the provision contained in article 29, paragraph 2 (*a*), because no such requirement had been laid down in article 25. He was, however, prepared to make good the omission.

It was agreed to postpone further discussion of article 25 and to deal first with article 29.

Article 29

48. Faris Bey el-KHOURI said that all difficulties of definition and ambiguity would be avoided if the articles were to refer solely to the "interest" of the coastal State, without any qualification of the nature of that interest.

49. Mr. SALAMANCA considered that the Commission should vote separately on the opening words of article 29. He would have thought that with regard to the nature of the coastal State's interest, Mr. Spiropoulos' proposal was substantially the same as Mr. Padilla-Nervo's.

50. He could not agree with Sir Gerald Fitzmaurice that Mr. Spiropoulos' intention had been to allow any State to regulate fisheries in an area contiguous to the coast of another State.

51. Mr. PADILLA-NERVO considered that the opening words of article 29, paragraph 1, were not consistent with paragraph 4 of the preamble to the draft articles, and therefore formally proposed the insertion at the beginning of Mr. Spiropoulos' text of a separate paragraph reading:

A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts.

Members would note that that text was identical with the beginning of paragraph 1 as adopted at the previous session, except that he had substituted the word " has " for the word " having ".

52. Mr. ZOUREK said that, although he did not believe that there was any substantial difference of opinion between Mr. Spiropoulos and Mr. Padilla-Nervo, he was inclined to support the latter's proposal because it explicitly recognized the coastal State's special interest in the conservation of resources within the area contiguous to its coasts, and because such a provision would make the whole draft more acceptable to governments.

53. Mr. AMADO observed that Mr. Padilla-Nervo's intention evidently was to affirm that the coastal State had a special interest by virtue of its geographical position.

54. Mr. PADILLA-NERVO confirmed that Mr. Amado's understanding was correct.

55. Mr. AMADO pointed out that it was also necessary to recognize the interests of other States fishing in the same area.

56. Mr. FRANÇOIS, Special Rapporteur, emphasized the need to restrict the right of the coastal State to the part of the high seas contiguous to its coasts; otherwise the provision might be interpreted as conferring on the coastal State unilateral powers over a very wide area. That was particularly important now that the Commission had deleted the limitation of 100 miles agreed upon at the fifth session.[12]

57. Mr. SCELLE found it difficult to agree to such a privilege being extended to the coastal State, since many such States had displayed no interest whatsoever in fishing in the area contiguous to their coasts, whereas other States had done so for many years. By way of example he mentioned the traditional fishing grounds of French fishermen off the coast of Newfoundland. There was no justification for favouring the coastal State in that way, since it might prejudice the interests of States wishing to maintain or develop a fishing industry.

58. The Commission seemed again to be engaged in whittling away the freedom of the high seas, which were essentially *res communis* and therefore open to all nations on an equal footing. That deplorable process had been much in evidence during the discussions on the continental shelf. If it were allowed to continue, the freedom of the high seas would disappear altogether and the oceans would be divided up between the coastal States, in flagrant violation of one of the basic principles of international law in regard to public property. As always, he would do everything in his power to resist such a trend, which would encourage further claims for wider belts of territorial sea.

59. Mr. SPIROPOULOS wished to make it clear that he had not accepted Mr. Padilla-Nervo's amendment to his text, which was based on article 29 but omitted the reference to the special interest of the coastal State.

60. Faris Bey el-KHOURI, observing that the opening words of article 29 might be interpreted as being merely descriptive of certain attributes of the coastal State rather than as laying down a condition for the exercise of unilateral rights, said he could support either Mr. Padilla-Nervo's wording or that proposed by Mr. Spiropoulos.

61. Sir Gerald FITZMAURICE appealed to Mr. Padilla-Nervo not to insist on his amendment, which would destroy the possibility of compromise opened up by Mr. Spiropoulos. He disagreed with Mr. Zourek that the adoption of Mr. Padilla-Nervo's amendment would render the draft more acceptable to the General Assembly. Coastal States would not reject the draft if no reference were made to their special interest, because of the rights conferred on them in article 29. On the other hand, the inclusion of Mr. Padilla-Nervo's amendment, which strongly suggested that only coastal States could have a special interest in conservation in the areas contiguous to their coasts, might make the draft unacceptable to a whole group of other States. He believed that though special *rights* were being conferred on the coastal State, it was undesirable to stress the coastal State's special *interest* too much in the article itself.

62. He believed that a more telling example than that given by Mr. Scelle was that of the long-established Spanish and Portuguese fishing grounds off Newfoundland, since neither Spain nor Portugal had any territories in that region, and the fisheries, at least for Portugal, were vitally important economically.

63. He asked whether Mr. Spiropoulos would be prepared to accept certain drafting changes to make his text adhere more closely to that adopted at the previous session. It might read roughly as follows:

Any coastal State, with a view to the maintenance of the productivity of the living resources of the sea, may adopt unilateral measures of conservation appropriate to any particular fisheries in the sea contiguous to its coasts provided.

The actual wording could be left to the Drafting Committee.

64. Mr. AMADO thought that, in view of modern developments, the coastal State must have some means of ensuring that its own nationals did not suffer from the fishing operations of nationals of other States with large fishing fleets, in areas contiguous to its coast. Perhaps a proper balance of the interests involved would be secured if Mr. Spiropoulos' text were adopted.

65. Mr. SPIROPOULOS said that drafting changes on the lines suggested by Sir Gerald Fitzmaurice were quite acceptable to him, particularly as he had concluded, after mature reflection, that some of the phrases from article 29 might well be reinstated.

[12] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2455), p. 17.

66. He, too, appealed to Mr. Padilla-Nervo not to press his amendment, because the special interest of the coastal State was already recognized in the preamble and it was undesirable to insert a statement in the draft articles themselves which might make them unacceptable to other States.

67. Mr. SCELLE observed that the tendency to extend the rights of coastal States had been partly corrected at the previous session by the provisions for compulsory arbitration, but now the Commission appeared to be going even farther by granting coastal States certain pre-emptive rights over the high seas in virtue of their geographical position. The scheme adopted at the previous session at least had the merit of being arranged in a logical order, and unilateral rights were conferred on the coastal State only after other possibilities had been exhausted. That text, in his opinion, had been acceptable and it had not given rise to any weighty objections from governments. He saw no reason whatever for making substantive changes and giving the coastal State preferential treatment when its rights were no more important than the rights of other States.

68. Mr. SALAMANCA considered that the main point at issue was whether or not the rights of the coastal State under article 29 should be made conditional on its having a " special interest ". Mr. Padilla-Nervo's amendment had the advantage of being explicit and of being consistent with paragraph 4 of the preamble.

69. In answer to a question by Mr. SANDSTRÖM, Mr. SPIROPOULOS confirmed that he had not proposed omitting paragraph 3 of article 29.

70. Mr. PADILLA-NERVO said that the discussion had led him to the conclusion that he must press for his amendment. Most of the objections had related not so much to his proposal as to the text adopted at the previous session. If, as had been argued by some members, the interests of the coastal State were exactly the same as those of other States, he failed to see what could have been the Commission's object at the previous session in recognizing the special rights of the coastal State. His amendment neither conflicted with the existing text of article 29 nor excluded States from fishing in areas contiguous to the coasts of other States. If his amendment did not gain support, those who were opposed to it could vote for Mr. Spiropoulos' text.

71. As his amendment contained an important statement of principle, he asked for a roll-call vote.

72. Sir Gerald FITZMAURICE said that he had understood Mr. Padilla-Nervo to have stated earlier that he wished what would now become the second paragraph of Mr. Spiropoulos' proposal to be prefaced by some such words as, " in consequence ".[13] If that were the case, although the first sentence as proposed by Mr. Padilla-Nervo might contain a statement of fact, the whole emphasis in article 29, paragraph 1, would have been changed. He would thus be forced to vote against the amendment, not because he disagreed that the coastal State had a special interest or should be given special rights, but because he was unwilling for the entire emphasis to be placed on them without mention of the corresponding interests of other States. He wondered whether Mr. Padilla-Nervo's point was not in fact met by Mr. Spiropoulos' text, which concentrated on the rights of all the States concerned.

73. Mr. PADILLA-NERVO said that he would not insist on the insertion of the words " in consequence ".

74. The CHAIRMAN put to the vote by roll-call Mr. Padilla-Nervo's proposal for a new paragraph[14] to be inserted at the beginning of Mr. Spiropoulos' text.

The result of the vote was as follows:

In favour: Mr. Amado, Mr. François, Mr. Krylov, Mr. Padilla-Nervo, Mr. Pal, Mr. Salamanca, Mr. Zourek.

Against: Mr. Edmonds, Sir Gerald Fitzmaurice, Mr. Sandström, Mr. Scelle, Mr. Spiropoulos.

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

Mr. Padilla-Nervo's amendment was accordingly adopted by 7 votes to 5, with 3 abstentions.

75. The CHAIRMAN, speaking as a member of the Commission, said that he had abstained from voting on the amendment because he thought it unnecessary to insert a statement concerning the special interest of the coastal State in article 29 once that had been done in paragraph 4 of the preamble. That should, of course, not be interpreted to mean that he was opposed to the principle itself. In fact he had been instrumental in securing its acceptance by the Commission at the previous session.

76. Mr. FRANÇOIS, Special Rapporteur, said that he had voted in favour of the amendment, which was less dangerous than Mr. Spiropoulos' text because at least it laid down some directive for the exercise of unilateral rights by the coastal State and would provide a criterion to guide an arbitral commission if the measures instituted in a zone which was claimed as " contiguous " were challenged.

77. Mr. KRYLOV, explaining his support for the amendment, said that although the special interest of the coastal State had been recognized in the preamble, it was nevertheless desirable to include a statement on the subject in the body of the text.

78. Mr. SPIROPOULOS said that he had opposed the amendment because of the existence of paragraph 4 in the preamble.

79. Mr. HSU explained that he had abstained from voting because Mr. Spiropoulos' text provided a better basis for reconciling two extreme points of view.

80. Faris Bey el-KHOURI said that he had abstained from voting on the amendment not because he rejected the contention that the coastal State had an interest in conservation in the area contiguous to its coast, but because he could not vote on the text until he knew how it would affect the remainder of article 29.

[13] See para. 19, above.

[14] See para. 51, above.

81. If Mr. Spiropoulos' text had been put to the vote first, he would have supported it.

82. Mr. SANDSTRÖM said that, although he agreed that the coastal State had a special interest in conservation in the area contiguous to its coasts, he had opposed the amendment because it might reduce the chances of agreement on the draft as a whole.

83. Mr. EDMONDS said that he had voted against the amendment because, although he had no objection to the statement of fact it contained, it might give rise to difficulties and conflicts because it took no account of the other provisions in the draft.

84. Mr. ZOUREK said that he had supported the amendment because it was consistent with the economic interests of coastal States, which had already been recognized on an even wider scale by the Commission in its draft articles on the continental shelf. In view of the latter decision, it would have been strange not to refer to the rights of coastal States to promulgate regulations for conservation, which, he pointed out, would in no way discriminate against nationals of other States.

85. Mr. PADILLA-NERVO observed that the Commission had now recognized the special interest of the coastal State in positive instead of conditional terms.

86. Mr. SCELLE said that he had already adequately explained his reasons for opposing the amendment.

The meeting rose at 1.15 p.m.

352nd MEETING

Thursday, 24 May 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add.1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 29 (continued)

1. The CHAIRMAN recalled that at the previous meeting the Commission had adopted Mr. Padilla-Nervo's amendment to Mr. Spiropoulos' combined text for articles 28 and 29. It remained to take a decision on Mr. Spiropoulos' text itself[1] which had now been appended by the inclusion of the provision contained in paragraph 2 (*a*) of the article adopted at the previous session.

2. Mr. SPIROPOULOS pointed out that he had also accepted certain drafting changes proposed by Sir Gerald Fitzmaurice, which could be referred to the Drafting Committee.

3. Referring to paragraph 3 of article 29 as adopted the previous year, he expressed concern at the possible contradiction between the stipulation that measures unilaterally adopted by the coastal State would remain obligatory pending the arbitral decision and the statement in paragraph 2 that the measures would be valid as to other States only if the requirements set out in sub-paragraphs (*a*), (*b*) and (*c*) were fulfilled.

4. Mr. PADILLA-NERVO said that it was not clear from Mr. Spiropoulos' text whether a coastal State was entitled to adopt conservation measures unilaterally after failure to reach agreement with the other States concerned.

5. The CHAIRMAN explained that, after lengthy discussion at the previous session, the Commission had decided that the coastal State should be obliged to initiate negotiations, the nature of which had not been specified, with other interested States for the purpose of reaching agreement on the conservation measures to be taken. It was only after that requirement had been fulfilled, and if no result had been reached within " a reasonable period of time "—and it had been left to the discretion of the coastal State to decide what constituted a reasonable period of time—that the coastal State could act unilaterally.

6. Mr. SANDSTRÖM considered that the condition was rather more rigorous and required States to make a real effort to initiate serious negotiations.

7. Mr. EDMONDS asked that the Drafting Committee should consider the following revised text for article 29:

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 coast may adopt unilaterally such measure or measures of conservation as may be appropriate for such area, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

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[1] A/CN.4/SR.351, para. 5.

2. Any measure 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) The scientific evidence shows that there is an imperative and urgent need for measures of conservation;

(b) The measure or measures adopted are based on appropriate scientific findings; and

(c) That such measures do not discriminate against foreing fishermen.

3. If a proposed measure or measures are not accepted by the other States concerned, any of the parties may initiate the procedure provided for in article 31. Subject to paragraph 2 of article 32, any such measure shall be in full force and effect pending the arbitral decision.

The changes he had made were of an editorial character.

8. Although he remained of the opinion he had expressed at the previous session,[2] that unilateral conservation measures promulgated by the coastal State should not be binding on others pending the arbitral award, he did not propose to reopen the question.

9. Mr. PAL said that paragraph 3 needed further clarification because it did not specify which were the other States concerned, and whether those which might have a potential interest in fishing in the area in question were included.

10. With regard to paragraph 1, he wished to sponsor the Indian Government's amendment (A/CN.4/97/Add.3, para. 48) substituting the words " provided that a State whose nationals are engaged or may be engaged in fishing in those areas may request the coastal State to enter into negotiations with it in respect of these measures " for the words " provided that negotiations . . . reasonable period of time ". The purpose of that amendment was to enable the coastal State to inaugurate conservation measures without first consulting the other States concerned. Those States could enter into negotiations with the coastal State if they found the measures objectionable.

11. Mr. SPIROPOULOS considered that the Indian Government's wish was met by article 27, the provisions of which could perhaps be made applicable to article 29, though that was a matter more of drafting than of substance.

12. Faris Bey el-KHOURI said that in cases where there were several coastal States grouped round one part of the high seas, the Commission should lay down that conservation measures could be promulgated only by agreement amongst all concerned, for it would be quite inadmissible to allow one State to impose its own regulations on the others.

13. Mr. PAL said that the Commission must also consider two more points. First, it must decide whether the tests contemplated in article 29, paragraph 2, were to apply only to the measures taken by a coastal State, or whether they should be extended to all conservation measures taken by any State or group of States, as in articles 25 and 26. Since all such measures would curtail the freedom of the high seas to some extent, he would ask that they too should be subjected to the tests. Although the last sentence of article 32, paragraph 1, indicated acceptance of that view to some extent, some more specific and clearer provision on the matter was required. Secondly, article 29 should specify what was meant by the term " coastal State " and which area would be the " area of the high seas contiguous to its coasts ".

14. Mr. SPIROPOULOS said that the draft gave rise to a whole series of intricate problems which it would probably be inadvisable to examine if the Commission was ever to complete its task. For example, when the draft spoke of a State whose nationals were engaged in fishing, did it in fact refer to ships flying the flag of that State, and not to their crews, which might include nationals of other States? Another question was in which area the regulations of one coastal State would apply, when there were several others in the vicinity?

15. In drafting rules on conservation the Commission should seek to lay down general principles without going into technical details; those could be considered at a later stage if a diplomatic conference were convened to examine the draft. In the present circumstances the Commission could not do more than seek some general way of regulating fisheries in accordance with existing international law, and he doubted whether a more radical approach would yield any results. He therefore believed it would be preferable to refer the point raised by Faris Bey el-Khouri to the Drafting Committee in order to avoid complicating the discussion.

16. Sir Gerald FITZMAURICE, while agreeing that the Commission could not enter into questions of detail, emphasized that the draft articles, if adopted, would have to be applied by fisheries experts, so that the Commission must take certain technical problems into account.

17. Faris Bey el-Khouri had drawn attention to a very pertinent point, to which he had himself referred at the previous meeting.[3] The case of several coastal States grouped round one part of the high seas was not unusual and was to be found, for example, in the eastern and western Mediterranean, in the Baltic Sea, in the North Sea, in the Caribbean, in the upper Indian Ocean, in certain parts of south-east Asia and in certain areas near Japan—all of which contained important fishing grounds. He had always felt that the Commission had concentrated too much in its draft on the case of a single coastal State fronting an open stretch of sea, interest in which had been largely responsible for initiating the discussion on conservation. The matter raised by Faris Bey el-Khouri called for a decision. If the confusion which might be caused by coastal States' enacting conservation measures unilaterally in the same area was to be avoided, such measures must be decided upon by agreement. The existence of conventions between coastal States in the North Sea, although perhaps not comprehensive in every respect, proved that agreement was possible.

[2] A/CN.4/SR.298, para. 6.

[3] A/CN.4/SR.351, para. 38.

18. Mr. SPIROPOULOS, though agreeing with the views expressed by Faris Bey el-Khouri and Sir Gerald Fitzmaurice, considered that the problem they had referred to would not be insurmountable and could be referred to the Drafting Committee. The fact that other coastal States in the area could appeal to the arbitral commission if they found unilateral regulations objectionable provided some safeguard against the possibility of chaos.

19. Faris Bey el-KHOURI considered that, throughout the discussions on the draft articles, the Commission had adopted an entirely wrong approach. Since conservation of the living resources of the high seas was a matter of universal interest, the necessary regulations should have been enacted by an international body such as the Food and Agriculture Organization. They would then have been uniform and generally applicable. However, now that the problem had been tackled from the national standpoint, both at the Rome Conference and by the Commission itself, it was too late to adopt the better course. He therefore proposed that a provision be included at the end of article 29, paragraph 1, to the effect that a coastal State wishing to initiate conservation measures in an area which was also contiguous to the coasts of other States must, if it were unable to reach agreement with the other States, submit its proposals to an arbitral commission before taking any action.

20. The CHAIRMAN doubted whether such a provision could be inserted in article 29, paragraph 1, since that article did not relate to the particular case which Faris Bey el-Khouri had in mind. If the Drafting Committee came to the conclusion that there was no appropriate place for such a provision in the draft articles themselves, perhaps the question might be mentioned in the comment.

21. Faris Bey el-KHOURI said that he had no objection to referring his proposal to the Drafting Committee; but he strongly believed that it should be incorporated in the articles rather than in the comment.

22. The CHAIRMAN said that he had suggested that the point might be mentioned in the comment only as a last resort.

23. Mr. ZOUREK said that, before taking up another article, the Commission must give the Drafting Committee some further guidance. First, it must decide about Mr. Pal's amendment to the latter part of article 29, paragraph 1,[4] and secondly, it must express its opinion on Mr. Pal's suggestion that the provisions of article 29, paragraph 2, should be applicable in all cases.[5] His own view was that, as the second question was already decided in the affirmative for all cases referred to the arbitral commission by the last sentence of article 32, paragraph 1, Mr. Pal's proposal to generalize the application of article 29, paragraph 2, should be adopted. It could easily be done by putting the provisions in question into a separate article, suitably modified.

24. Mr. SPIROPOULOS felt that the Commission should not decide the second point mentioned by Mr. Zourek until a much later stage.

25. Mr. PAL said that there was yet a third question to be dealt with—namely, that of definition—since it was not clear from the present draft what was meant by an area contiguous to the coast of a coastal State.

26. He added that the Indian Government had proposed a fundamental amendment to article 29, paragraph 1. The existing draft made negotiation with other States a prior condition for the initiation of any unilateral measure by a coastal State. The Government of India had suggested that the right of the coastal State in that matter should not be subject to any such condition. Paragraph 2 of the article amply indicated when, why and in what circumstances a coastal State would be entitled to take such measures. Urgency was one of the conditions for that power; negotiation with others, as a prior condition, would defeat its very purpose. The aim of the Indian amendment which he was now sponsoring was to remove a provision which might frustrate the purpose of the whole draft.

27. The CHAIRMAN agreed that the Commission itself must decide the important questions raised by Mr. Pal.

28. Sir Gerald FITZMAURICE, referring to Mr. Pal's amendment to paragraph 1, observed that after lengthy discussion at the previous session, the Commission had concluded that it would be both right and just to impose, as a prior condition, an obligation on the coastal State to try to reach agreement with the other States concerned before it could exercise the right of acting unilaterally;[6] for it would be inequitable to allow a coastal State, whose nationals might not previously have fished in the area concerned at all, to promulgate regulations without having attempted to reach agreement with States whose nationals might have done so for many years, and the words " within a reasonable period of time " protected the interests of the coastal State. That condition was important to non-coastal States, which might find the draft unacceptable without it. It should not be forgotten that the provisions would then not be binding, and coastal States would not be able to exercise the rights laid down in the draft, since they were not at present part of international law.

29. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice's conclusion, but not with his arguments. It was a general principle of international law that, before resorting to arbitration, States should try negotiation. The requirement in paragraph 1 was therefore a logical one and would not endanger the interests of the coastal State, since if the negotiations failed to result in an agreement, it could act unilaterally.

30. Mr. SANDSTRÖM endorsed Mr. Spiropoulos' remarks. Nevertheless, he thought the Drafting Committee should consider the possibility of two or more coastal States claiming the right to inaugurate conserva-

[4] See para. 10, above.

[5] See para. 13, above.

[6] A/CN.4/SR.302, paras. 21-29.

tion measures unilaterally in the same area. In his opinion, it was obvious that neither possessed a better right than the other.

31. The CHAIRMAN put to the vote Mr. Pal's amendment to the last phrase of article 29, paragraph 1, from the words " provided that negotiations " to the end.

Mr. Pal's amendment was rejected by 8 votes to 5 with 1 abstention.

32. The CHAIRMAN, referring to Mr. Pal's contention that the Commission should define what was meant by a coastal State, pointed out that the need to do so had not been felt either at the Rome Conference or during the Commission's own discussions. In view of the difficulties involved, he doubted whether an attempt to draft a definition would be successful.

33. Mr. KRYLOV agreed with the Chairman: not only was a definition unnecessary, because it was generally understood what was meant, but it might even be dangerous.

34. In response to an appeal by Mr. SPIROPOULOS, Mr. PAL said that he would not press his proposal.

35. The CHAIRMAN suggested that the Commission could now refer to the Drafting Committee paragraphs 1 and 2 of article 29 together with Mr. Padilla-Nervo's amendment adopted at the previous meeting and Mr. Spiropoulos' combined text [7] for articles 28 and 29 as amended during the discussion, which seemed to have gained general support.

It was so agreed.

36. The CHAIRMAN then invited the Commission to take up paragraph 3 of article 29.

37. Mr. FRANÇOIS, Special Rapporteur, said that the principle of compulsory arbitration had not been questioned by any government, though there was some divergence of opinion as to whether unilateral measures should be binding on other States pending the arbitral award.

38. Mr. ZOUREK drew attention to the comments of the Government of Israel [8] on the question.

36. Mr. FRANÇOIS, Special Rapporteur, reaffirmed his belief that in the two paragraphs referred to by Mr. Zourek the Israel Government was not contesting that conflicts arising from the draft articles should be submitted to compulsory arbitration, but was directing criticism to certain procedural matters.

40. Mr. SPIROPOULOS did not think there was any force in the Israel Government's comments.

41. Mr. SANDSTRÖM said that his impression had been that the Israel Government, like Faris Bey el-Khouri, favoured the establishment of some permanent body to deal with the regulation of fisheries from the outset. The statements contained in the first two sentences of the second paragraph referred to by Mr. Zourek were so indefinite that it was difficult to understand precisely what the Israel Government had in mind.

42. Mr. KRYLOV pointed out that far more serious objections to the arbitration provisions were those raised by Mr. Padilla-Nervo in his statement at the 338th meeting.[9]

43. Arbitration had played a great and honourable role in the history of international relations, but compulsory arbitration was fast disappearing and was now to all intents and purposes accepted only by small States. Members should be mindful of the reception given to the draft on arbitral procedure by the General Assembly and of the fact that the draft had so far led to no practical results, the reason being that both the eminent special rapporteur on the subject and the Commission itself had been too ambitious.

44. He was surprised that lawyers of such distinction should *expect* governments to commit themselves to compulsory arbitration when machinery for the peaceful settlement of disputes was provided by Article 33 of the United Nations Charter. Without in any way wishing to be intransigent, he urged the Commission to drop the provisions concerning compulsory arbitration and the time-limits, upon which Sir Gerald Fitzmaurice had insisted with such energy at the previous session and which it would be difficult for States to accept, and to substitute for that unnecessarily stringent and formal machinery a provision for the settlement of disputes in accordance with the procedures laid down in Article 33 of the Charter. Once the General Assembly had taken some final decision concerning the draft on arbitral procedure, the Commission could revert to the present articles which deal with implementation.

45. In conclusion, he suggested that, as a matter of drafting, it would be preferable to deal with the settlement of disputes in a single article, so as to remove the somewhat clumsy repetition which now occurred in, for example, articles 26, 27, 28 and 29.

46. Mr. SPIROPOULOS suggested that the whole question of principle raised by Mr. Krylov related to article 31, discussion of which had not yet begun.

47. Faris Bey el-KHOURI saw no reason why unilateral measures should be binding on other States pending the arbitral award. It would be unjust to place the burden of applying to the arbitral commission on those States, when they had not been responsible for the regulations.

48. The CHAIRMAN said that it was impossible to discuss the articles on conservation separately, one by one. That had been proved by the discussion on article 25. Similarly, article 29, paragraph 3, could not be discussed independently of article 31.

49. He therefore suggested that the principle of arbitration should be considered in that joint context. Once that question had been settled, a decision on the other aspects of the matter should be relatively easy.

[7] A/CN.4/SR.351, para. 5.

[8] A/CN.4/99Add.1, page 27.

[9] A/CN.4/SR.338, para. 14.

It was agreed to discuss the principle of arbitration as an essential preliminary to the decision on articles 29, 31, 32 and 33.

50. Mr. SCELLE said that the question under consideration was not really arbitration, but only a secondary and rather special aspect of it. It was only natural that jurists and States whose conception of international law was based on sovereignty should hesitate to approve the concept of arbitration, which entailed a limitation of sovereignty. Sovereignty carried to its extreme could, however, lead only to international chaos.

51. The Commission was concerned with the question of conservation, and the issue of arbitration had been raised because of the possibility of regulating and controlling fishing activities by means of an international organization. Although that stage had not been reached, the draft articles did represent a step towards it. Since States were sovereign entities, arbitration was the appropriate solution for any conflicts that might arise. Arbitration, however, was not a precise and uniform concept, for there were three types: diplomatic, legislative and judicial arbitration. It was the second type, by which regulations were made, that was under consideration, and the question whether arbitration was optional or compulsory was of secondary importance.

52. In connexion with Mr. Krylov's remarks, he pointed out that the attitude of the United Nations General Assembly to the Commission's draft on arbitral procedure had not been different from its attitude to other proposals submitted by the Commission.

53. He had often pointed out the important part played by conciliation in arbitral decisions on disputes between States. Purely judicial arbitration did not exist, and he was therefore inclined to agree with the Special Rapporteur that the Government of Israel's criticism was unfounded. It was, on the other hand, true that a more accurate term than " arbitral commission " might have been chosen for the organ which would settle disputes; perhaps some such term as " commission of experts " might be preferable.

54. Mr. AMADO said that the question at issue was whether the provisions on arbitration should or should not be retained. In his view, arbitration was the application of law.

55. Mr. SALAMANCA, endorsing the Chairman's point of view, said that a question of substance of considerable importance had been raised. He was convinced that the major problems should be tackled first, leaving points of detail till later. A decision should be taken on Mr. Spiropoulos' text.[10] It was obvious that article 29, paragraph 3 and article 31 were closely related.

56. The CHAIRMAN said that the Commission would doubtless find it desirable to take up the question of arbitration in connexion with the conservation of the living resources of the high seas on the basis of the system set out in article 31. The approach, however, should be of a strictly practical nature.

It was so agreed.

57. Mr. FRANÇOIS, Special Rapporteur, felt that Mr. Krylov's implicit reproach that, in his report, he had not dealt fully with governments' comments on the articles on arbitration was hardly justified. He had been asked by the Chairman to summarize the comments, not on the details of the arbitration procedure proposed, but on the principle of compulsory arbitration for the settlement of disputes regarding conservation measures. Although some governments—in particular, those of India and Israel—had made reservations, not a single one had opposed the principle of arbitration in that field. He was aware that the governments of some countries, including those of Mr. Krylov, Mr. Zourek and Mr. Padilla-Nervo, were opposed to compulsory arbitration; but since no comment had been received from them, he had been unable to summarize their views.

58. He shared Mr. Krylov's opinion that the Commission should not, as a rule, insert arbitration clauses in its drafts. Its task was codification, not the settlement of disputes, which was an entirely separate issue. The articles on the conservation of the living resources of the high seas, however, were not a mere codification of existing law, but constituted, rather, a progressive development of the law, entailing some restriction of the traditional freedom of States. It was understandable that States should be reluctant to accept such restrictions unless they could be convinced that the new rules would not be applied arbitrarily; there was therefore no doubt that many States would make their acceptance of the articles on conservation dependent upon the principle of compulsory arbitration for the settlement of disputes arising under those articles. If the new rights of coastal States were dissociated from the obligation to submit to arbitration in case of dispute, many States would reject the draft articles and the Commission's entire system of conservation measures would collapse. The discussion, therefore, could not be restricted to article 29, paragraph 1, and exclude paragraph 3. Certain governments had commented on article 31; for the moment, however, it might be preferable to confine the discussion to general principles.

59. Sir Gerald FITZMAURICE said that the Special Rapporteur had explained the point of principle with admirable succinctness, and he would add only that the draft articles on conservation gave certain rights to coastal States which under existing law they did not possess. It was quite clear that arbitration was an indispensable condition for the acceptance of the articles by other States when they were asked to agree to the new system.

60. Mr. Krylov had praised conciliation as superior to arbitration. But conciliation would not provide any solution in cases of disputes regarding conservation measures. To take the example of a number of States whose nationals were fishing in an area of the high seas near the coast of a coastal State: the coastal State might maintain that there should be a close season, on the

[10] A/CN.4/SR.351, para. 5, and para. 35 above.

ground that the fish in that area spawned during a certain period of the year. If the other States were to contest that view, there was clearly no room for conciliation; the only way to establish whether the proposed conservation measure was justifiable or not was by scientific investigation by an expert and authoritative body. The case was quite different where there was a dispute over, say, the exact area to be fished respectively by two States both having the right to engage in fishing in a particular zone; in any such clash of rights conciliation could certainly be brought into play.

61. The concern of the Commission, however, was with conservation, and it was absolutely essential for the successful functioning of the system conceived that the articles on arbitration should be retained substantially as they stood.

62. Mr. KRYLOV agreed with the Special Rapporteur that the settlement of disputes was quite a different issue from the establishment of substantive rules. For that reason he proposed that a formal vote on the question of arbitration in connexion with the conservation of living resources of the high seas should be deferred until the general question of arbitration had been settled.

63. He was unable to follow Sir Gerald Fitzmaurice's argument that conservation and arbitration could not be dissociated. There seemed to be no adequate reason why a settlement of any disputes that might arise should not be sought by other peaceful means and, of course, always on the basis of expert scientific advice. He was not opposed to arbitration in principle, although in general his preference would be for optional rather than compulsory arbitration. The conservation of the living resources of the high seas was, after all, not a political issue, but a matter which gave full scope for conciliation.

64. With regard to his comments on the Special Rapporteur's treatment of the question, he had not raised specific objections to the comment of the Government of Israel—although he regarded it as too long—and had merely intended to express his regret that an unsatisfactory method of presentation had been forced upon the Special Rapporteur.

65. Mr. SANDSTRÖM, supporting the views of the Special Rapporteur and Sir Gerald Fitzmaurice, said he would merely add that he was certainly not opposed to the settlement of disputes by other peaceful means than arbitration. Indeed, the articles had stressed the procedure of negotiation as a preliminary, arbitration following only if negotiations had failed to produce agreement. As Mr. Scelle had said, the term "arbitration" was perhaps not a very good choice.

66. Mr. HSU suggested that the point was perhaps being laboured to excess, since the draft articles had not been adopted by the General Assembly, which was the final arbiter. In the question of the adoption of judicial measures for the settlement of disputes it was of little importance whether the articles were drafted on the basis of Mr. Scelle's approach or according to the traditional model. They were, however, the corner-stone of the whole edifice. The Commission's ideas with regard to conservation had evolved in the direction of restricting the rights of States on the high seas by recognizing the special interests of the coastal State in the regulation and control of fishing. In order to win the acceptance of those States whose freedom had previously been unfettered, it was essential to provide some judicial method for the settlement of disputes, namely—arbitration. It would be impossible to abandon one part of the new provisions—dealing with arbitration—while giving full force to the other part: the extended rights of the coastal States. Such a course would bring down the whole scheme.

67. Mr. PADILLA-NERVO, referring to the Special Rapporteur's statement that the Mexican Government was opposed to compulsory arbitration, said that that was not the case. He need only instance the Pact of Bogotá of 1948, signed by his country, which had been one of the few to ratify it without reservations.

68. In matters of conservation, compulsory arbitration was not desirable. It might be true that some States would not accept the draft articles if those dealing with arbitration were not included. A greater number of States, however, would reject the system if the arbitration articles were included. The principle of compulsory arbitration had not gained acceptance among States, as was indicated by the fact that of 21 States signatories to the Pact of Bogotá only 8, including Mexico, had ratified the agreement; he recalled that the United States had entered an express reservation with regard to the article on compulsory arbitration. Again, the General Act of Geneva for the Pacific Settlement of International Disputes, of 1928, had received only a dozen ratifications. Mexico accepted the principle of general compulsory arbitration, and in any specific case the Mexican Government would be bound by the provisions of the Pact of Bogotá. As he had stated previously, opposition to compulsory arbitration was widespread and he was convinced that, on the basis of the good faith of States, settlement of disputes by voluntary means was a more solid foundation for lasting agreement.

69. The conditions in article 29, paragraph 2, were technical and could be opposed by no government acting in good faith. For purely practical reasons the pacific settlement of a dispute by means such as were suggested in Article 33 of the United Nations Charter, was perfectly feasible, always provided that the conditions in article 29, paragraph 2, were precisely drafted.

70. He proposed that article 29, paragraph 3, and articles 31, 32 and 33 be replaced by the following text:

> If these measures are not accepted by the other States concerned, the parties to the dispute shall seek a settlement by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, reference to regional bodies or by other peaceful means of their choice.

He was convinced that that was the most satisfactory solution of the problem. Compulsory arbitration might well exaggerate the importance of minor specific cases and even lead to more serious disputes. He was putting forward his personal view and not that of the Mexican Government.

71. The establishment of regional expert bodies to decide whether the provisions of article 29, paragraph 2, had been fulfilled was a possibility worth considering, and he recalled that the Inter-American Specialized Conference held at Ciudad Trujillo in 1955 had decided to set up an oceanographic institute. The technical advice of an institute of that kind would carry great weight.

72. Mr. ZOUREK said that several speakers had urged that compulsory arbitration was an indispensable condition for the practical application of the draft articles on conservation. He had not been convinced by the arguments adduced and failed to see what advantage the articles on arbitration had over other existing means for the settlement of disputes. For there was no lack of other means; he need only mention the Hague Convention of 1907 for the Pacific Settlement of International Disputes, the General Act of Geneva of 1928 for the Pacific Settlement of International Disputes (revised in 1949), the optional clause in Article 36 of the Statute of the International Court of Justice, the procedure for the settlement of disputes by the Security Council of the United Nations and many bilateral agreements between States interested in fishing on the high seas.

73. A further point was the question whether the procedure proposed in the draft article was in fact arbitration. He would agree with Mr. Amado[11] that the classic conception embodied in article 37 of the Hague Convention implied a legal basis for settlement. In the cases to which the present draft referred, however, it would usually be necessary to make new rules, and that was not within the scope of arbitration. Moreover, the cases covered by the draft articles varied widely in importance and scope, and a single instrument for dealing with them irrespective of their nature was inappropriate. In some cases, an expert opinion would suffice; in others, it would be advisable to have recourse to a commission of inquiry or a joint commission, while in yet others the best means of arriving at a solution might be to refer the matter to an arbitral tribunal after drawing up a *compromis*. He would take only one example. It might be considered that the purpose of conservation of the living resources of the sea was either to maintain those resources at their existing level or to develop them in order to secure the maximum supply of food and other marine products. A dispute between a coastal State, the growth of whose population urgently demanded that emphasis be laid on the latter aspect and another State, which wished only to maintain the *status quo*, was hardly a question that could be left to the decision of an arbitral commission. Such a matter, which was of vital importance to the coastal State, could be settled by the States concerned only by means of an international convention.

74. If it were objected that other means than arbitration were available under the articles, his reply would be that in practice an arbitration clause was always invoked without first seeking a settlement by other means. What was important was the obligation to settle the dispute by peaceful means. If that were codified, the decisive factor would be the common desire to settle and not a set of articles on compulsory arbitration.

75. Sir Gerald FITZMAURICE suggested that Mr. Zourek had misconceived the situation. The means for settling disputes that he had quoted were perfectly valid provided the States concerned *wished* to resolve a difficulty that had arisen. That, precisely, was the nub of the whole matter, for what would be the situation if the State that had unilaterally imposed certain measures of conservation did not want a settlement of any resulting dispute? Under Mr. Padilla-Nervo's proposal, such a State, while paying lip service to the principle of conciliation, might procrastinate for a period perhaps of years, during which time the conservation measures would be imposed, despite the disagreement of the other State. Only a positive obligation to submit a difference to arbitration could lead to a satisfactory solution. The Commission must draft articles that would be acceptable to all the States concerned, and it was in the interests of the partisans of the coastal State to work to that end. The attitude that they had adopted, however, if maintained, would inevitably lead to the frustration of their own hopes. At its previous session the Commission had gone a long way to meet their point of view. Without destroying the system it had set up, it could not possibly agree to the deletion of the provisions on arbitration contained in article 29, paragraph 3, and articles 31, 32 and 33.

The meeting rose at 1 p.m.

[11] See para. 54 above.

353rd MEETING

Friday, 25 May 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add.1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 29 (continued)

1. The CHAIRMAN pointed out that the Commission already had before it two amendments to article 29, paragraph 3—namely, a general proposal by Mr. Krylov [1] for the abandonment of the provisions concerning compulsory arbitration, and a specific proposal by Mr. Padilla-Nervo [2] for the substitution of alternative means of peaceful settlement.

2. Mr. ZOUREK, replying to Sir Gerald Fitzmaurice's contention at the previous meeting that he had misconceived the situation,[3] pointed out that States willing to seek a peaceful settlement of their differences would do so by voluntary recourse to one of the many means of peaceful settlement available. States willing to submit to compulsory arbitration could easily do so by accepting the optional clause in the Statute of the International Court of Justice or acceding to the General Act of 1928. States not so inclined would be even less willing to submit to compulsory arbitration in the matter of conservation of the living resources of the high seas.

3. It had frequently been argued during the discussions that compulsory arbitration must be imposed on States because the draft would confer rights on coastal States which they did not previously possess; but he did not find that argument convincing. In that connexion, he recalled the practice followed in aerial navigation. When the problem of regulating aerial navigation had arisen after the First World War, the Paris Convention of 13 October 1919 had recognized that States had sovereignty over the air space above their territory, at a time when the principle of freedom of the air had been upheld by most writers, after being twice affirmed by the Institute of International Law, in 1906 and 1911. The authors of the convention of 1919 had also thought it necessary to impose compulsory arbitration on the contracting Parties, but the body of rules formulated in the convention had worked very well without the parties ever having had recourse, as far as he was aware, to that method of settling disputes.

4. The CHAIRMAN regretted that difficulties had arisen over a question which, to all appearances, had been satisfactorily settled at the previous session. Mr. Krylov and other speakers had referred to the General Assembly's opinion on the Commission's draft on arbitral procedure and the fact had to be faced that the reaction had not been favourable. A close examination of the records, however, revealed that the rejection of the Commission's proposals had been due to the view that they were excessively rigorous as provisions for the settlement of disputes at the international level. The principle of compulsory arbitration had been accepted by the General Assembly when it set up a mixed arbitration commission to settle certain disputes between Italy and Libya.[4] It was therefore a reasonable assumption that the General Assembly would not reject the substance of the Commission's draft. The text in its existing form, however, was perhaps excessively rigid and tended to disregard the variety of contingencies.

5. The question at issue was whether disputes arising out of measures of conservation should be subject to compulsory arbitration. The principle of the traditional system of optional arbitration was embodied in Mr. Padilla-Nervo's proposal. In the settlement of international disputes during the period of predominance of the concept of sovereignty, procedure had been governed by that concept. The evolution of international law, however, had changed the situation. The new starting point was the recognition of the right of the coastal State to regulate the exploitation of certain resources that were not its own property, but were common to all States, and the point to be decided was whether the coastal State should be compelled to accept compulsory arbitration when differences arose with another State over the regulatory measures taken.

6. Mr. Padilla-Nervo's proposal amounted to the imposition of a clear obligation to resort to peaceful settlement. At the previous session, when the question had been considered in all its aspects, it had been decided that the obligation was imperfect in that it would lapse before it could be fulfilled. What were the means proposed by Mr. Padilla-Nervo? First, negotiation. If that were begun, the obligation would be fulfilled *ipso facto*. From the outset of negotiations the question of the appointment of mediators by the parties did not arise. If no agreement were reached, however, there was always the problem of who was to appoint the conciliation commission. In practice, that procedure inevitably entailed lengthy delay, during which time the unilateral measures imposed by the coastal State remained in force to the detriment of the rights of other States. He need not describe in detail certain recent cases in which a coastal State had taken unilateral conservation measures, for they would be in the minds of all members. It was known, however, that, conservation measures having been adopted in good faith, the State that had adopted them had subsequently refused to enter into negotiations for the peaceful settlement of differences that had arisen in that connexion with other States. In those cases, the stipulations of Article 33 of the United Nations Charter had been ignored, although they represented a rule of law that was in force, and the conservation measures unilaterally adopted had continued to be applied. The same result would follow from the acceptance of Mr. Padilla-Nervo's proposal.

7. It had been said that the Commission's draft articles would be rejected by several coastal States. But what of the attitude of non-coastal States if the arbitration provisions were deleted? The Commission must strike a balance between the opposing points of view. Recog-

[1] A/CN.4/SR.352, para. 44.

[2] *Ibid.*, para. 70.

[3] *Ibid.*, para. 75.

[4] General Assembly resolution 988 (X), 6 December 1955.

nition of a contiguous zone in respect of fisheries, in which the coastal State would have the right to adopt conservation measures unilaterally without any accompanying obligation, would lead to an absurd situation in which the coastal State would be given exclusive rights in an area of the high seas where its interests were not exclusive.

8. It should be stated in the report that acceptance of the principle of compulsory arbitration was without prejudice to any decision that the Commission might take on arbitral procedure in its draft on that subject to be submitted to the General Assembly at its thirteenth session.

9. Mr. EDMONDS suggested that during the discussion the main issue had become somewhat obscured. For many years nationals of States interested in fishing had conducted their operations in whatever area of the high seas they chose—a practice which, not unnaturally, had led to a decrease in many species of fish in several parts of the world. There was an appropriate analogy in the early extravagant expenditure of the forestry and oil resources of the United States, where conservation measures had been taken only tardily. In the case of fisheries, conservation measures on a sound scientific basis were undertaken with the object of increasing, or at least maintaining, the average sustainable yield of marine products.

10. Subsequent to the Commission's taking up that subject, the General Assembly, in resolution 900 (IX), had requested the Secretary-General to convene an international technical conference in Rome and had decided to refer the report of that conference to the Commission. The Rome Conference had linked the granting of special rights to coastal States with the obligation to resort to arbitration in the case of any dispute arising out of the exercise of those rights, and the Commission—whose present Chairman had been Deputy Chairman of the Rome Conference—had accepted that principle, which was the corner-stone of the whole system.

11. The question was one of fact and not of theory. If the living resources of the high seas were to be maintained or increased, the problem of conservation must be solved. There were two possible approaches. The first—mutual agreement between States—as implicitly recognized by the Rome Conference, had not proved satisfactory. The second was the establishment of an international organization to control conservation of all living resources; in the present circumstances, however, that was impracticable. The Commission had therefore agreed that international law should recognize the grant of certain additional rights to the coastal State, but that in exchange for such rights the coastal State should accept arbitration if any measure it imposed was objected to by another interested State.

12. Despite certain reservations, there had been a welcome measure of agreement among governments on the broad principles laid down by the Commission. To remove the foundation-stone of arbitration would bring down the whole structure, for it would inevitably entail rejection of the draft by the great majority of States interested in fisheries. Rules must be not only workable, but acceptable.

13. The Commission was fortunate in having as a basis for its work the findings of such an authoritative body as the Rome Conference, and an impartial study showed that the only workable plan was that embodied in the general principles set forth in the draft articles.

14. Mr. AMADO, referring to the discussions on the subject at the previous session, recalled that Mr. Spiropoulos and the Chairman had both said that questions of detailed arbitration procedure were not the proper concern of the Commission and that once a sufficient number of ratifications to the convention had been received it would be necessary to set up an international authority. He had agreed and had proposed a text.[5]

15. The whole system and its evolution were in a very large measure due to the Chairman, to whose initiative and authority he paid a tribute. It was he who had evolved the concept of the special interest of the coastal State.

16. It had to be realized that the apprehension of coastal States at the spectacle of large-scale, mechanized fishing off their coasts was natural, and he had doubted whether the small coastal States, which were fearful of their very survival, would accept the principle of compulsory arbitration. There was no doubt that many smaller States felt that, in the matter of juridical disputes, the scales were weighted against them. That fact emphasized the importance of scientific and technical justification for any conservation measures adopted—a point that had been stressed in his proposal—always bearing in mind the principle of arbitration as an essential provision that no jurist would oppose. His solution had been in the nature of a compromise, because he had been very conscious of the complexity and difficulty of the whole problem. Since then, there had been a trend of opinion towards the setting up of an international marine organization, in which the Brazilian Government in particular was interested.

17. On the question of the draft articles, he fully endorsed the Chairman's opinion.

18. Faris Bey el-KHOURI said that Mr. Padilla-Nervo's proposal suffered from two defects. First, there was a lack of decisiveness. In the case of a dispute, Mr. Padilla-Nervo's only solution was to enumerate a number of familiar procedures for peaceful settlement. The issue, however, might perfectly well remain undecided. At the previous session, he (Faris Bey el-Khouri) had stressed the necessity for compulsory arbitration,[6] his own preference for a tribunal being the International Court of Justice. Although that proposal had not gained the Commission's approval, he still thought that it was the best solution.

19. The second defect of Mr. Padilla-Nervo's proposal was that any solution arrived at by the means suggested would not be binding on other States, but would apply

[5] A/CN.4/SR.298, para. 15.

[6] A/CN.4/SR.304, para. 24, SR.305, paras. 13, 32.

only to the States immediately concerned. To be fully satisfactory, however, a solution should be of general application.

20. Mr. SCELLE endorsed the Chairman's remarks, except for one point, which he thought had not been fully understood. It was a simple matter of procedure, which did not involve the institution of compulsory arbitration. When a State agreed to resort to arbitration, the basic assumption was simply that it would act in good faith. The obligation depended in fact on the voluntary acceptance by a State of the principle of arbitration. What must be avoided was acceptance in principle followed by evasion in practice. Further, the question of principle must be clearly distinguished from the issues in a specific case.

21. Mr. Padilla-Nervo's proposal merely re-stated Article 33 of the Charter. Unfortunately, for all practical purposes, that article was a dead letter. In the matter of conservation, however, the situation was one of crisis and could not be allowed to drift, particularly in view of the increasing awareness of the truth that many peoples of the world were under-nourished.

22. Mr. Amado's idea of an authoritative international organization was admirable, but the plain fact was that in existing world conditions the proposal was premature.

23. The draft articles were an undoubted step in the right direction, whereas Mr. Padilla-Nervo's proposal amounted to little more than beating the air.

24. Mr. PAL asked what would be the consequence of the votes on the proposed amendments to article 29, paragraph 3. If the amendments were rejected, would article 31 be adopted automatically? If so, he would be in some difficulty. Article 29, paragraph 3, referred to the procedure envisaged in article 31, and article 31 comprised three distinct paragraphs. If the Commission accepted the principle of compulsory arbitration in that connexion, he would then have no objection to article 31, paragraph 1, but paragraph 2 would still be unacceptable to him. It was of the very essence of arbitration that the parties to the dispute should have the choice of arbitrators. That would be so, as long as the parties' confidence in justice remained a factor to be considered in the administration of justice. For all practical purposes, article 31, paragraph 2, of the draft did not leave the parties any choice. It was notorious that agreement of the parties even on the choice of one umpire was a rare thing. Paragraph 2, in requiring agreement of the parties on all the members of the arbitral commission, practically took the choice out of their hands. Hence States would be invited not only to submit to compulsory arbitration, but also to submit to arbitration by a body set up by a third party—a situation that would, he feared, be quite unacceptable to them.

25. The CHAIRMAN replied that rejection of the amendments to article 29 would not pre-judge any decision on article 31, which would be put to the vote in the usual manner, together with any amendments that might be submitted.

26. Mr. PAL said that in that case there was nothing to be gained by taking a decision on article 29, paragraph 3, separately. It would be simpler to decide once and for all on provisions for the settlement of disputes.

27. The CHAIRMAN said that that point, which had been made by Mr. Krylov at the previous meeting,[7] raised a different issue.

28. Sir Gerald FITZMAURICE said that the question at issue was the principle of compulsory arbitration and not the detailed provisions covered by article 31. Mr. Pal's point might be met by Mr. Edmonds' amendment [8] to article 31.

29. Mr. SANDSTRÖM, concurring, said that consideration of procedural details should be deferred pending the decision of principle on article 29, paragraph 3.

30. Mr. SALAMANCA said that, with regard to Mr. Padilla-Nervo's proposal, the Commission had a choice between two alternatives. Mr. Padilla-Nervo considered that the Commission should simply establish the rights of a coastal State, leaving it free to choose the method of exercising those rights. That, of course, implied a certain criticism of the work of the previous session, which Mr. Padilla-Nervo justified by stressing the trend of opinion in favour of his view. There was, however, another point of some interest from the political angle —namely, the apprehension that the rights of the coastal State might be denied it by fishing States. He would point out that both the Rome Conference and the Commission had established only one criterion—namely, the technical criterion referred to by Mr. Scelle.

31. He was aware of the international tension that had arisen between the States concerned in the cases referred to by Mr. Scelle, but he must stress that any unilateral affirmation of rights was precarious until endorsed by international law.

32. The Commission had recognized the special interest of the coastal State by granting it rights which it did not previously enjoy. Unfortunately, the progressive nature of the Commission's work had not been appreciated in all quarters. Despite differences of opinion within it, it should act as a catalytic agent, for in that way it would be fulfilling its true functions. The conclusion reached at the Inter-American Specialized Conference at Ciudad Trujillo in 1956 had been that there was no agreement among the States represented at the Conference concerning the nature and scope of the special interest of the coastal State. Rejection of Mr. Padilla-Nervo's proposal would not prevent the question being raised in the General Assembly. Some attempt at least should be made to reconcile the two conflicting viewpoints. He deprecated doubts being thrown on the validity of the Commission's work at the previous session and would be unable to vote for Mr. Padilla-Nervo's proposal.

33. Mr. ZOUREK said that Mr. Scelle's strictures on Article 33 of the Charter had been too severe. As far as he knew, not a single dispute concerning conservation of the living resources of the high seas had yet been submitted, either to the Security Council or to any other international body.

[7] A/CN.4/SR.352, para. 62.

[8] See para. 56 below.

34. Mr. SCELLE observed that that fact proved his point exactly, not only with regard to disputes concerning conservation, but also with regard to differences in other spheres.

35. Mr. ZOUREK emphasized that it was for the interested States themselves to have recourse to the provisions of Article 33 and put them into effect to settle their differences.

36. Mr. SANDSTRÖM observed that the special interest of the coastal State in the region of the high seas contiguous to its coast was being spoken of as though it were an exclusive right. Other States, especially those with long-established fishing industries, also had interests in the same regions, and therefore in case of conflict between the different interests the matter should be submitted to arbitration.

37. Mr. SALAMANCA agreed that that was the crucial issue, but pointed out that States had already begun to talk in terms of " rights " rather than " interests "; some had even spoken of " exclusive rights ".

38. Mr. PADILLA-NERVO said that he did not intend to reply to all the comments on his proposal, and would only emphasize that it had been based on a twofold premise: first, that the good faith of States should not be questioned unless their actions belied it and, secondly that differences between them must be settled by peaceful means; otherwise, in the absence of an international authority to ensure that States honoured their treaty obligations, armed conflict was the only remaining remedy.

39. He certainly did not subscribe to the view that Article 33 of the Charter had remained a dead letter, and believed it was an over-simplification to suggest that States would not abide by the Charter, but would resort to arbitration. The Commission must take into account political realities and the practice of States. He himself believed that disputes concerning conservation measures could be settled easily.

40. Perhaps there was some confusion, in that conservation was sometimes approached purely from the point of view of exploiting the resources of the sea, rather than from the point of view of preserving certain species from depletion. It seemed hardly likely that small States which had not the facilities to carry out costly scientific experiment and research would be in a position to hamper the activities of powerful fishing fleets.

41. At times, members gave the impression that the Commission was conceding some rights or privileges to the coastal State, and that that concession must be matched by acceptance of compulsory arbitration, without which, it was contended, the scheme would be inoperable; but he had so far heard no convincing arguments in support of that thesis.

42. Whatever decision the General Assembly might take, the coastal State had a special right by very reason of its contiguity and a number of other important factors, and that special right would not disappear even if the procedure for the settlement of disputes proved unworkable. An important step forward had already been taken by the Commission, in recognizing the coastal State's special interest.

43. Although certain economic interests were involved, it was unlikely that an armed conflict would result from the application of conservation measures, and hence there was a good chance of achieving international agreement.

44. Mr. KRYLOV said that, in spite of Mr. Padilla-Nervo's able defence of his proposal, he remained of the opinion that the Commission should, for the time being, discard the provisions concerning arbitration until a final decision had been reached concerning the draft on arbitral procedure. He accordingly made a formal proposal, which he considered to be purely of a procedural nature, to that effect.

Mr. Krylov's proposal was rejected by 10 votes to 4, with 1 abstention.

45. Mr. SPIROPOULOS, observing that Mr. Padilla-Nervo seemed to share the view of most members, asked whether the substance of his proposal could be covered in the comment.

46. Mr. PADILLA-NERVO said that he would not insist on his proposal's being put to the vote if the text were reproduced in the comment, together with the reasons he had given for submitting it. Members of the General Assembly would then be able to acquaint themselves with his views.

47. The CHAIRMAN explained that it was customary to refer in the Commission's report to the various proposals submitted. The personal views of individual members were not recorded in the report, except that short statements of dissenting opinions might be inserted, together with a reference to the summary records, where fuller explanations of those opinions were given.

48. Mr. FRANÇOIS, Special Rapporteur, said that it was possible to indicate in the report that a certain view had been expressed, and had either been supported or opposed by the majority; but if a statement of that sort were to be made, a vote must be taken on Mr. Padilla-Nervo's proposal, as he did not know how much support it had obtained.

49. Faris Bey el-KHOURI said it would be most undesirable to put Mr. Padilla-Nervo's proposal to the vote, since its rejection might be interpreted to mean that the Commission was not in favour of disputes concerning conservation measures being settled by the procedures laid down in Article 33 of the Charter, whereas obviously such procedures would be permissible and desirable.

50. He himself could not vote for the proposal because it was inadequate and because it should be stipulated that if other peaceful means for the settlement of disputes failed, there should be compulsory reference to an arbitral tribunal or to the International Court of Justice.

51. The CHAIRMAN assured Faris Bey el-Khouri that such a construction would not be placed on the rejection of the proposal.

52. Mr. AMADO said that the Commission should take advantage of Mr. Padilla-Nervo's willingness not to insist

on a vote; that would enable it to avoid taking any radical decision. Interested persons could obtain an account of the discussion from the summary records.

53. Mr. PADILLA-NERVO did not believe that a vote cast against his proposal by those who found it inadequate and who believed that compulsory arbitration was essential because reliance could not be placed on the good will of governments, would imply opposition to the peaceful settlement of disputes as such. The difference of opinion was of a purely legal character and had nothing whatever to do with political considerations.

54. The CHAIRMAN put to the vote Mr. Padilla-Nervo's proposal[9] of a new text to replace article 29, paragraph 3, and articles 31, 32 and 33.

Mr. Padilla-Nervo's proposal was rejected by 9 votes to 4, with 2 abstentions.

Article 29, paragraph 3, was accordingly adopted.

Article 31

55. The CHAIRMAN thought that the best procedure would be for the Commission to continue by discussing article 31, after which it would be easier to take a decision on the remaining articles.

56. He said that Mr. Edmonds would shortly introduce his new text for article 31, which read as follows:

1. The differences between States contemplated in articles 26, 27, 28, 29 and 30 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 composed, in any combination, of seven members well qualified in the legal, administrative or scientific fields of fisheries, depending upon the nature of the dispute to be settled.

3. Two members shall be named by the State or States on the one side of the dispute; and two members shall be named by the State or States contending to the contrary. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement of the States in dispute, or failing agreement shall, upon the request of any State party, be from neutral countries and named as follows: one, who shall act as chairman, by the Secretary-General of the United Nations; one by the President of the International Court of Justice; and one by the Director-General of the Food and Agriculture Organization. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named by the Secretary-General of the United Nations. Any vacancy arising shall be filled in the same manner as provided for the initial selection.

4. The arbitral commission shall be convened by the chairman within five months from the date of the request for arbitration. Its determination or determinations shall be submitted to the parties within a further period of three months, unless the arbitral commission decides to extend such period.

5. Except as herein provided, the arbitral commission shall determine its own procedure.

6. The remuneration of members of the arbitral commission shall be paid by the State or States selecting the member, or on whose behalf the member was selected by the Secretary-General of the United Nations; the remuneration of the other three members shall be an item of joint expense. Joint expenses arising from the arbitration shall be divided equally between the parties.

57. Mr. FRANÇOIS, Special Rapporteur, summarizing the comments of governments on article 31 (A/CN.4/97/Add.3), said that the Brazilian Government had recommended the establishment of a permanent international maritime body, not only to settle differences arising from the application of the articles, but also to carry out technical studies. That possibility had been discussed at the previous session, and he thought it merited further careful study. In his opinion such a body, if of an advisory character only, could be valuable, but in view of the great diversity of the problems to which differences might give rise, he doubted whether it should be given wide arbitral and judicial powers. He therefore continued to believe that the machinery provided by article 31 was preferable.

58. The suggestion by the Government of the Union of South Africa that the words " after consultation " be substituted for the words " in consultation " in paragraph 2, was consistent with the Commission's intention and could be accepted.

59. The Netherlands Government's observations related only to points of drafting.

60. The United Kingdom Government had objected to the provision in paragraph 3 enabling the arbitral commission to extend the time-limit for rendering its decision. As he had explained in paragraph 65 of the addendum to his report, he did not share the United Kingdom Government's fear that the clause might lead to dangerous delays, because he believed that a commission in which both parties had enough confidence to allow it to settle the issue between them should be able to extend the prescribed period for the completion of its work, if it considered that necessary.

61. The United States Government had made certain proposals concerning the composition of the arbitral commission and those proposals had been taken up in part by Mr. Edmonds. He was not in favour of restricting, as Mr. Edmonds' text appeared to do, the wide freedom in the choice of members given to the Secretary-General in the original text, because it was essential to take into account the numerous interests involved.

62. The Canadian Government's view (A/CN.4/99/Add.7, page 3) that, if there were disagreement about the composition of the commission, all parties to the dispute should have the right to be represented seemed to be covered by Mr. Edmonds' text.

63. The CHAIRMAN invited the Commission to consider the comments by governments in the order in which they had been introduced by the Special Rapporteur.

64. Mr. AMADO said that, although support for the kind of institution proposed by the Brazilian Govern-

[9] A/CN.4/SR.352, para. 70.

ment was gaining ground, he did not believe it was practicable at the present stage.

65. Mr. SCELLE said that if there had been any chance of the Brazilian proposal being accepted by governments he would have been the first to support it, but in the present circumstances he would vote in favour of the text adopted at the previous session.

66. Mr. SANDSTRÖM also had much sympathy for the Brazilian Government's proposal, but would not vote for it for the reasons given by Mr. Scelle. Nevertheless, he believed that an international body with advisory and research functions was desirable, and some statement to that effect might well be made in the comment.

Mr. Sandström's suggestion was approved.

At the Chairman's suggestion, it was agreed to refer the points raised by the Governments of South Africa and the Netherlands to the Drafting Committee.

67. Sir Gerald FITZMAURICE explained that the reason for the United Kingdom Government's proposal, which he supported, that the arbitral commission should not be empowered to extend the time-limit for rendering its decision, was that fisheries circles would find it difficult to accept a provision allowing a State or group of States acting in agreement, to adopt unilaterally conservation measures that were binding on other States. A system under which such unilateral measures would have to obtain the sanction of an international body before being promulgated would have been preferable. That course, however, had been rejected by the Commission, and the unilateral measures would now remain in force until the arbitral decision had been given, so that a whole fishing season might be missed, with resultant financial and economic loss. Consequently, it was most desirable for the arbitral proceedings to be concluded speedily. The arbitral commission, however, would probably avail itself of the power given to it to extend the time-limit, particularly since discussions between scientists and technical experts, who frequently disagreed amongst themselves, tended to be lengthy. He considered that the period allowed in paragraph 3, though not long, was reasonable, and that there was no need to give the commission power to extend it, since that might encourage delay.

68. Mr. PAL was in favour of retaining the provision at the end of paragraph 3, because owing to its very nature the question to be settled might require considerable time. There were no grounds for apprehending that the arbitral commission would abuse the right of extension given to it. Furthermore, the United Kingdom Government's concern should be allayed by the provision in article 32, paragraph 2, by virtue of which the arbitral commission could decide that pending its award the measures in dispute should not be applied.

69. Mr. SANDSTRÖM agreed with Mr. Pal, because he thought that three months was a very short period. However, the Commission could stress in its report the need for the arbitral commission to reach a settlement as quickly as possible.

70. Mr. KRYLOV could not support the United Kingdom Government's proposal and hoped that Sir Gerald Fitzmaurice would not press it.

71. Mr. SPIROPOULOS, though sympathizing with the United Kingdom Government's point of view, feared that it was virtually impossible to conclude the arbitral proceedings, during which each of the parties would probably wish to make an oral submission, in three months, particularly if certain scientific questions had to be examined as well. Nevertheless, he thought it was valuable to prescribe a fairly short time-limit, such as that in paragraph 3, allowing for an extension if necessary.

72. Mr. AMADO said that while he was not in favour of a substantive change in paragraph 3, it might be well to make the provision more stringent by ensuring that the time-limit could be extended only when strictly necessary.

73. Sir Gerald FITZMAURICE recognized the force of the objections to the United Kingdom Government's proposal and said that he would be satisfied if attention were drawn, in the comment, to the danger of delay if the arbitral commission was unable to reach a decision within the time-limit prescribed.

74. The CHAIRMAN suggested that the Special Rapporteur be asked to amend paragraph 3 in the sense suggested by Mr. Amado and to prepare a statement on the lines suggested by Sir Gerald Fitzmaurice for inclusion in the comment.

It was so agreed.

75. Mr. EDMONDS, introducing his new text for article 31, explained that paragraph 1 remained unchanged. The modifications he had proposed followed the United States Government's suggestions concerning the procedural and administrative provisions relating to the constitution of the arbitral commission.

The meeting rose at 1 p.m.

354th MEETING

Monday, 28 May 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU,

Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add.1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 31 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 31 and the alternative text proposed by Mr. Edmonds.[1]

2. Mr. EDMONDS, in amplification of his brief remarks at the previous meeting[2] introducing the new text proposed by him for article 31, pointed out that some differences between States might be of a kind that required the arbitral commission to be entirely, or almost entirely, composed of technical experts. A dispute of another kind might require a commission of lawyers. He had therefore provided that the selection of arbitrators be made according to the nature of the dispute.

3. In the interests of prompt appointment, he had proposed that two members of the arbitral commission should be nominated by each of the parties to the dispute. That provision, he said, would also ensure that the remaining three members would be designated without delay; the existing procedure for nomination, as laid down in the Commission's draft, might result in much delay. In the event of disagreement between the parties, the remaining three members should be selected by the Secretary-General of the United Nations, the President of the International Court of Justice (ICJ), and the Director-General of the Food and Agriculture Organization (FAO) respectively. That too should make for greater flexibility, since both the President of ICJ and the Director-General of FAO would tend to select persons with special qualifications in the legal and technical fields.

4. Finally, he had added a paragraph dealing with the remuneration of the arbitral commission.

5. His text contained no fundamental changes; it was designed only to clarify the original article and to make certain that the arbitral process was carried out expeditiously.

6. Mr. FRANÇOIS, Special Rapporteur, doubted whether Mr. Edmonds' amendments were necessary. He particularly deplored the effect they would have of reducing the number of absolutely impartial arbitrators to three. It was true that national arbitrators tried not to act as the advocates of their governments, but it was almost impossible for them to be entirely disinterested; and as in fisheries disputes the interests involved were numerous and varied, it was desirable for the arbitral commission to include as many independent technical experts as possible. He also feared that Mr. Edmonds' provision that, in the event of disagreement between the parties, the Secretary-General, the President of the ICJ and the Director-General of FAO should choose the remaining three members without having to consult each other, would not be conducive to achieving a proper balance. He could agree to the parties' nominating one member each—that would be consistent with the Commission's draft on arbitral procedure—but with regard to the five other members, he thought that the Commission should retain the provisions adopted at its previous sessions, which would give some assurance that the arbitral commission would be a balanced one.

7. Faris Bey el-KHOURI asked whether Mr. Edmonds had taken account of the possibility of there being more than two parties to a dispute. If the several parties on one side did not agree among themselves, would each have the right to nominate two members of the commission? The point should be elucidated either in the article itself, or in the comment.

8. Mr. FRANÇOIS, Special Rapporteur, said that in such cases the parties on one side should nominate their two members, as provided in Mr. Edmonds' text, by agreement.

9. Mr. EDMONDS, observing that the point was an important one, said that nearly always, although there might be more than two parties, there were only two sides to a controversy. It would certainly not be equitable to allow each one of a group of States on one side of a dispute to nominate a member of the arbitral commission. His object, in that regard, was made clear in the first sentence of paragraph 3 of his text, reading: "Two members shall be named by the State or States on the one side of the dispute; and two members shall be named by the State or States contending to the contrary."

10. Faris Bey el-KHOURI asked what would happen if a group of such States failed to agree on the nominations.

11. Sir Gerald FITZMAURICE said that the answer to Faris Bey el-Khouri's question was given in the third sentence of paragraph 3 in Mr. Edmonds' text, where it was laid down that if within a period of three months the parties failed to make a nomination, it would be made by the Secretary-General of the United Nations.

12. Referring to the Special Rapporteur's observations, he expressed disagreement with the view that the Commission's original text would secure the appointment of the largest number of impartial experts, since, according to the terms of the first sentence of paragraph 2, there was nothing to prevent the two parties from agreeing to appoint three or more of their own nationals. He thought that in all probability they would agree to nominate at least two members each so that there would be only three neutral experts. Notwithstanding, the Commission's text had certain disadvantages.

[1] A/CN.4/SR.353, para. 56.

[2] *Ibid.*, para. 75.

13. The merit of Mr. Edmonds' text, on the other hand, lay in its drawing attention to the important point that in most disputes there was one major issue at stake, and that the parties tended to divide into two sides. The original text implicitly provided for the situation where there was more than one State on one side and where it would be inequitable for each to nominate members of the tribunal, by stipulating that if the parties failed to reach agreement the tribunal would be appointed by the Secretary-General, who would take into account the need for a balanced membership and the nature of the dispute. Perhaps Mr. Edmonds had been prompted to propose a change by the fear that the Secretary-General might find himself in a position of some embarrassment.

14. At the same time, although it was true that generally speaking there would be two sides to a dispute, there could be cases in which different points of view were held on one side, and would have to be represented on an arbitral commission. If a provision to meet such cases could be inserted in Mr. Edmonds' text, he would be abie to accept it.

15. Mr. EDMONDS said he would be prepared to insert a provision of the kind suggested by Sir Gerald Fitzmaurice.

16. Mr. SPIROPOULOS considered that the question was whether or not national arbitrators should be appointed in cases where the parties disagreed. Personally he did not favour their being appointed, because with very few exceptions and for very natural reasons they never took a contrary view to that of the government appointing them. Given that the parties to a dispute were able to submit their case through an agent, it was unnecessary to have national arbitrators and it would be far preferable for the commission to consist entirely of neutral experts.

17. Although he did not believe that the Secretary-General of the United Nations would exercise the functions conferred upon him in the original text in an arbitrary way, there was some merit in Mr. Edmonds' proposal concerning the designation of the remaining three members of the commission when there was disagreement between the parties.

18. Mr. PAL said that he had already had occasion to comment on article 31, paragraph 2,[3] of the present draft, and had objected to its acceptance on the grounds that it added stringency to the already rigorous provision that differences should be submitted to compulsory arbitration. The essence of arbitration was its voluntary character, and Mr. Edmonds' text was therefore a distinct improvement, because it left the parties at least some freedom of choice in the appointment of the arbitral commission. Judging by the difficulties experienced in reaching agreement even on the choice of one umpire in ordinary cases of arbitration, he thought that the Commission's present text, which required agreement of the parties on each and every one of the arbitrators, amounted to denial of choice to the parties. Furthermore, Mr. Edmonds had provided for the appointment of technical experts who would undoubtedly be needed for settling disputes concerning fisheries. Although he would have preferred the parties to have even wider powers in the selection of the arbitrators, coupled with appropriate safeguards to ensure an adequate number of impartial experts, he found Mr. Edmonds' text acceptable.

19. He could not subscribe to the view that only neutral arbitrators were capable of impartiality. If the Commission really believed that national arbitrators were so lacking in integrity, he saw no purpose whatsoever in establishing arbitral machinery at all. Confidence in justice was, indeed, the primary consideration in the administration of justice and it was always sought to be secured by giving the parties the choice of their own judges in matters of arbitration.

20. Although it was conceivable that there might be more than two States parties to a dispute, he believed that the differences themselves would centre on whether there was need for measures of conservation, and if so whether the measures proposed were appropriate. It should suffice to clarify that point in the comment and to allow for the nomination of more arbitrators if necessary.

21. Mr. SANDSTRÖM, referring to the question of impartiality, said that the important point was that the parties would have more confidence in the arbitral commission if it included one of their own nationals to expound their point of view during the proceedings. He had had personal experience of presiding over a tribunal dealing with disputes between employers and workers, consisting of two members appointed by each of the two groups and three appointed by the government. The tribunal, which had operated well, had won the respect and trust of both sides. He therefore saw no objection to allowing each of the parties to nominate one or two members.

22. The question raised by Faris Bey el-Khouri concerning cases in which there were more than two States parties to a dispute could be referred to the Drafting Committee.

23. Mr. HSU said that at its previous session the Commission appeared to have been influenced by the idea that arbitral commissions for settling fisheries disputes would be of a different character from traditional arbitral tribunals, because of the technical nature of the disputes in question. But all arbitral tribunals required expert advice. Hence he did not think that the provisions laid down at that session for the appointment of the arbitral commission were particularly sound. Apart from the provision that in certain circumstances the President of the ICJ and the Director-General of FAO might appoint a member each, which might not help matters, he favoured Mr. Edmonds' text, because it approximated more closely to the classical conception of an arbitral tribunal.

24. Although there might be several parties to a dispute, they were likely to take two sides, because the question at issue would in all probability be whether measures of conservation were necessary to obtain the maximum sustainable yield, and if so whether the measures taken should be binding on third parties.

25. Mr. SPIROPOULOS said that some provision analogous to that contained in Article 31. paragraph 5,

[3] A/CN.4/SR.353, para. 24.

of the Statute of the International Court of Justice must be made in Mr. Edmonds' text, in order to ensure that responsibility was placed somewhere for deciding whether there were several parties to a dispute in the same interest.

26. Faris Bey el-KHOURI said that it was not clear whether the commission's decision would be binding on all States, or only on those which were parties to the dispute.

27. If there were several States on one side of the dispute and they were unable to reach agreement on the members to be nominated, some States might withdraw from the arbitration proceedings altogether, in which case other proceedings might have to be initiated at a later stage.

28. Mr. PADILLA-NERVO said that the discussion had confirmed his contention that the arbitral provisions in the draft would give rise to many difficulties.

29. Personally he believed that the problem of there being several parties in the same interest had been exaggerated, because the questions whether conservation measures were necessary and what form they should take would naturally tend to create two sides.

30. On the other hand, the Commission must give its attention to the problem of how long and for what States the arbitral decision would be binding. Certain measures of conservation might become obsolete and should then cease to be enforceable.

31. Mr. EDMONDS observed that, although different parties on the same side might be relying on different grounds in seeking to achieve a certain result, there would nearly always be only one real issue in dispute. However, he would agree to provide for those cases where there was more than one issue.

32. In reply to Mr. Spiropoulos' he pointed out that there was no requirement in his text for the appointment of a national arbitrator. Indeed, there had been numerous instances of arbitral tribunals having none. Personally he did not think that they need necessarily be prejudiced.

33. He also stressed that, according to his text, by agreement the whole commission could be appointed by the parties. It was only when they failed to exercise that prerogative that the Secretary-General of the United Nations and others were authorized to act for them.

34. With regard to the point raised by Faris Bey el-Khouri as to whether the commission's decision would be binding on all States he said that States not parties to the arbitral proceedings could not be bound by the decision.

35. His text could be referred to the Drafting Committee so that an additional provision of the kind suggested by Sir Gerald Fitzmaurice could be incorporated.

36. Mr. HSU said that, since the most important person in any arbitral procedure was the umpire, one such official would act more efficiently than three.

37. In such technical issues, the advice of the expert was the most reliable guide. In that respect the text of Mr. Edmonds' paragraph 2 was sound.

38. Mr. ZOUREK observed that the Commission was in fact reviewing a question which had often been brought up at previous sessions, but without being adequately settled. The functioning of the arbitral commission had been discussed without taking into consideration the different types of case it should be competent to hear. If a dispute under article 26, for example, were submitted to the so-called arbitral commission because the various States concerned had been unable to reach agreement, it would be impossible to resolve such a conflict of interests on the basis of existing international law.

39. The CHAIRMAN stressed that the draft for the General Assembly must be general in its outline of the composition, organization, and procedure of the arbitral commission. The Commission should not discuss the technical aspects of possible disputes, which should be referred to a body having special competence in the matter. The broad principles for compulsory arbitration had been established in article 31, and since there seemed to be some measure of support for Mr. Edmonds' proposal—which would undoubtedly improve the 1955 draft —the article could be referred to the Drafting Committee, to which Mr. Edmonds might fittingly be appointed.

It was so agreed.

Article 32

40. The CHAIRMAN said that Mr. Edmonds had submitted a proposal for article 32, which read as follows:

1. The arbitral commission shall, in each case, make the determinations and apply the criteria listed in the appropriate articles.

2. The commission may decide that, pending its award, the measures in dispute shall not be applied.

41. The first sentence of paragraph 1 of the Commission's draft article could be adopted, but until articles 26-28 and 30 had been discussed, it would be difficult to take a decision on the second sentence; the same applied to paragraph 2. It would therefore be advisable to defer consideration of the article and meanwhile to leave it in the hands of the Drafting Committee.

It was so agreed.

Article 33

42. The CHAIRMAN said that Mr. Edmonds had submitted a proposal for article 33 which read as follows:

1. The decisions of the arbitral commission shall be by a simple majority of four votes and shall be based on written or oral evidence submitted by the parties to the dispute or obtained from other qualified sources.

2. The decisions of the arbitral commission shall be binding upon the States concerned. If the decision includes a recommendation, it shall receive the greatest possible consideration.

43. Mr. SANDSTRÖM said that the United States comment on article 26 (A/CN.4/97/Add.3, paragraph 23) was linked with the provisions of article 33, and the question of the role of the arbitral commission was one that should be discussed. He understood that the United States considered that the arbitral commission was restricted to consideration of the conservation proposals of the parties to the dispute, and could not take the initiative in making proposals itself. In his interpretation

it had been the Commission's intention in the 1955 draft that the arbitral commission would give binding decisions only on the proposals of the parties, but would have the power to make recommendations to the parties even if they went beyond those proposals. But the position was not quite clear and ought to be clarified.

44. After a short discussion Mr. FRANÇOIS, Special Rapporteur, said that, in drafting the phrase concerning recommendations in article 33, the Commission had had in mind that the arbitral commission should not only impose conservation measures on parties, but should add some recommendations on the way in which they should be executed.

45. Mr. EDMONDS suggested that Mr. Sandström was perhaps confusing the United States Government's comment, in so far as recommendations as to conservation were concerned, with what was stated in article 33. There might be recommendations in an arbitral decision which had nothing to do with conservation in its technical aspects. The arbitral commission should not be a technical body either charged with the duty or with competence to recommend conservation measures. It could, however, make recommendations of a non-technical conservation character for the settlement of a dispute. He asserted that article 26 and the provisions of article 33 with regard to recommendations were not necessarily contradictory.

46. Mr. SCELLE shared some of Mr. Sandström's doubts. The view of governments that it was the prerogative of States to submit proposals for regulations was understandable. If two States proposed different regulations, the arbitral commission would decide between them, but governments were hardly likely to accept regulations that neither party had proposed. They would consider that such a regulation was not a decision.

47. The so-called arbitral commission was quite unlike a domestic administrative tribunal, which could impose its own regulations. It was not an arbitral tribunal, for its powers were far more restricted, but was more in the nature of a conciliation board. In a dispute, say, over riparian rights, an administrative tribunal could impose on both parties such regulations as it saw fit. A dispute between States, however, could be settled only on the basis of claims put forward by the parties to the dispute. That fact did not seem to emerge clearly from the article as drafted.

48. Mr. AMADO failed to see the point of the second sentence of the article; it seemed to be a quite unnecessary appendix to the categorical statement in the first sentence, which conveyed the essence of the question—namely, the binding nature of the decision of the arbitral commission. Moreover, the recommendations to which Mr. Sandström had referred had no relevance in the context of article 26. The United States proposal, in its enumeration of criteria, applied to all the articles.

49. The CHAIRMAN, speaking as a member of the Commission, recalled that at its seventh session the Commission had replaced the system elaborated in 1953 [4] by a different system, particularly in respect of the substitution of arbitral procedure for the permanent international body.

50. With regard to Mr. Amado's point, his own interpretation of the text was that the arbitral commission could not only take decisions, but also make recommendations, the difference being that the former were mandatory and compliance with the latter optional. They were similar only in that they were resolutions of the arbitral commission.

51. Mr. FRANÇOIS, Special Rapporteur, suggested that the comments of Mr. Sandström and Mr. Scelle, however interesting, had no particular relevance to article 33, for the Commission, in inserting the recommendations clause, had not had in mind the other question of the arbitral commission's decisions being bound by the claims of the parties. The arbitral commission was not bound to restrict itself to proposals put forward by one or other of the parties, and was perfectly competent, if it thought fit, to initiate proposals itself. That was why it had been given the title of " arbitral commission " and not " arbitral tribunal ", although the epithet was perhaps misleading. The concept behind its function was what he might perhaps describe as " compulsory conciliation ". He would be quite willing to meet Mr. Amado's point by deleting the second sentence.

52. Mr. SCELLE recalled that, prior to the Commission's study of the question, the only means of settling disputes in such matters had been by mutual agreement. The Commission had taken a step forward by proposing the setting up of a conciliatory organ, which, as he had pointed out earlier, was not strictly arbitral in its functions, for in arbitration the decision was taken on the basis of law, whereas the proposed arbitral commission would proceed on a basis of regulation. It would arrive at its decision independently of the attitude of the States parties to the dispute. Neither State claimed a positive right based on international law, but each claimed that it possessed a means of regulating fishing in a certain area and asked the arbitration commission to decide whether such regulation was permissible subject to certain conditions. It was the difference between the application and the establishment of a juridical provision. For that reason he himself would favour giving regulating powers to a duly authorized United Nations technical organ.

53. Mr. SALAMANCA pointed out the added complication that whereas, at the seventh session, when the chapter on fishing had been added, the problem had been discussed in general terms, during the present discussion the Commission had turned to points of detail which, not unnaturally, had given rise to difficulties. Juridically speaking, there was a great difference between article 31, which referred merely to a decision of the arbitral commission, and article 33, which added that its recommendations should receive the greatest possible consideration. The difficulty of interpretation might be resolved by drafting, but on the whole he agreed with Mr. Amado.

54. Mr. AMADO said that the second sentence of article 33 was very like the kind of declaration that the Commission was reluctant to include in an article and

[4] Officials Records of the General Assembly, Eighth session, Supplement No. 9 (A/2456), p. 17.

usually disposed of in the comment. The fundamental necessity was for the arbitral commission to decide whether the proposed measures were based on justice. Once that had been decided and the decision taken, recommendations became otiose.

55. Mr. SANDSTRÖM said that between its fifth and seventh sessions the Commission had made important changes in its approach to the question; having abandoned the idea of a permanent international body, it had adopted the concept of an arbitral commission to be set up in each specific case of dispute. As to the recommendations in article 33, they were to some extent inevitably out of line with the other activities of the arbitral commission. The comment, at least, should make the interpretation to be placed on the article perfectly clear.

56. Mr. EDMONDS said that if the text of the article were read together with the comment it would be seen that there was no inconsistency with the normal procedure in domestic law, in which the judgment, while providing the final settlement of a dispute, would often include a recommendation with regard to the enforcement of the right it had recognized. He would deprecate granting the arbitral commission competence to recommend measures of conservation, for the Commission had never had that kind of body in mind. Moreover, governments had not agreed to any such step. There was therefore no ground for construing the text as allowing the arbitral commission to initiate or to make binding any measure of conservation. His proposal aimed at stressing the necessity for stating clearly the criteria adopted in each case. He would, however, agree to the deletion of the second sentence of the article.

57. Mr. KRYLOV suggested that, in view of the gradual broadening of the concept of the means for the settlement of disputes since the Commission's fifth session, the Special Rapporteur's lapidary phrase "compulsory conciliation" be examined with a view to its definition by the Sub-Committee.

58. Mr. LIANG said that the second sentence of the article had been discussed at length at the previous session.[5] The recommendations referred to did not stand on their own, but were dependent on a decision of the arbitral commission. The comment brought out that the amplification by recommendations was essentially part of the decision.

59. As to the United States comment, it had never been contended that the decision of the arbitral commission should include measures of conservation independently of the specific issue. As he saw it, the United States Government was anxious to make that point quite clear. The second sentence, however, might well be deleted.

60. Mr. SPIROPOULOS said that admittedly there was more than one possible interpretation of the text of article 33. To find a satisfactory solution, the Commission should perhaps discuss the other articles of the draft in order to decide whether to adopt the criteria proposed by Mr. Edmonds. If all the articles established clear criteria, as did article 29, the situation would be much simpler. But articles 26 and 28, for instance, established no criteria at all.

61. Most of the cases which came before the arbitral commission, however, would be disputes over concrete issues, which would be settled by a decision of the commission. In due course, the commission's decisions on disputed issues of that kind would establish a body of case law, and that, added to the issues in which there was no dispute, would then constitute a set of regulations for fishing.

62. The CHAIRMAN observed that the regulating powers of the international authority which the Commission had proposed in the draft adopted at its fifth session[6] had now been transferred to a compulsory arbitral commission, which could enact regulations by virtue of articles 26 and 27, or could confine itself to rendering a binding decision and in addition make recommendations.

63. Mr. SCELLE said it was difficult to believe that States would be prepared to accept a specialized agency's making regulations. He believed that the three draft articles adopted at the fifth session were clear, simple and bold and he appealed to the Commission to revert to that text and to abandon the provisions agreed upon at its seventh session. Under those provisions the functions of the international authority were given over to a compulsory arbitral commission, with the result that even if an arbitral settlement could be reached between two States, a whole series of arbitral proceedings between other States would inevitably become necessary.

64. Sir Gerald FITZMAURICE said that there were two types of question which could be referred to the arbitral commission. First, unilateral measures promulgated under articles 25 and 29 and challenged by another State. There, the commission would only need to decide whether those measures were justified or not and would not be called upon to fulfil regulating functions of any sort. Secondly, recourse might be had to the arbitral commission if, under articles 26 and 27, a number of States had tried and failed to reach agreement on conservation measures. There would then be no measures in existence and the commission would have to decide between various alternative proposals. In the text adopted at the previous session, the question whether the arbitral commission could propose other measures of its own had been left open. Mr. Edmonds was seeking to tie the arbitral commission to the proposals put forward by the parties, and though it was probable that in fact its decision should be based on those proposals, he doubted whether such rigidity was really necessary and whether the Commission's original text needed modification on that point.

65. He had no strong views as to whether or not the second sentence in article 33 should be retained. The question was not of great moment, because in each case the commission was called upon to reach a decision and it would obviously bear in mind any matters on which a recommendation might be necessary.

[5] A/CN.4/SR.305, paras. 108, 109 and A/CN.4/SR.306, paras. 8-24.

[6] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), p. 17.

66. Mr. PAL did not think that the retention or deletion of the second sentence in article 33 would meet the United States Government's comment on article 26, paragraph 2. It was significant that the United States Government, when commenting on article 33, had made no observation on that sentence. It did not take the sentence as having any important bearing on the question raised.

67. Perhaps Sir Gerald Fitzmaurice had over-simplified the question of whether or not the decision should be based on the measures suggested by the parties. Even in the case of measures promulgated under articles 25 and 29, the subject of the dispute might be the denial for any necessity for conservation measures and also of the adequacy or justification of the particular measures adopted. It the arbitral commission concluded that measures were necessary, but that those adopted did not fulfil the conditions laid down in article 29, paragraph 2, would it have completed its task or should it also decide what measures were needed? Then again, under article 26 the disagreement might be on the necessity for any conservation measures and also on the measures suggested by the several States. The arbitral commission would then be invited to settle the dispute, which should mean settling the disagreement. Would it suffice for the arbitrators to declare the necessity of conservation but reject the measures hitherto suggested? Should they or should they not take a further decision as to the appropriate conservation measures? Would the disagreement be settled without such further decision? If such decision were permissible it would be a binding decision, though presented in the form of a recommendation.

The meeting rose at 6.30 p.m.

355th MEETING

Tuesday, 29 May 1956, at 9 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add.3, A/CN.4/99 and Add.1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 33 (continued)

1. The CHAIRMAN said that it was necessary to settle the substantive question of whether the arbitral commission had power only to take decisions of a judicial kind on points in dispute, or whether its power extended to laying down regulations. The question might be settled without prejudice to the actual wording of article 33 or to the question of the arbitral commission's power to make recommendations.

2. Mr. HSU said that if the arbitral commission's recommendations were merely intended to facilitate the enforcement of its decisions, there was no need to refer to them in the text of the article. If, however, its recommendations were to deal with broader problems not strictly legal in character, the article must contain a separate sentence specifying that the arbitral commission had the power to make such recommendations.

3. Mr. ZOUREK observed that he had already expressed his opposition to compulsory arbitration as a method for the settlement of disputes in that field. He had several times made it clear that arbitration in the ordinary sense of the term was not involved and practically all the members who had spoken had admitted that that was correct. In that case, it would be wiser not to describe the body in question as " an arbitral commission " but to give it some other name, such as its original title of " board of experts ".[1]

4. Since States would wish to be clear as to its exact powers, it was essential to decide whether the arbitral commission should have the power to make recommendations, or rather, to propose solutions, in the absence of a request from the parties to the dispute. The United States Government in its comments had opposed such a suggestion, considering that the arbitral commission should have no power to initiate proposals unless requested to do so.

5. Faris Bey el-KHOURI said that the conservation of the living resources of the sea was a matter not of private rights but of public property rights of concern to all. Since arbitration in municipal law was reserved for disputes involving private rights, disputes regarding public property rights being settled solely in courts of law, he still considered that disputes relating to the conservation of the living resources of the sea should be referred to the International Court of Justice. Such a solution could meet with no objection from States and would avoid all the difficulties arising out of the complexity of arbitral procedure. He feared that the adoption

[1] A/CN.4/SR.300, para. 1.

by the Commission of a system of arbitration for public property rights would be adversely criticized by jurists all over the world. He did not wish to oppose the solution favoured by the majority of the Commission but would abstain from voting on article 33.

6. Mr. EDMONDS said that if it was the intention to put the matter to a vote at that stage, he wished to make a formal proposal to delete the last sentence of the article in the 1955 draft and in his own revised proposal, according to which the arbitral commission had the power to make recommendations.

7. Mr. AMADO considered that the various texts of article 33 should be referred to the drafting committee in the same manner as the text of previous articles, without any vote being taken. The provision regarding recommendations was not a very important one. Moreover, the phrase " they (the recommendations) shall receive the greatest possible consideration ", sounded rather weak. If so important a question as the manner in which the arbitral commission should be constituted could be simply referred to the drafting committee without a vote, surely the question of the power to make recommendations could be too.

8. Mr. HSU said that there could be only one kind of decision by an arbitral commission and that was a categorical one. A vote could however be taken on the question whether the arbitral commission should have the additional power of making recommendations. It would be quite harmless and indeed helpful to give it such a power, which would not conflict with the provisions of article 27.

9. The CHAIRMAN said that he had perhaps not made himself quite clear. The question to be decided by vote was whether the Commission should have the power merely to settle disputed points or should also be able to lay down new regulations. In both cases a decision and not a recommendation would be involved. He felt that the Commission should decide that question, regardless of whether the principle was to be included in the article or explained in the commentary.

10. Mr. FRANÇOIS, Special Rapporteur, wondered if the moment was ripe to settle the question. Mr. Edmonds, in his revised proposals, had put forward certain criteria as a basis for arbitration and it would be difficult to take any decision regarding article 33 until the Commission had reached a decision on those criteria. He therefore suggested that there should be a general discussion on articles 26 to 30, after which they could be referred not to the drafting committee, but to some other specially established committee which would frame proposals.

11. Mr. SANDSTRÖM was also opposed to voting at that stage on the nature of the arbitral commission's decisions. Article 33 in the 1955 draft was framed on the same basis as article 3 in the 1953 draft [2] and no definite proposal had been made for limiting the powers of the arbitral commission. The whole question was one of drafting and it would be for the drafting committee to decide whether the Commission's ideas were adequately expressed in either the article or the commentary.

12. Mr. SPIROPOULOS observed that, if a decision were to be deferred, there was a danger that the discussion might be repeated. The point at issue might be clarified by taking a concrete case. If a State objected to measures taken by a coastal State under article 29 and the dispute were brought before the arbitral commission in accordance with article 31, the arbitrators' first task would be to decide whether there was an imperative and urgent need for measures of conservation. If no such need were proved, the dispute would be settled in favour of the plaintiff. If, on the other hand, such need were proved, the arbitrators would then have to decide whether the measures adopted were based on appropriate scientific findings. Should the arbitrators decide that they were, their decision, in favour of the defendant, would be an ordinary judicial one. It was in the event of their deciding that the measures were not correct ones that a dilemma would arise. Should the arbitrators do no more than give a legal ruling, in the manner of the International Court of Justice, or should they go farther and dictate what measures they considered to be correct? Naturally they would not take such a course unless requested to do so by the plaintiff State.

13. Replying to Mr. Edmonds, he said that if the Commission adhered to its previous interpretation of the powers of the arbitral commission, any new regulations issued by the arbitrators would have to be binding on the States concerned. The arbitrators, after deciding that the measures were not based on appropriate scientific findings, could, of course, impose no new regulations but make recommendations based on appropriate scientific findings.

14. Mr. EDMONDS remarked that no State would be willing to resort to arbitration if there were any risk of its being presented with an entirely different set of regulations. The only decision which States would be willing to accept would be a ruling on the points actually in dispute.

15. Mr. SPIROPOULOS said that he was not stating his own opinion but merely seeking to clarify the issues involved.

16. Mr. AMADO pointed out that, whereas the authority envisaged under article 3 of the 1953 draft would have powers of regulation, no such provision was made in the 1955 draft with regard to the arbitral commission. It was quite impossible to read any powers of regulation into the provisions of article 33 as it stood.

17. Sir Gerald FITZMAURICE said that Mr. Spiropoulos' concrete illustration had helped to clarify the issue. As far as decisions were concerned, the role of the arbitral commission must be confined to deciding points at issue between disputing parties. It would, however, always have the right to make recommendations.

18. Mr. PADILLA-NERVO said that there appeared to be some confusion concerning the powers to be given to the arbitral commission which had taken the place of

[2] *Official Records of the General Assembly, Fifth session, Supplement No. 9* (A/2456), p. 17.

the permanent international authority within the framework of the United Nations envisaged by article 3 of the 1953 draft. From the remarks of the Chairman and the Special Rapporteur, it appeared that the powers of regulation enjoyed by the international authority as an administrative organ were to be transferred to the arbitral commission. If members were agreed on that point, the fact would have to be clearly specified in article 33. If, however, the existing wording of article 33 were retained, it was quite clear that an arbitral commission appointed by the parties to the dispute to deal with concrete issues would have no power to impose regulations, but only to decide the question referred to it by the parties, except naturally in the case where the parties themselves expressly asked the Commission to recommend or impose conservation measures.

19. The situation envisaged by article 26 was a special one, since it was there assumed that no measures had been adopted and thus that no regulations existed. If, however, the parties were able to agree on the appointment of arbitrators, they would presumably be able to agree on the questions to be submitted to the arbitrators for decision. He would go even farther and say that when the parties submitting a dispute to arbitration requested the arbitral commission to propose new regulations if necessary, it was open to them to agree to accept the new regulations. Failing such agreement, however, the arbitral commission could do no more than pronounce a decision on the points referred to it.

20. A more serious problem was whether the decisions of the arbitral commission were to be binding on States not parties to the dispute. Article 3 of the 1953 draft had described all States as under a duty to accept as binding upon their nationals the system of regulations prescribed by the international authority. Article 33 of the 1955 draft, however, merely stipulated that the decisions of the arbitral commission would be binding on the States concerned. It was essential to be quite clear as to the meaning of the term " the States concerned ".

21. The Commission should begin by settling the fundamental question whether the arbitral commission should be given administrative powers of regulation. If it were to have such powers, the existing wording of article 33 would be inadequate. He, personally, considered that the Commission should not be given such powers. Once the Commission was quite clear as to what it wanted, the drafting of the article would be a simpler matter.

22. Faris Bey el-KHOURI inquired whether the arbitration would be based on a *compromis*.

23. Mr. SPIROPOULOS thought that it would not.

24. The CHAIRMAN said that it might be so if the parties agreed on a *compromis*. Failing such agreement, article 31, paragraph 2, would apply and would constitute the *compromis*.

25. Faris Bey el-KHOURI said that it was essential for the arbitrators to know what their terms of reference were. He wondered whether it would be the task of the Secretary-General of the United Nations to draw up the *compromis*. The complexity of the question bore out his previous contention that reference of disputes to the International Court of Justice would be the simplest solution.[3]

26. The CHAIRMAN replied that the powers of the arbitral commission would be established by the articles which the Commission was in course of drafting.

27. It emerged from the discussion that there were five points on which a decision was required: first, whether the arbitral commission should have power to make binding decisions on points in dispute—a question which could hardly be in doubt; secondly, if the parties requested the arbitral commission to lay down new regulations in the event of the regulations under dispute proving unacceptable, whether those regulations should also be binding; thirdly, whether the arbitral commission had in any case the right to make recommendations; fourthly, whether those recommendations should be binding; and fifthly, whether the decisions of the arbitral commission would be binding *erga omnes*.

28. Replying to Mr. Spiropoulos, he said that the question of the arbitral commission's power to impose regulations would be settled by the decision on the second point.

29. Mr. SPIROPOULOS observed that regulations issued at the request of the parties would obviously be binding on them. It was quite another question, however, whether the Commission had the power to make new regulations.

30. Mr. EDMONDS said that, if the Commission was to vote on article 33, he wished to move the following amendments to the article as it stood in the 1955 draft or in his own proposal: to substitute the words " binding on the parties to the arbitration " for the words " binding on the States concerned ", and to delete the last sentence of the article concerning the power of the arbitral commission to make recommendations. Should the Commission decide, however, to retain the last sentence, he would propose adding the following sentence at the end of the comment: " However, such a recommendation should not include any regulation in regard to conservation and would have no binding force."

31. The CHAIRMAN suggested that Mr. Edmonds might move his proposals as amendments when the Commission came to vote on the points he had listed.

32. Mr. EDMONDS observed that the Commission must vote on a definite text: it could not vote on interpretations.

33. The CHAIRMAN said that it was impossible to formulate a text until the question of principle had been decided. The purpose of his five points had been to facilitate that task.

34. Mr. PAL said that those members who had favoured compulsory arbitration now seemed to be retreating from that standpoint by suggesting that it was open to the parties to refer only part of a dispute to the arbitral commission.

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[3] See para. 5 above.

35. The CHAIRMAN, speaking as a member of the Commission, pointed out that compulsory arbitration ended with the settlement of the dispute, but it was now being proposed—and he could support such a move—to give legislative functions to the arbitral commission.

36. Mr. PAL emphasized that, once the principle of compulsory arbitration had been accepted, the arbitral commission must be empowered to settle the whole dispute, since otherwise there was a possibility of stalemate. If, for example, the parties submitted only the questions of, first, whether the measures proposed were at all necessary, and, secondly, whether they were adequate, and the commission decided the first question in the affirmative, but the second in the negative, it would not be entitled to go farther and decide what would be adequate measures.

37. Mr. EDMONDS disagreed with the Chairman's third point that the commission could, in addition to rendering its decision, put forward optional recommendations as to what measures would be most appropriate. He had understood from the comment that the recommendations would concern the way in which the parties could make use of their rights; in other words he had interpreted the word " recommendation " as being used in the sense of an interlocutory judgment in municipal law.

38. The CHAIRMAN said that for the time being all the Commission had to decide was whether or not the arbitral commission should be empowered to make recommendations; the subject-matter of the recommendations was a separate question.

39. Mr. EDMONDS explained that he would be satisfied either with the text of article 33 and its comment as they stood, or with the deletion of the second sentence in the article regarding recommendations or with the addition he had proposed at the end of the comment. As he saw it, any of those solutions would have the same result; his only concern was that there should be no misunderstanding of the Commission's intentions.

40. The CHAIRMAN said that there could be no doubt that recommendations would not be binding.

41. He then put to the vote the proposal that the arbitral commission's recommendations could contain proposals concerning conservation measures.

The proposal was adopted by 7 votes to 1, with 6 abstentions.

42. The CHAIRMAN, speaking as a member of the Commission, considered that there could be no question of either the arbitral commission's decisions or its recommendations being binding upon States not parties to the dispute.

43. Mr. SALAMANCA said that there was another important point to consider—namely, the position of another State whose nationals started to fish in an area where conservation measures had already been the subject of arbitral proceedings.

44. The CHAIRMAN considered that that point could be covered in the comment on article 33.

45. Mr. SPIROPOULOS believed that some provision was necessary to allow for the revision of conservation measures.

46. The CHAIRMAN then invited the Commission to revert to the discussion on article 25.

Article 25 (resumed from the 351st meeting).

47. The CHAIRMAN, observing that article 25 had already been discussed at length, invited the Commission to consider Mr. Pal's amendment for the addition of the words " unless the area in question is contiguous to the coast of another State " [4] at the end of the article.

48. Mr. PAL said that he was prepared to add some words to meet the objection that, if his amendment were accepted, a State or States vitally interested in fishing in an area contiguous to the coast of another State would be unable to adopt any conservation measures when the coastal State failed to do so. Such an addition, however, was not strictly necessary if only one State was concerned, because in the absence of conservation measures by the coastal State the former could, without adopting conservation measures, take the necessary steps to prevent depletion of stocks. The only difficulty that could arise would be if other States came to fish in the same area, and in the absence of conservation measures there were no means of putting any restraint on them. He had no objection to providing for such a contingency.

49. If non-coastal States found unilateral measures taken by a coastal State unacceptable they already had a remedy in article 29.

50. Once the special interest of the coastal State had been admitted and the safeguards contained in article 29 imposed, he believed there could be no objection to his amendment.

51. Mr. SPIROPOULOS observed that, if a coastal State did not promulgate conservation measures—and it was under no such obligation—any State, however distant, fishing in the area contiguous to its coast was entitled to do so. Of course, if the coastal State had promulgated regulations, other States were bound to respect them or to refer their case to arbitration.

52. Sir Gerald FITZMAURICE noted that Mr. Pal had recognized the justice of the argument that, if the coastal State failed to make regulations when they were needed, other States must be allowed to make regulations for their own nationals, otherwise there would be a serious gap in the whole scheme of conservation. He therefore wondered whether Mr. Pal need maintain his amendment. It would create great administrative difficulties, because there was no definition of what was meant by the area contiguous to the coast, and it would be impossible to know in which particular part of the high seas regulations could not be established by non-coastal States. In terms of conserving a particular stock of fish, the amendment was contrary to the reason of the thing and would be unworkable in practice. Moreover, it was unnecessary, because the rights of the coastal State were already safeguarded in article 29, and if the coastal State adopted no measures itself it could challenge those of others.

[4] A/CN.4/SR.350, para. 36.

53. Mr. PAL failed to understand how his amendment concerning the measures taken in an area contiguous to the coast of a State could be regarded as contrary to reason. At the moment, under article 25, a State fishing in such an area could promulgate conservation measures without being subject to any restriction, but if the coastal State then inaugurated conservation measures, as it was empowered to do under article 29, which of the two would prevail before the question had been settled by arbitration? In his opinion the provisions of article 25 were subject to the provisions of article 29, and therefore the coastal State had the prior claim to impose its regulations.

54. The CHAIRMAN wondered whether that point might not be elucidated in the comment.

55. Sir Gerald FITZMAURICE emphasized that, under articles 25 and 29, the State adopting the conservation measures could define the area in which they applied, but Mr. Pal was proposing a general prohibition on non-coastal States promulgating measures in an area which *ex hypothesi* could not be defined.

56. He was unable to subscribe to the view that the Commission had ever contemplated measures of the coastal State, adopted after the measures of another State and applicable to the same area, prevailing over the latter. What it had laid down was that the coastal State could challenge such measures before an arbitral tribunal. That was the effect of the draft as it stood at present and, if Mr. Pal's entirely different interpretation were accepted, chaos would result.

57. Mr. SANDSTRÖM said that up to a point he could agree with Sir Gerald Fitzmaurice. It a State, whose nationals alone fished in a certain area, adopted conservation measures, and the coastal State disagreed with them, the coastal State must refer the case to arbitration and could only institute other regulations provisionally if there was an imperative and urgent need as laid down in article 29.

On being put to the vote Mr. Pal's amendment was rejected by 5 votes to 1, with 8 abstentions.

58. Mr. PADILLA-NERVO explained that, despite his support of Mr. Pal's amendment during the discussion, he had not voted for it, because according to his understanding of the Chairman's remarks it would be made clear in the comment that, if the area in which a State were to take conservation measures under article 25 were to coincide with an area in which a coastal State adopted other measures under article 29, the latter would prevail.

59. The CHAIRMAN recalled, with reference to Mr. Pal's proposal, that the draft had restricted any reference to criteria for the adoption of conservation measures to article 29. Mr. Edmonds' proposals would extend such criteria to articles 26 and 27. When article 26 was taken up, it would be advisable first to settle the question of whether the provisions of that article called for the inclusion of such criteria.

60. The CHAIRMAN then invited the Commission to consider Mr. Zourek's amendment [5] to substitute the words " shall adopt " for the words " may adopt " in article 25.

61. Speaking as a member of the Commission, he pointed out that the provisions of article 25 might, even with the text as it stood at present, become mandatory if any State invoked the provisions of article 30. He therefore believed that if Mr. Zourek's amendment were to be adopted the words "when necessary " should be inserted before the words " for the purpose of conservation " in article 25, so that there should be no contradiction with article 30.

62. Sir Gerald FITZMAURICE agreed that the proviso suggested by the Chairman must be incorporated if Mr. Zourek's amendment were adopted. The change would also affect article 26, since it would be inconsistent to make it obligatory on the State whose nationals alone fished in a particular area to adopt conservation measures and not to impose the same requirement if more than one State were concerned—the case dealt with in article 26. Personally he would prefer article 25 to remain unchanged, because in the first case, if a State were fishing in an area, it could be left to that State to decide whether measures were necessary, and in the second case measures could be considered at the request of any of the States concerned.

63. Mr. SANDSTRÖM considered that Mr. Zourek's amendment went too far. He asked whose responsibility it was to ensure that the State in question did adopt the necessary measures.

64. Mr. ZOUREK, replying to Mr. Sandström's objection, said that if the provisions of article 25 were to remain permissive, that would be tantamount to condoning over-fishing or fishing in a manner prejudicial to the general interest in conservation. If the real object was to obtain the optimum sustainable yield, his amendment was necessary and would be consistent with article 30. He did not think that any State whose nationals were engaged in fishing in a certain area could fail to be concerned to protect the resources of that area from being wasted, harmed or exterminated, and it would be that State itself which would make itself responsible for seeing that the measures were complied with by its nationals.

65. Mr. SPIROPOULOS said that if the primary purpose of the draft was conservation, Mr. Zourek's amendment should be accepted. But if the primary purpose was to safeguard the interests of each State it was unnecessary because, under article 30, any State could ask for the adoption of the necessary measures of convervation, even if its nationals did not fish in the area concerned.

66. The CHAIRMAN, speaking as a member of the Commission, pointed out that the answer to Mr. Spiropoulos' question was contained in paragraph 3 of the preamble to the draft (A/2934, p. 17) from which it was clear that the aim was conservation in the general interest of mankind. Account had thus been taken of the potential interest of States in fishing grounds where their nationals did not fish at present.

[5] A/CN.4/SR.350, para. 55.

67. Considering the provisions of article 30, he did not think that Mr. Zourek's amendment would greatly alter the draft.

68. Mr. AMADO viewed Mr. Zourek's amendment, which would certainly be unacceptable without the proviso suggested by the Chairman, with some hesitation, because he disliked mandatory provisions and believed that States would, in their own interests, enact conservation measures if they were needed.

69. Mr. ZOUREK found Mr. Amado's objection unconvincing and pointed out that many of the articles in the draft concerning the regime of the high seas contained provisions which imposed obligations on States.

70. Faris Bey el-KHOURI pointed out that an obligation implied sanctions in the event of non-compliance, for which, however, no provision had been made.

71. Mr. SPIROPOULOS suggested that Mr. Zourek's proposal would entail the combination of articles 25 and 30, since under article 25 as drafted the conservation measures adopted by a State could not be challenged.

72. The CHAIRMAN put to the vote jointly Mr. Zourek's amendment to substitute the word " shall " for the word " may " and his own amendment to insert after the words " such areas " the words " when necessary ".

Both Mr. Zourek's and the Chairman's amendments were adopted by 7 votes to none, with 7 abstentions.

Article 25 as thus amended was adopted.

Article 26

73. Mr. FRANÇOIS, Special Rapporteur, referring to the comments by governments (A/CN.4/97/Add.3, paragraphs 16 to 31), said that, in view of the rejection of Mr. Pal's amendment to article 25 [6] he hoped that the Indian Government's proposal with regard to the 100-mile belt would not be pressed.

74. The Icelandic Government's comments, which covered also the other articles on conservation, rejected the proposed system because of its failure to grant the coastal States exclusive fisheries jurisdiction. He wished to draw attention to a correction to paragraph 20 of the addendum to his report, where, inadvertently confusing the Indian and the Icelandic Governments' comments, he had referred to " areas extending 100 miles from the coast "; since the Icelandic Government had not specified the breadth of the area in question, the passage should read " a great distance from the coast ". The change did not, however, affect the issue.

75. With regard to the United States Government's comments, Mr. Edmonds had submitted a new draft for the article reading as follows:

1. If the nationals of two or more States are engaged in substantial fishing of the same stock or stocks of fish in any area or areas 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 such stock or stocks of fish.

2. If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of a proposed conservation measure, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations, depending upon the nature of the disagreement:

(a) Whether a conservation measure or measures are necessary to make possible the maximum sustainable productivity of the particular stock or stocks of fish;

(b) Whether the measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly:

(1) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;

(2) The cost of their application and enforcement; and

(3) Their relative effectiveness and practicability.

(c) Whether the specific measure or measures discriminate against the fishermen of any participating State.

3. Measures considered by the arbitral commission under paragraph 2 *(b)* of this article shall not be sanctioned by the arbitral commission if they discriminate against the fishermen of any participating State.

76. He doubted the value of inserting in paragraph 1 the word " substantial " before " fishing ". " Fishing " already carried the implication of substantial, which word in itself was open to the objection of being liable to individual interpretation.

77. With regard to the proposal to introduce the qualification " the same stock or stocks " of fish, he would quote the case of two States not fishing the same stock, but where conservation measures taken by one State might threaten the interests of the other—e.g., by the use of nets of a smaller mesh. If the United States Government would agree to recognition of that case, which was by no means theoretical, it could be made clear in the comment.

78. The South African proposal, which he accepted, was a drafting point only, while the Yugoslav proposal fell as the result of the lack of support for the Yugoslav proposal in respect of article 25.[7]

79. Mr. EDMONDS said that the purpose of the proposed insertion of the word " substantial " was to restrict fishing to parties engaged in fishing regularly and substantially rather than incidentally and experimentally. He agreed that the epithet was not entirely free from vagueness; it did, however, complete the text.

80. As to stocks, the proposal was based on a conclusion in the report of the Rome Conference that a convention should cover " one or more stocks of marine animals capable of separate identification and regulation, or a defined area, taking into account scientific and technical factors, where, because of intermingling of stocks or for other reasons, research on and regulation of specific stocks . . . was impracticable ".[8] However, he would

[6] See para. 57, above.

[7] A/CN.4/SR.350, para. 31.

accept the Special Rapporteur's proposal to meet that point by a reference in the comment.

81. With regard to the listing of criteria in paragraph 2, it was important for the practical functioning of the article that its provisions should be both unambiguous and acceptable. States would inevitably wish to have prior knowledge of the scope and the competence of the arbitral commission. He had therefore proposed the criteria, first, of the necessity of conservation measures and, secondly, of their appropriateness. In that respect, he had in mind certain measures that might be put into effect, although at a cost out of all proportion to the benefits derived therefrom. There was a definite advantage in inserting in each article criteria restricting and specifying the issue, particularly in view of possible subsequent disputes.

82. Mr. SANDSTRÖM said that, although there were sound considerations behind Mr. Edmonds' proposal to insert the word " substantial ", he would nevertheless agree with the Special Rapporteur that the text as drafted was adequate, at least in the French version, which used the verb *se livrer*. The English phrase " engaged in fishing " was perhaps insufficiently explicit.

83. The question of stocks of fish was properly a matter for expert decision. The Special Rapporteur's remarks, however, were pertinent.

84. With regard to the question of criteria, Mr. Edmonds' proposals seemed to suffer from excessive detail. The point would be adequately met if paragraph 1 of article 32 were amended by the addition at the end of the first sentence of the phrase " in so far as they are applicable, taking into consideration the relative value of the different proposals put forward ".

85. Mr. PAL, while agreeing with the Special Rapporteur that the Indian proposal had no further relevance, pointed out that the distance of 100 miles for the proposed distance from the coast of a State had been based on the Commission's own decision embodied in article 2 of the chapter on fisheries adopted at the fifth session.[9] That phrase had been subsequently modified to read, as in article 28, " contiguous to its coasts ".

86. With regard to Mr. Edmonds' proposal, he preferred the text in the draft, which had the advantage of simplicity. The word " substantial " was decidedly vague.

87. Mr. Edmonds' paragraph 2 went into too much detail. Why should the Commission define the issues between the parties? The question of the criteria to be applied should be left to the arbitral commission without any restrictions.

88. Mr. SALAMANCA, referring to Mr. Edmonds' proposal in paragraph 1 to insert the word " substantial ", pointed out that the Spanish version " habitualmente ", though perhaps not inappropriate, had not the same meaning as " substantial ", the vagueness of which Mr. Edmonds had acknowledged. He feared that the word might be given a limitative interpretation.

89. If the nationals of, say, two States were engaged in fishing, conservation measures might not be required. A third party might begin fishing in the same area, however, and the question of such measures might then arise. The Commission should not overlook the principal objective of conservation, which, as stated in the report of the Rome Conference, was " to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products." [10]

90. Mr. HSU, with regard to the comments of the Government of Iceland, said that the question had two aspects. If exclusive fisheries jurisdiction applied only to measures of conservation, the point was not of great significance, for, as he saw it, such jurisdiction would not be an obstacle to conservation. If, however, the interests of a coastal population, dependent mainly on fishing for its livelihood, has involved—a by no means uncommon situation—the question was one of considerable importance and there might be justification for claiming some kind of exclusive jurisdiction. The point, however, was more properly related to the question of the contiguous zone. In that connexion, two questions would have to be decided: first, the necessity for conservation measures, which would depend on the nature of the economy of the coastal population, and secondly, the extent of the area in question.

91. Sir Gerald FITZMAURICE, referring to Mr. Edmonds' proposals, said that, while appreciating the reasons for proposing the insertion of the word " substantial " in paragraph 1, he foresaw difficulties in the interpretation of the word. The point should be satisfactorily disposed of by an appropriate reference in the comment.

92. As to Mr. Sandström's point with regard to the appropriateness of " engaged in fishing ", the text might be improved by substituting " participating in ". That point, however, could be left to the Drafting Committee.

93. With regard to " stocks " of fish, he could not entirely endorse the Special Rapporteur's argument. Conservation measures must refer to a definite stock of fish and would vary with the differing habits of fish. He would support Mr. Edmonds in his contention that the provisions of article 26—and for that matter article 25—were too general. In accordance with the true technique of conservation, it should be made clear that it was the same stock of fish that was being fished. He believed expert opinion held that the case the Special Rapporteur had quoted was an extremely remote contingency. The essential was that conservation measures should be directed to a particular stock of fish and that the countries participating should be fishing the same kind of fish.

94. He would also support the principle of Mr. Edmonds' proposal with regard to criteria in paragraph 2. The question was admittedly difficult, for the arbitral com-

[8] A/CONF.10/6, para. 76 (*a*).

[9] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), p. 17.

[10] A/CONF.10/6, para. 18.

mission might be called upon to decide what measures of conservation should be adopted. That being so, it was necessary to define with some precision the criteria on which it should base its findings. If the principle were adopted, he would submit certain amendments with regard to particular criteria.

95. Mr. ZOUREK said that Mr. Edmonds' suggestions in the first paragraph would be restrictive in their effect on fishing. Bearing in mind the provisions of article 30, he would ask whether it was Mr. Edmonds' intention to withhold from a State whose nationals were engaged in fishing, even though sporadically, in an area of the high seas a faculty that would be granted to a State whose nationals were not engaged in fishing there at all?

96. As to the word " substantial ", he shared the doubts of the Special Rapporteur; it was a term that lent itself to subjective interpretation, and as such was unacceptable.

97. With regard to the proposal to specify the same stock of fish, if the intention was to make that a condition for restricting the right of a State to request regulatory. measures, the suggestion was obviously not to the point. The point was the restriction of the right of a State requesting the adoption of conservation measures, which had a technical aspect. It would be impossible to withhold from a State whose nationals were fishing one stock in the same area as the nationals of another State the right or interest in respect of conservation measures with regard to another stock. If, for instance, one stock of fish were exhausted, as a result of over-fishing, the right to fish other stocks could not be withheld, particularly in the case of a coastal population dependent on fishing for its livelihood.

98. On the other hand, the proposals with regard to criteria in paragraph 2 were worthy of consideration, for the principle had already been incorporated in the 1955 draft, which now only needed developing. The point might best be dealt with in a separate article.

99. Mr. SPIROPOULOS asked whether, if the criteria that Mr. Edmonds had in mind were the appropriate scientific findings mentioned in article 29, paragraph 2 (B), it would not be better to list them under that article or, as Mr. Zourek had suggested, embody them in a separate article.

100. The CHAIRMAN said that that question could be deferred for the time being. The Commission should first decide the two simpler questions raised by Mr. Edmonds in paragraph 1 of his proposal, the insertion of the word " substantial " and the qualification " same stock or stocks of fish ".

101. Mr. EDMONDS, with regard to the insertion of the word " substantial ", said that if the Drafting Committee would study the English, French and Spanish texts, and if a reference clarifying his meaning were added to the comment, he would not press for a vote on that issue.

102. Mr. ZOUREK asked whether Mr. Edmonds maintained that a State whose nationals were engaged in sporadic fishing or fished another stock of fish would not enjoy the right to raise the question of conservation measures. In view of the fact that at the seventh session the Commission had in article 30 extended such a right to a State, the nationals of which were not engaged in fishing, the question of reconciling the provisions of the two articles called for careful study.

103. Mr. PADILLO-NERVO welcomed Mr. Edmonds' decision with regard to the insertion of the word " substantial ". Whatever the interpretation put on the word, it undoubtedly implied an undesirable restriction on a State engaged in fishing.

104. He would reserve his position with regard to the question of criteria in paragraph 2.

105. The CHAIRMAN thought that the proposal to meet Mr. Edmonds' point by an appropriate explanation in the comment should command general support.

It was so agreed.

106. The CHAIRMAN put to the vote Mr. Edmonds' proposal for the insertion in paragraph 1, after the word " fishing ", of the words " of the same stock or stocks of fish ".

Mr. Edmonds' proposal was adopted by 11 votes to 2, with 1 abstention.

107. Sir Gerald FITZMAURICE suggested, in the light of the conclusions of the Rome Conference, the addition after the word " fish " of " or other marine resources ".

It was so agreed.

The meeting rose at 1 p.m.

356th MEETING

Wednesday, 30 May 1956, at 9 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 Add. 3, A/CN.4/99 and Add. 1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 26 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 26 and of the new draft submitted by Mr. Edmonds.[1]

2. Mr. EDMONDS, referring to the question put to him by Mr. Spiropoulos at the previous meeting,[2] recalled that at that meeting he had indicated the general principles that made the listing in each article of the appropriate criteria highly desirable.[3] He repeated that no State would accept arbitration unless it had prior knowledge of the issues. There was, moreover, a certain advantage in defining the criteria, for the question was linked with the technical aspect of the selection of the members of the arbitral commission. A narrowing of the issues always led to greater clarity of decision.

3. More specifically, it was desirable to state the criteria in each article because of the different circumstances of the particular cases. In his article 26, for instance, the first question was the necessity for the conservation measure. When that had been decided in the affirmative, the second point was their appropriateness and the last whether the specific measure was discriminatory. In his article 27, a dispute under paragraph 2 would require the same criteria as in article 26, but those criteria would not apply to a dispute under paragraph 3. In article 28, the same criteria would apply as in article 26. In article 29, however, which related to unilateral action by a coastal State prior to a settlement by arbitration, there was an additional criterion of urgency. There was sufficient variation in the scope of the articles to justify a separate set of criteria for each one, and in view of the advantage of that approach the small amount of duplication involved was insignificant.

4. In reply to Mr. Spiropoulos, who had asked whether the criterion of discrimination would apply in all cases, he would say that each criterion would not be applicable in every case. In one case, there might be no urgency; in another, the conservation measure might not be necessary. In each case, the arbitral commission might have to determine an appropriate set of criteria.

5. Mr. SPIROPOULOS said that there seemed to be two alternative methods; either to accept Mr. Edmonds' proposal or to take the criteria in article 29 one after another and examine whether they could be applied to the other articles.

6. Mr. PAL said that his remarks had already been anticipated by Mr. Spiropoulos.

7. At the previous meeting he had commented adversely on Mr. Edmonds' proposed paragraph 2 for article 26[4] but now realized that it was quite in keeping with the principle the Commission had adopted in article 32. The Commission would remember that he had himself suggested that the criteria in article 29, paragraph 2, should be made applicable to all conservation measures,[5] not merely to those adopted by a coastal State, for, to some extent, all conservation measures contemplated in articles 25, 26 and 29 were unilateral.

8. Mr. Edmonds' proposal gave at least partial effect to that suggestion, and he could accordingly support it in principle.

9. The CHAIRMAN, speaking as a member of the Commission, said that he was increasingly convinced that the draft articles should be confined to a general outline of a system for the conservation of the living resources of the high seas; technical details were not within the Commission's competence, which was restricted to the juridical field. If the Commission adopted detailed provisions that were alien to its true functions, not only would it be straying outside its competence, but it would leave itself open to criticism by technical and scientific bodies in the field of fisheries conservation. The ideal, of course, would be to set up a code of conservation so that a set of regulatory provisions for fishing would be available and applicable to all possible cases. That, however, was not the task before the Commission.

10. In view of the fact that Mr. Edmonds' proposal was really only a more detailed version of the provisions adopted at the previous session, and that the Commission had already in article 32 provided for the application in specific cases of the same criteria to both coastal and non-coastal States, he wondered whether Mr. Edmonds wished to press his proposal with regard to article 26.

11. Mr. SPIROPOULOS, endorsing the Chairman's view, said that adoption of Mr. Edmonds' proposal would imply a concern with technical details, which for the Commission would be inappropriate. He feared that the insertion of criteria dealing with technical matters—in which most of the members of the Commission had not the advantage of technical advice—would result in the rejection of the system by governments at any international conference that might be subsequently convened.

12. Mr. SANDSTRÖM said that at the previous meeting he had considered the provisions of article 32 to be adequate as guidance for the arbitral commission. A comparison of article 29, to which article 32 referred, with Mr. Edmonds' proposal showed that there was one common criterion, that of necessity. Article 29 went farther than Mr. Edmonds' article 26 in stressing the aspect of urgency, but that was due to the fact that article 29 envisaged unilateral provisional measures of the coastal State. On the other hand, article 26 in Mr. Edmonds' proposal contained directives to the effect that the merits of the different proposals made in the dispute should be compared.

13. He would therefore repeat his proposal to add to paragraph 1 of article 32, at the end of the first sentence, the words " in so far as they are applicable, taking into

[1] A/CN.4/SR.355, para. 75.

[2] *Ibid.*, para. 99.

[3] *Ibid.*, para. 81.

[4] *Ibid.*, para. 87.

[5] A/CN.4/SR.352, para. 13.

consideration the relative value of the different proposals put forward ".[6]

14. Mr. EDMONDS, in reply to Mr. SPIROPOULOS, pointed out that the criteria he had proposed in paragraph 2 of article 26 were not exclusive, but indicative, being intended rather as a guide to the parties concerned. His proposal was merely a broader statement of the issues involved than that formulated in the draft text. Clarity of expression was more important than the saving of a few words. He failed to see the objection to a clarification of the text which could result only in improving its practical application.

15. Mr. ZOUREK wondered whether Mr. Edmonds' point could be met by embodying the criteria in paragraph 2 of article 29 in a separate article. It would not affect the structure of the system and would clarify it by indicating that the criteria would apply in all cases covered by the articles. To take a concrete case: if, under article 26, the nationals of two or more States were engaged in fishing in any area of the high seas, under the present draft there was no obligation, in the case of agreed measures of conservation, to apply the criteria of article 29. Indeed, the measures adopted might even be in contradiction with those criteria. Such a situation would be avoided if the criteria in article 29 had general application and were embodied in a separate article.

16. Mr. HSU, concurring, said that repetition of criteria in several articles should be avoided, since it tended to confusion.

17. Mr. EDMONDS said that, while maintaining his opinion of the benefits of his proposal, if the Commission so desired, he would be prepared to consolidate all his proposed criteria in one text for general application.

18. Mr. SPIROPOULOS, expressed his surprise at Mr. Edmonds' change of attitude; previously Mr. Edmonds had maintained that different criteria were needed for different situations and that that was the reason why he proposed a separate list of criteria for each article.

19. Mr. EDMONDS explained that he had by no means abandoned his position; his willingness to incorporate the criteria in a single article was merely a compromise solution.

20. Mr. AMADO said that the Commission seemed to be in danger of overlooking the vital distinction between the provisions of articles 26 and 29. Article 26 contemplated negotiations between two or more States. Since it could be assumed that States were perfectly capable of deciding what was in their own interests, it had not been found necessary to lay down that the adoption of conservation measures must conform with specific requirements. Article 29, however, dealt with the adoption of unilateral measures by the coastal State alone. Since in that case there were other interests at stake, some restrictive provisions were necessary. The arbitral commission of technical experts would apply the appropriate criteria in each case.

21. Mr. SCELLE favoured the retention of article 29 practically as it stood. The only modification he would like to see was some mitigation of the criterion in sub-paragraph (*a*) of " an imperative and urgent need ". In practice, the situation might develop so rapidly that the conservation measure contemplated might no longer be effective if it were unduly delayed. He would prefer some such phrase as " certain " or " imminent " need.

22. Mr. AMADO pointed out that such an amendment raised a question of substance.

It was agreed to refer Mr. Scelle's suggestion to the Drafting Committee.

23. Mr. SANDSTRÖM said he interpreted Mr. Scelle as meaning that the criterion in paragraph 2 (*a*) of article 29 would not apply in ordinary cases —for example, to situations such as those covered by article 26—and that article 29 dealt with cases of unilateral measures, which could be regarded as out of the ordinary.

24. The CHAIRMAN suggested that the Commission should vote on the question of principle, whether article 26 should embody specific criteria for the adoption of conservation measures.

25. Faris Bey el-KHOURI said that it would be preferable to decide whether general criteria applicable to all cases of conservation measures should be laid down in a separate article. Such criteria should be accepted by any State, irrespective of whether it was coastal or non-coastal; he understood that paragraph 2 of article 29 was in fact applicable to all States.

26. Sir Gerald FITZMAURICE pointed out the danger of confusing two quite separate questions. Faris Bey el-Khouri and Mr. Zourek had in mind a general article, the provisions of which would be applicable to all States prescribing conservatory regulations, even when the States concerned agreed on the regulations. Mr. Edmonds' point, however, was the inclusion in the different articles of specific criteria for the guidance of the arbitral commission, in case of dispute.

27. The CHAIRMAN recalled that the Commission's original intention had been that the criteria should be applicable to the coastal State only. Consequent upon a proposal by Faris Bey el-Khouri at the seventh session,[7] on which article 32 was based, those criteria had been extended to other States. As things stood, therefore, the criteria, established for the coastal State were now applicable to all other States, subject to the circumstances of each case. Mr. Edmonds' proposal offered a new solution, that of sets of criteria for the different cases that might arise. The Commission should vote on the question of whether to adopt that principle for article 26.

28. Mr. PADILLA-NERVO agreed that under article 32 the provisions of paragraph 2 of article 29 would have general application. He saw no intention in Mr. Edmonds' proposal to amplify the criteria listed in article 29. He was in the difficulty, however, that if the Chairman's procedure were followed, a vote against the principle of including

[6] A/CN.4/SR.355, para. 84.

[7] A/CN.4/SR.302, para. 49.

criteria in article 26 might imply opposition to their extension under the last sentence of paragraph 1 of article 32 to cases dealt with under article 26. It must be stressed that the criteria laid down were directives for the guidance of the arbitral commission.

29. The CHAIRMAN said that that point could be met by voting on Mr. Edmonds' concrete proposal.

30. He then put to the vote Mr. Edmonds' proposed paragraph 2 of article 26.

Mr. Edmonds' proposal was not adopted, 7 votes being cast in favour and 7 against, with 1 abstention.

Article 26 was accordingly adopted as amended at the previous meeting.[8]

31. Mr. SPIROPOULOS said that, basing his decision on the opinion of Mr. Edmonds and Sir Gerald Fitzmaurice, the two members of the Commission who had technical advice at their disposal, he had voted for the proposal. The technical aspects of the question would need further study, however, before the system could be made acceptable to governments.

32. Mr. SANDSTRÖM said that he had abstained from voting, not because he was opposed to the criteria, but because the issue at stake was a problem of drafting and the question as put did nothing to solve that problem.

33. Mr. KRYLOV said that he had voted against Mr. Edmonds' proposal despite the fact that much of what it contained was quite sound. He had already expressed doubts regarding the nature of the proposed arbitral commission. However, if such a solution was to be adopted, it was clear that the arbitral commission must have a certain competence. Its members, who would be experts, would have enough common sense to know how to deal with specific cases. A draft containing some sixty or seventy articles was far too voluminous. The Commission should not try to work on so large a scale, but should produce as brief and simple a draft as possible, without attempting to lay down all the criteria to guide the arbitral commission in every case.

34. Mr. PAL said that he had voted for the proposal because he fully agreed that article 26 required a special set of criteria. The article was essentially concerned with the settlement of disputes between States engaged in fishing. In the case of article 26, the actual merit of the measures adopted was not so important since those measures, whether adopted by agreement or after the intervention of the arbitral commission, could be challenged by other States under the terms of article 27 and when so challenged would have to stand the test in accordance with article 29, paragraph 2, together with article 32, paragraph 1. Thus, by adopting specific criteria for the purposes of article 26, the Commission would in no way be prejudicing the application of the general criteria set out in article 29, paragraph 2. Special guidance was required for the settlement of disputes of the nature contemplated in article 26.

35. Mr. AMADO said that he had voted against the proposal, partly for the reasons he had already outlined [9] but also because article 26 envisaged the settlement of disputes by experts on the subject who would know what technical criteria to apply. The Commission, with the exception of a few members, had no special knowledge of the subject.

36. A further consideration was the need to avoid provisions conflicting with article 29, which laid down the criteria for unilateral action by a coastal State, and article 32, which specified that the criteria should be applied according to the circumstances of each case.

37. The CHAIRMAN, speaking as a member of the Commission, said that he had no objection to the substance of the proposal and had voted against it for considerations alien to the question of the validity of the criteria. Like Mr. Krylov, he did not consider it the task of the Commission to go into such detail on matters on which its members could not normally be expected to be well informed. The proper task of the Commission was to lay down the fundamental legal principles for the conservation of the living resources of the sea.

38. He had also been prompted by the consideration put forward by Mr. Amado in his first statement that, whereas it was essential to furnish criteria in article 29 since it dealt with measures taken unilaterally by a coastal State, such criteria were not required in article 26 where it was a question of collective regulation by the States concerned.

39. An exhaustive code giving clear guidance on all possible cases would, of course, be an ideal instrument. The Commission was not competent, however, to draft such a code.

Article 27

40. The CHAIRMAN invited Mr. Edmonds to introduce his proposal for article 27.

41. Mr. EDMONDS proposed the following text for article 27:

1. If, subsequent to the adoption of the measures referred to in articles 25 and 26, nationals of other States engage in fishing the same stock or stocks of fish in any area or areas of the high seas, the measures adopted shall be applicable to them.

2. If the States whose nationals are so engaged in fishing do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested States may initiate the procedure provided for in article 31, in which case the arbitral commission shall make one or more of the determinations stated in paragraph 2 of article 26 of these articles, depending upon the nature of the disagreement. Subject to the provisions of paragraph 2 of article 32, any measure adopted shall be obligatory pending the arbitral decision.

3. Where, within reasonable limits, the maximum sustainable yield under current conditions of any stock of fish is already being obtained and the maintenance and further development of such yield is dependent on the conservation programme, including research, development and conservation being carried on by the State or States whose nationals are substantially fishing such stock, States not so fishing or

[8] A/CN.4/SR.355, para. 106.

[9] See para. 19, above.

which have not done so within a reasonable period of time, excepting the coastal State adjacent to the waters in which this stock is found, shall abstain from fishing such stock. In the event of disagreement as to whether a particular stock meets the above qualifications for abstention, the matter shall be referred for arbitration as provided in article 31.

4. The arbitral commission shall reach its decision and make its recommendations under paragraph 3 of this article on the basis of the following criteria:

(*a*) Whether by reasonably adequate scientific investigation it may be determined that certain conservation measures will make possible the maximum sustainable yield;

(*b*) Whether the stock is under reasonable regulation and control for the purpose of making possible the maximum sustainable yield, and whether such yield is dependent upon the programme of regulation and control; and

(*c*) Whether the stock is, within reasonable limits, under such exploitation that an increase in the amount of fishing will not reasonably be expected to result in any substantial increase in the sustainable yield.

42. The abstention principle enunciated in the third paragraph of the article had, he said, been discussed at length at the Rome Conference, which had decided that it was essential for the conservation and increase of fishery resources. Briefly, the principle was that States which had devoted funds, time and effort to conserve and develop certain fishery resources should be able to reap a return for their efforts in the form of increased yield and other benefits. To that end, whenever the resources were so fully exploited that more intensive fishing would not increase the yield, States, other than coastal States, which had not fished in the area in recent years should refrain from fishing there. The principle was analogous to that of " unjust enrichment " in United States municipal law.

43. Mr. PADILLA-NERVO said that he wished to make some observations on the abstention principle as enunciated in Mr. Edmonds' draft article. The United States comment maintained that when the yield of a fishery was kept at a high level by the efforts and investment of one or more States and by scientific management, it was only logical and fair that other States, with the exception of coastal States, whose special interest was acknowledged, should refrain from fishing in the area.

44. The principle in question had been embodied in the North Pacific Treaty of 1953 between the United States, Japan and Canada for the protection of salmon fisheries in the hydrographical area of the River Fraser. Since the United States and Canada had taken measures to improve the fishery, and had even refrained from building dams at suitable sites, it was natural that the stock of salmon due to those measures and sacrifices, on reaching the high seas, should not be fished by other countries which had not contributed to its conservation. Japan was bound by that treaty.

45. It was interesting to note, however, that as early as 1937 the United States had put forward the same thesis in a note to Japan, which contained the following statement: " The United States Government believes that the safeguarding of these resources involves important principles of equity and justice. It must be taken as a sound principle of justice that an industry such as described, which has been built up by the nationals of one country, cannot in fairness be left to be destroyed by the nationals of other countries."

46. What Mr. Edmonds was now proposing was that the thesis be made a general rule of law. In that connexion it should be stressed that the United States regarded the abstention of foreign fishers from fishing in such circumstances as justified in itself and not merely by the fact that a State, in a treaty, had waived a right normally enjoyed by its nationals.

47. As the Chairman had recently pointed out, there was a difference between measures for the conservation of resources which applied equally to nationals and foreigners, and the sole right of exploitation of resources, which involved the exclusion of foreign fishermen. Mr. Edmonds' proposal belonged to the second category, and what was euphemistically called the " abstention principle " should really be termed " the principle of justified exclusion of third parties ". The object of the exclusion was, admittedly, the conservation of a species which was being fished to the permissible maximum. Were the measure, however, really one of conservation, the proper course would be to divide the maximum exploitable yield amongst the fishermen of all countries wishing to fish the area, giving all an equal opportunity without discrimination, instead of reserving it for nationals of a few States and excluding the rest. The abstention principle, being clearly discriminatory, could not be regarded as a measure of conservation.

48. The purpose of his remarks was not to criticize the principle put forward by Mr. Edmonds, with which he was, in fact, in agreement, but simply to reveal its true nature. It seemed much more just, though perhaps not entirely in accordance with the traditional and negative concept of the principle of the freedom of the seas, that the sole right of exploitation of a limited stock of fish should be granted to those who had a good claim to it in virtue of their expenditure of funds and effort, to the exclusion of those who had made no contribution to the conservation and improvement of the stock.

49. The United States thesis showed that it was neither absurd nor an *aberratio juris* to grant in certain cases, when it was justified, exclusive rights of exploitation. But if that thesis were accepted, all the logical and juridical inferences must be drawn from it. Mr. Edmonds had merely picked out one from the many possible cases in which it might be desirable to grant exclusive rights of exploitation. There might be other special cases, however, as when a species spent its early life in the internal waters of a State before taking to the high seas, or when an important economic activity within a State was clearly dependent on a certain species inhabiting the neighbouring waters. The interesting biological cycle " anchovy–guano–fertilizer–agricultural produce " to be observed in Peru and part of Chile was one such case. He was sure that a large number of countries in similar circumstances would consider that a coastal State should have the exclusive right of exploitation, in cases such as those he had mentioned.

50. Mr. SANDSTRÖM said that he could not regard the abstention principle merely as a development of the principle of " unjust enrichment ". If it were so regarded,

a difficult situation would arise when a new State offered to pay its share of the outlay of the States claiming exclusive rights. He regarded the principle more as a product of the conflict between the fundamental principle of the freedom of the sea, on the one hand, and the interest of all States not to discourage the adoption of measures of conservation on the other. The second consideration ought, in his opinion, to take precedence over the first. He considered that there was a considerable amount of justice in the proposal, and he would support it.

51. He would not, however, go so far as Mr. Padilla-Nervo and grant exclusive right of exploitation to coastal States. There was a difference between the two cases: under Mr. Edmonds' proposal, States which had already fished in the area would not be excluded, whereas in the instances supported by Mr. Padilla-Nervo, one State would be granted sole rights.

52. Sir Gerald FITZMAURICE said that, while he fully understood the reasons and the special case which had led Mr. Edmonds to make his proposal, he had some doubts regarding its acceptability as a general principle. The proposal was, in fact, out of place in a set of articles on conservation of resources, since it was concerned rather with the distribution of the catch than with the conservation of a stock of fish. He realized, of course, that indirectly the proposal was designed to serve the purpose of conservation, but the main questions at stake was equitable participation in the exploitation of certain fishery areas.

53. His chief concern was whether the proposal was compatible with the spirit of the other articles in the draft, which enunciated as a fundamental principle that measures of conservation should be non-discriminatory and should not have the total exclusion of fishermen from other countries as their aim or result. However strong the argument in favour of the abstention principle might be in special cases such as the North Pacific salmon fisheries, the principle was undoubtedly in conflict with the general spirit of the draft. It might, moreover, easily lead to abuses whereby a group of States might attempt to exclude nationals of other countries from a particular fishing ground by plausibly but incorrectly claiming that it had been worked up to a particular level by their sole efforts. Hence, though viewing the proposal sympathetically in relation to the special circumstances which had given rise to it, he regretted that he was unable to support it.

54. Mr. EDMONDS pointed out that exclusive rights would not be granted beyond appeal. If the claim to exclusive rights were challenged the matter would be referred to an arbitral commission.

55. Sir Gerald FITZMAURICE replied that he had not overlooked that provision. Undoubtedly it made the proposal more acceptable, but he still entertained doubts regarding the advisability of its adoption as a general rule.

56. Mr. SCELLE said that he feared that the Commission, in attempting to convert the results of diplomatic negotiations between States into a general rule, was exceeding its proper role—which was to lay down general rules representing the absolute minimum that States could claim in the matter of regulating fisheries in their contiguous zones.

57. If a State wished to establish what was, to all intents, a monopoly of fishing in a certain area, its claim should be referred to the arbitral commission as the crucial point in a set of regulations.

58. Mr. AMADO wondered whether the exceptional case dealt with in paragraph 3 of Mr. Edmonds' proposal could not be regarded as one of the measures necessary for conservation within the meaning of article 26, and accordingly referred to the arbitral commission.

59. Like Mr. Scelle, he was reluctant to enunciate the abstention principle as a general rule. The principles governing the conservation of fisheries were a comparatively new subject of discussion and the Commission should not be too hasty in formulating general rules.

60. Mr. SALAMANCA considered that the abstention principle could be applied either unilaterally or by two or more States, in the same manner as other measures contemplated in other articles of the draft. It would be recalled that he had referred on a number of occasions in the past to the anchovy fisheries in the Pacific Ocean as an example of the special interest which a State might have in applying conservation measures affecting its own nationals as well as foreign fishermen, in order to preserve stocks of fish essential to its coastal economy and agriculture. The sole difference between the application of the abstention principle unilaterally on the high seas and its application in the adjacent waters of the State lay in the fact that different criteria would have to be adopted for the solution of the problems involved.

61. The question was of great importance. The Commission normally tended to think in general terms, but in the present case it was dealing with a specific issue. He was in favour of basing the law, where possible, on concrete cases such as those just described. If paragraph 3 of Mr. Edmonds' proposal were not adopted, he hoped that it would at least be stated in the commentary that the abstention principle could be applied in special cases where its application was shown to be technically justified.

62. Mr. ZOUREK said that, though appreciating the reasons prompting Mr. Edmonds' proposal, he believed that the principle it contained related rather to the exploitation or the possibility of exploitation of fisheries by States and thus went beyond the question of regulating the conservation of the living resources of the sea.

63. His main objection to the proposal was that it established a kind of monopoly and one of unlimited duration. Such a provision was incompatible with the freedom of fishing on the high seas and ignored the rights of coastal States regulated by other provisions in the draft. It would, moreover, be unjust to many States. Newly established States, for instance, or those which, like the under-developed countries, had only recently acquired the possibility of exploiting more distant fisheries, would be excluded from fishing in certain areas.

64. Precisely because the cases cited were exceptional ones, he felt that the principle involved should not be

embodied in the articles of the draft, which dealt with general principles. So general a provision, which could give rise to frequent abuse, was out of place in the draft. Problems of that nature could be regulated as between the States themselves by international agreements on the lines of the International Convention of 1946 for the Regulation of Whaling.

65. Mr. FRANÇOIS, Special Rapporteur, agreed that it would be a case of unjust enrichment if newcomers were allowed to exploit resources conserved and developed by the efforts of other States. The abstention principle, it was true, infringed the principle of the freedom of the seas, of which he was generally a firm adherent. But principles of law must be viewed in their proper setting. The Commission had in the past accepted other restrictions on the freedom of the seas. If the abstention principle was applied, no injustice would be done to the States thereby excluded, since, had the measures not been taken by the State claiming exclusive rights, there would have been no stocks for them to exploit.

66. If the Commission wished to encourage measures of conservation it should include Mr. Edmonds' proposal in the draft, especially as it contained the safeguard that the measures might be referred to an arbitral commission.

67. He could not agree with Mr. Amado that the case was already covered by article 26. That article related to measures adopted by common agreement for the conservation of fisheries. Abstention from the exploitation of stocks was quite a different matter.

68. Sir Gerald FITZMAURICE did not think the case was as simple and straightforward as the Special Rapporteur's remarks would seem to suggest. The fact that as a result of certain action a specially high degree of productivity had been attained did not mean that the stock would otherwise not have been conserved. Moreover, the State wanting to come in might be fully prepared to observe the already established measures.

69. He did not consider that Mr. Edmonds' proposal, though it might be legitimate in another context, related to conservation as such, but was rather concerned with the equitable exploitation of certain fisheries. He could however, support Mr. Salamanca's suggestion that the proposal should be mentioned in the comment with an explanation that, as the Commission considered that it fell outside the scope of the present draft, no provision on the subject had been included.

70. Mr. EDMONDS could not agree that his proposal was unrelated to conservation, since that concept embraced not only the protection of existing resources from waste and harmful use, but also means of increasing those resources. His proposal had been based on the conclusion of the Rome Conference that: " Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action."[10]

[10] A/CONF.10/6, para. 61.

71. The Commission was not only engaged in codifying, but was also laying down rules for the progressive development of international law, and acceptance of the principle he had proposed would foster efforts to increase productivity. He had not proposed that States should be allowed to claim absolute rights not subject to appeal over certain stocks of fish, since the measures proposed could be challenged before an arbitral commission which would decide whether other States were entitled to enrich themselves at the expense of those that through their own efforts and expenditure had improved the yield. It was in the interests of mankind as a whole to encourage States to invest in such measures rather than to allow the depletion of certain stocks by permitting unrestricted fishing.

72. In conclusion he observed that the Canadian Government favoured the inclusion of a provision on the lines he had suggested largely for the same reasons as his own.

73. Mr. SCELLE, wishing to correct an erroneous impression given by the Special Rapporteur and Mr. Sandström, both of whom had based their argument on a concept of private law, emphasized that in the domain of public property there could be no question of trying to balance investment against gain. If that were not so, many States would be heavily indebted to their peasants, who for many centuries in the past had been compelled to maintain public highways when there had been no commensurate burden upon townsmen. Any State whose nationals were engaged in fishing should contribute something towards conservation measures without considering what it would obtain in return. It was quite sufficient to empower an arbitral expert body to determine whether any particular measure was appropriate.

74. Mr. SALAMANCA pointed out that the enactment of any conservation measures was bound to create some degree of monopoly, but since the measures proposed by Mr. Edmonds could be taken by more than one State the fears expressed by some members were groundless.

75. One way or another the matter raised by Mr. Edmonds must be mentioned somewhere, and once the Commission had decided on the principle, the question should be referred to the Drafting Committee.

76. Mr. KRYLOV observed that, since an important matter of principle was at stake, the decision must be taken by the Commission itself.

77. Mr. AMADO said that at the outset he had thought that Mr. Edmonds' proposal might be covered by the provisions of article 26, but the Special Rapporteur's remarks had now convinced him that the proposal brought up an entirely separate question.

78. Mr. ZOUREK said that the Special Rapporteur's argument about the position of newcomers—namely, that if no conservation measures had been taken, there would have been no stocks for them to exploit, was not decisive, because they in their turn could contend that if the stock in a certain area had not already been fished by nationals of the more developed States it would have been left intact for them.

79. He then asked for what length of time States would be entitled to prevent others from fishing a certain stock.

80. Mr. EDMONDS replied that it was for the arbitral commission to decide that question when the measures were challenged.

81. The CHAIRMAN, speaking as a member of the Commission, said that the principle of abstention was vitally important at the present stage of development of international law. Under article 27, paragraph 1, conservation measures already adopted for a certain area would be applicable to nationals of other States which had not taken part in their preparation. The same held good of measures adopted unilaterally by a coastal State by virtue of article 29.

82. Mr. Edmonds was now proposing to go much farther and to enable States in certain circumstances to prevent others from fishing altogether, which, as Mr. Padilla-Nervo had pointed out, was not a conservation measure at all, but an effort to establish rights of exclusive exploitation analogous to those enjoyed in the territorial sea or internal waters. In the Declaration of Santiago, of August 1952, the need for conservation had been given as the ground for claiming exclusive rights in a certain area. In that connexion it was significant that the Icelandic Government had expressed the view that the draft articles on conservation would not reduce the importance of exclusive coastal fisheries jurisdiction.

83. Hitherto the Commission had never studied the question of exclusive rights of exploitation outside the territorial sea and internal waters. If it wished to do so he would have no objection, but the present draft, dealing as it did with conservation, was not the proper place for a provision on that subject. After careful examination it might be established that in certain circumstances coastal States were entitled to claim exclusive fishing rights in certain areas. The point had been considered at the Rome Conference, but no conclusion had been reached as to what conditions should be laid down to justify such rights.

84. Thus, while not rejecting the possibility of exclusive rights in a certain area, he considered that it should be examined in an entirely different context.

85. Mr. EDMONDS said that in view of the understandable differences of opinion on a new and progressive principle, he would be satisfied with an appropriate statement in the comment and would not press for a vote on his proposed new text for article 27.

86. Mr. SALAMANCA, pointing out that the whole draft on conservation was *de lege ferenda*, said that Mr. Edmonds' proposal was in line with the object of the whole draft and must be taken into account. He agreed that if it could be proved that the economic life of a State depended in great measure on certain stocks of fish, other States as well as the State immediately affected should abstain from fishing in the area concerned. Such a measure, moreover, would be taken in conformity with the conditions laid down in the draft.

87. Mr. PAL said he was unable to follow Mr. Sandström in accepting the third paragraph of Mr. Edmonds' proposal as innocent, but apprehended that it was merely an attempt to secure a monopoly for vested interests. If Mr. Edmonds really had in view only a conservation measure, then articles 25 and 26 would amply cover his case, but when any other States challenged the measures adopted, those measures would have to face the tests laid down in article 29, paragraph 2. If, on the other hand, Mr. Edmonds had something else in view, it should not be presented in the guise of an innocent-looking conservation measure. Such a measure could be discussed and decided on only if properly presented in its appropriate place.

88. Mr. AMADO observed that the Commission's task had been greatly simplified by Mr. Edmonds' readiness to have his point dealt with in the comment. The principle of abstention itself would undoubtedly be discussed at length at some future stage, but in the absence of data the Commission could not at present reach any constructive conclusions.

89. Mr. SCELLE observed that the Hague Conference for the Codification of International Law of 1930 had failed to reach agreement on a contiguous zone where the coastal State could exercise exclusive fishing rights. The Commission's efforts had also come to nothing, and that was precisely why he believed that it would be unprofitable to discuss Mr. Edmonds' proposal.

90. The CHAIRMAN proposed that the Special Rapporteur be requested to prepare, for the Commission's consideration, a statement concerning the principle of abstention, also mentioning other analogous principles, for inclusion in the comment.

The Chairman's proposal was adopted and Mr. Edmonds' proposal was referred to the Drafting Committee.

91. Mr. SANDSTRÖM drew the attention of the Drafting Committee to the need for making clear that paragraph 2 in article 27 referred to States whose nationals were newcomers to fishing in the area for which measures had been adopted under articles 25 or 26.

92. The CHAIRMAN, speaking as a member of the Commission, considered that it should be made clear, either in the comment or in the text of the article itself, that the measures were binding only on those States which began large-scale fishing operations in the area for which conservation measures were already in existence.

Subject to the decision concerning the comment, article 27 was adopted.

Article 28

93. Mr. FRANÇOIS, Special Rapporteur, said that the Government of India had proposed the deletion of article 28 (A/CN.4/99) and the Netherlands Government had expressed uncertainty about the relationship between the article and article 29 (A/CN.4/99/Add.1). He reminded the Commission that Mr. Spiropoulos had proposed a new text[11] combining the provisions of articles 28 and 29 and his proposal had been substantially accepted. Personally, he did not think that the modi-

[11] A/CN.4/SR.351, para. 5.

fications introduced in article 29 had altered the position to any great extent and he therefore favoured the retention of article 28, so that the coastal State would still have the choice of either negotiating with others concerning the regulation of fisheries or taking unilateral action. That would meet Sir Gerald Fitzmaurice's contention [12] that when regulations agreed upon between two or more States existed in an area contiguous to the coast of another State, only in case of emergency could the last State promulgate other regulations without first trying to reach agreement with the signatories to the existing regulations.

94. Mr. SPIROPOULOS explained that when he had originally moved his proposal combining articles 28 and 29 he had omitted the requirement contained in article 29, paragraph 2 (*a*), but now that it had been reinstated he was no longer in favour of deleting article 28.

95. Mr. SANDSTRÖM agreed that article 28 should be retained, but did not entirely share the Special Rapporteur's opinion that articles 28 and 29 presented the coastal State with two alternative procedures; the latter article had a narrower application and the rights it conferred could be exercised only if there was urgent need for conservation.

96. Faris Bey el-KHOURI considered that the Drafting Committee's attention should be drawn to the inaccuracy of the expression " an area of the high seas contiguous to a coast ". The high seas could only be contiguous to the outer limit of the territorial sea.

97. Mr. FRANÇOIS, Special Rapporteur, agreed that the expression was an unfortunate one. The Drafting Committee should also be requested to substitute throughout the whole draft on conservation some other word for " contiguous ", so as to eliminate any possibility of confusion with " the contiguous zone ". Perhaps the word " adjacent " might serve.

98. Mr. SCELLE agreed that two different words were necessary for the articles on conservation and for the provisions relating to the contiguous zone.

99. Mr. ZOUREK reaffirmed his opinion [13] that since the expression " contiguous zone " had acquired a definite technical connotation, some other term was needed for the present draft.

It was agreed to refer the points raised by Faris Bey el-Khouri and the Special Rapporteur to the Drafting Committee.

Article 28 was adopted.

Article 29 (resumed from the 353rd meeting)

100. Mr. SANDSTRÖM proposed that the Drafting Committee be requested to consider the possibility of deleting the word " scientific " in paragraph 2 (*a*).

The meeting rose at 1.5 p.m.

[12] A/CN.4/SR.355, para. 56.

[13] A/CN.4/SR.349, para. 84.

357th MEETING

Thursday, 31 May 1956, at 9 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Also present: Mr. M. CANYES, Representative of the Pan-American Union.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97/Add. 3, A/CN. 4/99 and Add. 1-7) (*continued*)

Conservation of the living resources of the high seas (continued)

Article 29 (continued)

1. The CHAIRMAN invited the Commission to consider a number of outstanding points arising out of the draft articles relating to the conservation of the living resources of the sea.

2. Speaking as a member of the Commission, with reference to the point made by Mr. Sandström at the previous meeting regarding the different applications of articles 28 and 29,[1] he said he interpreted article 28 as being intended to meet the normal non-urgent case where the coastal State, in view of its special interest, was allowed to take part in any system of research and regulation in an area of the high seas contiguous to its coast even though its nationals did not carry on fishing there; article 29, on the other hand, dealt with the special case where the parties had failed to agree and there was urgent need for conservation measures.

[1] A/CN.4/SR.356, para. 95.

3. Mr. EDMONDS agreed with the Chairman's interpretation of the two articles, each of which had a particular and definite purpose. He therefore did not favour the deletion of article 28, and emphasized that the rights conferred upon the coastal State in article 29 could be exercised only if the need for conservation measures was so urgent that they could not wait upon negotiations with other States.

4. Mr. PAL also considered that both articles were necessary and pointed out that, following the adoption of Mr. Padilla-Nervo's amendment [2] to article 29, the opening words of article 28 should now read " A coastal State has a special interest ".

5. The CHAIRMAN observed that such consequential amendments could be entrusted to the Drafting Committee.

Article 29 was referred to the Drafting Committee.

Article 30

6. The CHAIRMAN drew the Commission's attention to the alternative text for article 30 submitted by Mr. Edmonds, which read:

1. Any State which, although its nationals are not engaged in fishing in an area of the high seas, has a special interest in the conservation of the living resources in that area, may request the State or States whose nationals are fishing there to take the necessary measures of conservation.

2. If satisfactory action is not taken upon such a request within a reasonable period, such requesting State may initiate the procedure provided for in article 31.

3. The arbitral commission shall, in procedures initiated under this article, reach its decision and make its recommendations on the basis of the following criteria:

(*a*) Whether scientific evidence shows that there is a need for measures of conservation to make possible the maximum sustainable productivity of the particular stock or stocks of fish; and

(*b*) Whether the conservation programme of the States fishing the resource is adequate for conservation requirements.

4. Nothing in this article shall be construed as a limitation upon any action taken by a State within its own boundaries.

7. He suggested that the criteria set out in the above text should be mentioned in the comment in order to explain which criteria would be applied by the arbitral commission in the cases mentioned in the second sentence of article 32, paragraph 1, and asked for the views of members.

8. Mr. EDMONDS thought that, in the interests of clarity and precision, it would have been preferable to state in each of the relevant articles the criteria applicable. However, he would be prepared to accept the Chairman's suggestion, though it was not an ideal solution.

9. Mr. FRANÇOIS, Special Rapporteur, asked whether the Chairman's intention was that the criteria should be mentioned in the comment without any expression of opinion by the Commission.

10. The CHAIRMAN, speaking as a member of the Commission, replied that he could accept some expression of support for the criteria in the comment in the case of article 26, for instance, when the vote had been equally divided.[3]

11. Mr. FRANÇOIS, Special Rapporteur, thought that amounted to going back on the Commission's decision not to express an opinion on the validity of the criteria. If the Chairman's suggestion were followed, the Commission would have to reopen the discussion, in which event it might after all be concluded that it would be preferable to embody the criteria in the text of the articles themselves.

12. The CHAIRMAN, speaking as a member of the Commission, observed that although there was substantial agreement on the criteria themselves, some members, including himself, considered that there were strong objections to inserting them in the body of the text.

13. Mr. HSU observed that at its previous meeting [4] the vote had only been on the question of whether specific criteria should be inserted in article 26; no decision had been taken on the general question of whether criteria should be included in the articles or in the comment, so that there was no procedural objection to discussing the latter point, as suggested by the Special Rapporteur. Perhaps, as the criteria were not of a technical nature, an acceptable solution might be found.

14. Mr. SANDSTRÖM, endorsing Mr. Hsu's remarks, said that it might be possible to simplify the criteria and make them applicable in all cases.

15. Sir Gerald FITZMAURICE said that he could accept a reference to the criteria in the comment.

16. Mr. PAL considered that the criteria should be mentioned in the comment without any expression of opinion, since the Commission had taken no decision as to their substance.

17. Faris Bey el-KHOURI considered that the criteria should be embodied in the text itself and should be applicable in all cases. He saw no purpose in inserting them in the comment, which would have no binding force and was purely designed to assist jurists in interpreting the Commission's draft.

18. The CHAIRMAN suggested that Mr. Edmonds might be requested to prepare a text for insertion in the comment. The Commission could then decide whether it wished to express approval of the criteria.

It was so agreed.

Article 30 was adopted.

Question raised by the Norwegian Government

19. Mr. FRANÇOIS, Special Rapporteur, felt that the Commission should give some consideration to the Norwegian Government's question, in its comments on articles 24-33 (A/CN.4/99/Add.1) about the effect on existing treaties of the arbitration procedure prescribed in the draft articles. In his opinion, the answer would

[2] A/CN.4/SR.351, para. 74.

[3] A/CN.4/SR.356, para. 29.

[4] *Ibid.*, para. 23.

depend on the final form given to the present draft. If the rules being prepared by the Commission were eventually embodied in a convention, a provision would have to be included to explain how it affected existing treaties.

20. Mr. SPIROPOULOS said that it was self-evident that the present draft, though it might influence the development of international law, had at the moment no other standing than that of a scientific work. Only an international convention could affect existing treaty obligations.

21. Mr. ZOUREK said that the question was relevant to all the other drafts prepared by the Commission. In the present instance, since the draft would constitute the basis for future discussion, whether at the General Assembly or at a special international conference, an additional article was needed to explain the relationship between a new general convention and existing bilateral or multilateral treaties, many of which might contain provisions which were at variance with the proposed articles. In view of the variety and special nature of the interests involved, it should be laid down that the provisions of a new general convention would only be applicable when matters had not already been regulated by existing treaties. Such a provision should facilitate the adoption of a new convention since States would not like being forced to abandon existing treaties and would prefer to be free to denounce them if they felt it necessary. For that reason, and because the new rules proposed by the Commission could not settle all problems, his suggestion of an additional article deserved consideration.

22. Mr. SPIROPOULOS did not think that the Commission, whose primary task was to codify, need concern itself with a complex problem which was usually dealt with at the concluding stages of drafting a convention or treaty.

23. Mr. EDMONDS considered that a complete reply to the Norwegian Government's question was provided in article 24.

24. Mr. SCELLE failed to understand why the Norwegian Government should have raised the question in connexion with a particular draft since it was a well-known fact that if a general convention conflicted with any of the provisions of existing treaties, on ratification of the convention such provisions were superseded *ipso facto*. There was therefore no need for the insertion of a special article.

25. Mr. FRANÇOIS, Special Rapporteur, considered that the principal question at stake was whether, if the present draft were eventually ratified in the form of a convention, its arbitration provisions would come into play if differences arose in connexion with existing treaties.

26. Mr. SCELLE considered that States must bear that possibility in mind.

27. Mr. ZOUREK thought that if there was a general treaty establishing special controls, as in the case of the International Convention for the Regulation of Whaling, it should not be affected by the present draft, which could not possibly embrace all the particular problems pertaining to different species. He added that the draft should not be restricted, as it appeared to be at present, to fishing, but must also explicitly cover whaling and sealing.

28. Mr. SCELLE agreed with Mr. Zourek.

29. Mr. KRYLOV said that it was premature to decide the question raised by the Norwegian Government. The International Convention for the Regulation of Whaling dealt with a special question and would not be affected by the present draft.

30. The CHAIRMAN said that the question raised by the Norwegian Government could not be considered at present, as the Commission did not yet know what final form its draft articles would be given. Instead of being incorporated in a convention, they might be adopted by the General Assembly as recommendations.

Other questions

31. Mr. SPIROPOULOS said that he wished to raise another question connected with the draft articles relating to conservation—namely, the precise meaning of the words in article 24, " All States may claim for their nationals the right to engage in fishing on the high seas ". Taking, for example, the case of Mr. Onassis, who was of Argentine nationality, whose vessels sailed under the Panamanian flag and were manned by German crews, would the claim be made for him, for his fishing fleet or for its crews? The question deserved consideration.

32. Mr. SANDSTRÖM considered that Mr. Spiropoulos' question would be answered when the draft articles, if embodied in a convention, came to be applied. There was, however, another matter raised earlier [5] by Mr. Spiropoulos that must be discussed sooner or later —namely, that of provision for the revision of conservation measures.

33. *The CHAIRMAN declared the discussion on the draft articles relating to conservation of the living resources of the high seas closed.*

34. He then called on the Secretary to the Commission to make a statement on item 10 of the agenda, Co-operation with Inter-American bodies.

Co-operation with inter-american bodies (item 10 of the agenda)

35. Mr. LIANG, Secretary to the Commission, said that, in accordance with the resolution adopted by the Commission at its previous session,[6] he had attended the third meeting of the Inter-American Council of Jurists and had presented a report (A/CN.4/102) which contained more than a routine account of what had taken place, since, in addition to the question of co-operation between the Council and the Commission, it also dealt with matters of special interest to the latter connected with the law of the sea and reservations to multilateral treaties. He hoped that the section on maritime questions would

[5] A/CN.4/SR.355, para. 45.

[6] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), para. 36.

be particularly useful, as the record of the debates of the Inter-American Council of Jurists had hitherto been available only in Spanish.

36. In a statement [7] concerning co-operation made in a plenary meeting before the Inter-American Council of Jurists, he had expressed the view that while the work of the Council was similar in character to that of the Commission, there was little scope for co-ordination and that it would be preferable for both bodies to proceed on parallel lines as before since there could be no question of duplication. The results achieved on both sides would contribute towards the development of international law. He hoped that his opinion on that point would be shared by both bodies.

37. Mr. CANYES (representative of the Pan-American Union), speaking at the invitation of the CHAIRMAN, thanked the Secretary for his comprehensive report, which summarized the essential features of the discussions at the third meeting of the Inter-American Council of Jurists concerning questions of the territorial sea and reservations to multilateral treaties.

38. He believed it might be useful to describe briefly the method of work of the Inter-American Council of Jurists and its relation to the work of the Commission. With the signature of the Charter of the Organization of American States (OAS) at the Ninth International Conference of American States held at Bogotà in 1948, the Organization had acquired a new legal status of a more formal character and the functions of its six organs had been more precisely defined. The Council of OAS had its permanent seat at Washington and included all twenty-one members of the Organization. Like the other two organs of the Council, the Inter-American Economic and Social Council and the Inter-American Cultural Council, the Inter-American Council of Jurists, which had replaced the body previously entrusted with the work of codification, possessed some technical autonomy. It met every two or three years and between sessions its standing body, the Inter-American Juridical Committee of Rio de Janeiro, carried out the preparatory work on different questions. After its drafts had been submitted to governments for comment through the Council of Jurists, they were given a second reading in the Council in the light of those comments. That procedure, which was similar to the procedure followed by the International Law Commission, dated back to 1906. In considering their particular problems, the American States had always sought to bear in mind general trends in the development of international law and to apply universal principles, a policy which was consistent with the declaration made by the American Institute of International Law in 1925. It was noteworthy that certain Latin-American countries were now participating both in the work of the Council and in that of the Commission.

39. In conclusion he assured members that the Secretariat of the Inter-American Council of Jurists would be pleased to co-operate with the Commission in every way possible.

40. Mr. PADILLA-NERVO, thanking Mr. Canyes for his statement, hoped that the relations which had been established with the Inter-American Council of Jurists would be further strengthened. Attendance by representatives of the secretariat of each body at meetings of the other would be to the advantage of both and would make it possible for them to keep informed about each other's work. He agreed that their spheres of competence were not mutually exclusive.

41. The CHAIRMAN suggested that the Special Rapporteur, in conjunction with the Secretary, be requested to prepare a passage for inclusion in the Commission's report, expressing its satisfaction that Mr. Canyes should have attended some of its meetings and welcoming the resolution adopted by the Inter-American Council of Jurists, which had reciprocated the Commission's own resolution of the previous year. The Commission should also take note with satisfaction of the Secretary's report. The two bodies had similar duties to develop and codify international law and should benefit from each other's work.

It was so agreed.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/99/Add.1 and A/CN.4/102/Add.1) (*resumed from above*)

The continental shelf

Article 1

42. Mr. FRANÇOIS, Special Rapporteur, introducing the draft articles on the continental shelf, recalled that they had been adopted at the Commission's fifth session after re-examination in the light of observations from Governments.[8] Since then the United Kingdom Government, in its comments on the provisional articles concerning the regime of the high seas and the draft articles on the regime of the territorial sea, had included certain observations on the continental shelf (A/CN.4/99/Add.1, pages 71-74), which called for consideration. He would suggest that the Commission take up the articles *seriatim*.

43. In article 1, the United Kingdom, though not rejecting outright the 200-metre line as the criterion for the outer edge of the continental shelf, considered that the 100-fathom line would be preferable, since that was the line already marked on most charts of those countries producing charts covering the whole world. He was in two minds about that proposal, for he doubted whether the difference was an important one. The point, however, should be considered. The United Kingdom further proposed the insertion of the word "immediately" before the word "contiguous".

44. In addition, there were the Chairman's amendments to the draft articles, which read as follows:

1. The articles would be preceded by the following preamble:

Whereas;

Progress in scientific research, as well as technical progress,

[7] A/CN.4/102, paras. 91-94.

[8] *Official Records of the General Assembly, Eighth session, Supplement No. 9* (A/2456), p. 12.

has rendered possible the exploration and utilization of the natural resources of the soil and subsoil of the submarine areas adjacent to continents and islands;

There is a geological continuity and physical unity between the continental and insular territory of each State and the submarine areas adjacent to it;

By reason of these circumstances, international law recognizes the exclusive (or sovereign) rights of each State over the submarine areas adjacent to its territory for the purpose of the exploration and utilization of the natural resources existing in, or that may be found in, the soil and subsoil of the said areas, without prejudice to the rights of other States under the principle of freedom of the seas;

The International Law Commission has adopted the following articles:

2. Article 1 would be drafted as follows:

Article 1

1. As used in these articles, the expression " submarine areas " refers to the soil and subsoil of the submarine shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal State outside the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

2. Likewise, as used in these articles, the expression " natural resources " refers to the mineral riches of the soil and subsoil of the submarine area, as well as to the living resources which are permanently attached to the bottom.

3. In the other articles of the draft, the expression " submarine areas " would be substituted for the expression " continental shelf."

45. The CHAIRMAN, speaking as a member of the Commission and introducing his proposal, said that consideration of the preamble might suitably be deferred.

46. He would stress that neither of the two paragraphs in article 1 entailed any change of substance. The draft adopted at the fifth session had contemplated only the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of 200 metres. There were, however, other areas contiguous to the coast of a State that were both explored and exploited. He had accordingly circulated to members the " Terminology and Definitions approved by the International Committee on the Nomenclature of Ocean Bottom Features " adopted by the International Committee of Scientific Experts at Monaco in 1952. Those definitions were as follows:

1. *Continental Shelf, Shelf Edge and Borderland*

The zone around the continent, extending from the low water line to the depth at which there is a marked increase of slope to greater depth. Where this increase occurs, the term " shelf edge " is appropriate. Conventionally, the edge is taken at 100 fathoms (or 200 metres), but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low water line is highly irregular, and includes depths well in excess of those typical of continental shelves, the term " continental borderland " is appropriate.

2. *Continental Slope*

The declivity from the outer edge of the continental shelf or continental borderland into great depths.

3. *Borderland Slope*

The declivity which marks the inner margin of the continental borderland.

4. *Continental Terrace*

The zone around the continents, extending from low water line, to the base of the continental slope.

5. *Island Shelf*

The zone around an island or island group, extending from the low water line to the depths at which there is a marked increase of slope to greater depths. Conventionally, its edge is taken at 100 fathoms (or 200 metres).

6. *Island Slope*

The declivity from the outer edge of an island shelf into great depths.

47. The essence of his proposed paragraph 1 was, first, the distinction drawn between the continental shelf and the continental terrace; the latter had not been included in the draft article. He explained that the continental terrace was formed by the right-angled triangle, the hypotenuse of which was the continental slope, the other two sides being the perpendicular dropped from the outer edge of the continental shelf and the horizontal line joining the base of that perpendicular and the base of the continental slope.

48. Paragraph 1 of the operative part of the resolution on the subject adopted at the Inter-American Specialized Conference at Ciudad Trujillo was drafted on that basis, whereas the Commission's draft excluded both the continental terrace and, in certain instances, other submarine areas also. In addition, the Ciudad Trujillo resolution took account not only of the legal, but also of the economic and scientific aspects of the question. It would be seen that that resolution had adopted not only the International Committee's terminology, but, in respect of the areas excluded from the Commission's concept of the continental shelf, the criterion of exploitability adopted at the third session.

49. The Inter-American Specialized Conference had, moreover, added the criterion of equality. The Commission was aware that the concept of the continental shelf had been the subject of criticism, because there were several States, such as the countries on the Pacific coast of Latin America and the Dominican Republic, off whose coasts there was no continental shelf, which exploited other adjacent submarine areas. In some cases, for instance, the sea-bed was exploited for coal-mining purposes up to a depth of 1,100 metres, whereas the Commission had restricted the rights of a coastal State to a depth of 200 metres. The considerations guiding the Commission's choice were explained in paragraph 64 of the report of the fifth session (A/2456). To a certain extent, the element of arbitrariness in the provisions had been mitigated in paragraph 66 which recognized the principle of equality, to which effect was given in the Ciudad Trujillo resolution, for it envisaged the possibility of reasonable modifications of the 200-metre figure. His proposal amounted to explicit recognition of that principle in the text of the article.

50. Nor did his proposed paragraph 2 involve any

change of substance. In 1953, the Commission had extended the concept of " natural resources " to include the products of sedentary fisheries (A/2456, para. 70). The purpose of his proposal was to transfer that decision from the comment to an article in order to define natural resources, just as paragraph 1 defined the expression " submarine areas ". The Inter-American Specialized Conference had set up a Working Party to study the question of the relationship between the various species of living resources of submarine areas—including the continental shelf. Adopting a biological approach, the Working Party had classified three types of organism. The first two, classified as sedentary species, were benthos permanently attached to the bottom, and other benthos though still adhering to the sea-bed, which were mobile. The third type comprised floating plankton. Certain species changed their habits during their lifetime, but the organisms attached to the bottom were the most vulnerable. The first two types constituted an integral part of the sea-bed, whereas the plankton, completely mobile, belonged to the superjacent water.

51. The establishment of such a classification was important, for in determining the rights of the coastal State there was no uniformity of definition of the term " natural resources ". Sometimes the term was interpreted as meaning sedentary fisheries, but that term, too, had been given a broader scope and even been taken to include as much as 85 per cent of the total production of world fisheries, a fact which underlined the importance of drawing a clear distinction. His purpose, therefore, was simply to retain the criterion adopted by the Commission at its fifth session and to embody it in an article.

52. Mr. FRANÇOIS, Special Rapporteur, referring to the Chairman's proposal to substitute " submarine areas " for " continental shelf," recalled that a similar proposal had been rejected by the Commission at its third session.[9] That attitude had been maintained at the seventh session, because the term " continental shelf " was in common use and generally recognized. He therefore doubted the wisdom of making a change at that stage. Moreover, the Chairman's proposal was itself vague since it included " other submarine areas " which were not defined.

53. As for the term " continental and insular terrace ", he was not sure of its real meaning. It must not be forgotten that the Commission's draft was not intended for study only by experts: consequently, if its terms were not clear to members of the Commission, how could the lay public be expected to understand it?

54. The second proposal, extending the limit of the area in which a coastal State would have exclusive rights to beyond the 200-metre limit, was not objectionable in itself, but the contingency of practical exploitation in such submarine areas was so remote that he doubted the necessity of providing for it in an article.

55. The definition of natural resources in paragraph 2 was of greater importance, and the idea of inserting in an article the inclusion of marine organisms permanently attached to the bottom was acceptable. The term " living resources ", however, gave rise to some doubts and was liable to cause misunderstanding.

56. The CHAIRMAN, replying to the Special Rapporteur and referring to his proposal in paragraph 1, explained that his main concern was to anchor the definition of the area of the sea-bed and subsoil to an established scientific criterion of recognized importance, and he would again stress the distinction between the continental shelf and the continental terrace. The Special Rapporteur had rejected the term " submarine areas " on the ground that " continental shelf " was in common use. It was a fact, however, that about 50 per cent of national legislations referred to both continental shelf and continental terrace, whereas the Commission had disregarded the latter term completely. Again, the term " submarine areas " was used in a treaty between the United Kingdom and Venezuela[10] and in other official documents. It was a generic term which included the continental shelf, the continental terrace and other areas which, on account of their depth, did not fall within either of those categories. Since the point was already covered in paragraph 66 of the report of the fifth session (A/2456), it seemed logical in the final draft to deal with it in an article.

57. Mr. AMADO was not convinced by the argument for excluding from the draft the term " continental shelf ", which had been made familiar by wide usage and had a perfectly clear connotation for both jurists and the general public. While appreciating the Chairman's distinction between the continental terrace and the continental shelf, he could not accept the proposal to substitute " submarine areas " for " continental shelf ".

58. Mr. HSU was in favour of the expression " submarine areas ", because in so far as it referred to areas subtracted from the high seas there was a scientific basis for their determination. " Continental shelf ", on the other hand, was an inaccurate and unscientific term. Moreover, many States did not have a continental shelf in the scientific sense and would therefore welcome a change of nomenclature, as would also the lay public. While appreciating the desire of the Special Rapporteur to retain a familiar term, he would suggest that the conservatism of jurists should not be blind to valid scientific reasons for change.

59. Sir Gerald FITZMAURICE deprecated Mr. Hsu's suggestion of an area being taken from the high seas. The continental shelf had no relevance whatever to the superjacent waters. What was envisaged was merely the sea-bed and subsoil, and neither the status of the waters above nor fishing or other rights in regard to those waters were affected or included.

60. Mr. HSU explained that he had meant to convey that a contiguous zone—although it had not the extent of the territorial sea—was taken from the high seas. As to the point that it was only the sea-bed and subsoil and not the superjacent waters that were affected, he would agree that that was the purpose of the draft. Whether

[9] *Official Records of the General Assembly, Sixth session, Supplement No. 9* (A/1858), Annex, article 1, para. 3.

[10] Treaty between the United Kingdom and Venezuela relating to the Submarine Areas of the Gulf of Paria, 26 February 1942.

the distinction could be maintained in practice was another matter.

61. The CHAIRMAN said that the question raised by Mr. Hsu was covered by article 3, and he would have the opportunity of raising the point again when that article was discussed.

62. Mr. SALAMANCA said that he did not see the legal importance from the standpoint of the draft of adopting the terminology approved by the International Committee on the Nomenclature of Ocean Bottom Features. Mr. Amado had been to a large extent right in saying that the Commission, in adopting its definition of the continental shelf, had been interpreting a current of opinion which had already fixed the sense of the term. The Chairman, in advocating the use of other concepts to be found in scientific publications, had not made it clear why they must be adopted. The term " submarine areas " covered a variety of things whereas the term " continental shelf " referred to a definite area.

63. If the idea was accepted that the continental shelf extended as far as it was practicable to exploit the natural resources of the sea-bed, the only point that remained to be discussed was whether an individual State could exploit those resources beyond a depth of 200 metres. He knew of no rule of international law which prevented it from doing so, subject, of course, to the reservations set forth in draft article 6.

64. There remained the cases of countries without continental shelves—Chile, for instance—where exploitation of the sea-bed was carried out from the land to a depth of 1,000 metres. But such cases, though not without importance, were exceptional, and he saw no point in attempting to cover them in article 1.

65. If such terms as " continental slope " and " continental terrace " had any scientific value, the Commission should include them in the comment on the article, saying why it had done so. In the remote eventuality of a dispute between States concerning rights over the continental shelf, such esoteric scientific terms might be of some relevance.

66. Mr. PAL said that he would confine his remarks for the moment to the question of the substitution of the term " submarine areas " for the term " continental shelf ". He did not see how the change would improve matters at all. If the provisions of the draft resulted in any restriction of the domain of the high seas, the restriction would be made regardless of whether the term used was " continental shelf " or " submarine areas ".

67. The object of the Chairman's proposal might be to avoid a certain confusion in terms. Scientists employed the term " continental shelf " for part of the submarine area only, using the terms " continental borderland " and " continental slope " to designate other parts of the area. The Commission used the term " continental shelf " for a much larger area. It might, therefore, avoid confusion if the term " continental shelf " were dropped.

68. However, since 1951, the Commission had taken a certain number of decisions on the matter. It had submitted its draft to the General Assembly and to governments for their comments and it might be argued that in recommending that the General Assembly adopt by resolution the draft articles on the continental shelf, it had taken a final decision on the matter under rule 23 of its Statute. The Commission had submitted a very clear definition of the continental shelf and he did not think that States would find any difficulty in accepting it. So far he had heard nothing to justify any change in terminology.

69. Mr. SANDSTRÖM pointed out that the Commission, when defining the term " continental shelf " in article 1, had deliberately departed from the geological concept. The only real difference between the text submitted by the Chairman and that previously adopted by the Commission appeared to be that the Chairman's text also included submarine areas beyond the depth of 200 metres where exploitation of the natural resources was possible. He could see no ground for making such a change.

70. Mr. SCELLE observed that, as he did not attribute any scientific value, far less any legal validity, to the concept of the continental shelf, he welcomed any discussion which might further obscure the concept and thereby lead to its rejection.

71. Mr. SALAMANCA agreed with Mr. Sandström that the essential difference between the Chairman's text and that of the Commission was that the former extended the limit of the continental shelf to the maximum depth at which exploitation of the natural resources of the sea-bed and subsoil was possible. He approved of that change and proposed that the Commission retain the text of its draft article as far as the words " outside the area of the territorial sea ", and then continue with the words " to where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil ". If the coastal State had the right to exploit the resources of the continental shelf, it must be allowed to carry exploitation as far as practicable. Such a solution would be in conformity with the criteria defended by a number of States at various conferences.

72. The technical terms relevant to the question of the continental shelf could be explained in the comment to the article.

73. Mr. PAL said that if the Chairman's addition to the definition of the continental shelf were adopted, the concept might, with the advance of technique, be broadened to embrace practically the whole submarine area of the high seas. The comments of governments disclosed general approval of the use of the term " continental shelf " in a sense differing from its juridical or scientific sense and connoting only an area within a specified distance of the coast. Indeed the term " continental shelf " had the merit of suggesting at least some juridical basis for the new claim. He could not see any legal justification for the extension of coastal territory to an area which was otherwise *res communis*, unless the area could be regarded as a continuation of the continental territory. When the Commission decided to adopt the name and to limit the area to an arbitrarily specified depth of 200 metres, discarding the test of exploitability, it did so advisedly. The freedom of the high seas was

only an incident of a higher right—namely, the right of property of the nations enjoying that freedom. That being so, he failed to see how an area which, as a submarine area of the high seas, was the common property of all, could change its character and become the property of the coastal State alone as soon as it became available for different use. He was not unaware that there had been claims by coastal States and that as yet no protest had been made by other States, but there was a real danger if further encroachment in that direction was attempted. He was not in favour of changing the definition and thereby reopening the whole question.

74. Faris Bey el-KHOURI said that, as the term " continental shelf ", in French " plateau continental " could not be rendered by an exact equivalent in Arabic, the concept was expressed by words conveying the idea of " continental terrace " or " continental projection ". It was therefore a matter of indifference to him whether the term " continental shelf " was retained or not, since whatever term was adopted would have to be freely rendered in Arabic.

75. Mr. PADILLA-NERVO said that although the terminology proposed by the Chairman might be scientifically more correct, he did not see that it carried any different legal implications. It might therefore be wiser to retain the accepted term.

76. He wished to propose that, when it came to a vote on the Chairman's amendment, article 1, paragraph 1, as far as the words " to a depth of 200 metres " should be put to the vote first, in order to ascertain whether the Commission agreed to the substitution of the term " submarine areas " for the term " continental shelf ". The Commission would then vote on the rest of the paragraph, containing the concept of exploitability taken from the 1951 draft. He himself would prefer to have that concept combined with the geological criterion of 200 metres. He accordingly thought the wording proposed by the Chairman should be used, " or beyond that limit etc.", which was found both in the 1951 draft and in the resolution adopted by the Inter-American Specialised Conference.

77. Mr. ZOUREK said that the reasons prompting the Chairman's amendment were praiseworthy, since its purpose was to adapt the terminology of the draft to that used in the sciences. Logically speaking, it would have been better to have adopted the geological definition of the continental shelf from the start, as he had advocated in 1953; in that way, terminological difficulties would have been avoided. The Commission had, however, preferred a special, legal definition which differed somewhat from the geological concept, since, as the International Committee on the Nomenclature of Ocean Bottom Features had recognized, the depth at which the edge of the continental shelf began was in some cases less and in others more than 200 metres. As, however, the term was already accepted by the scientific world and by governments, he was not in favour of changing it at that stage, unless absolutely necessary.

78. In view of the decision already taken by the Commission and of the practical considerations involved, he wondered whether it would not be the wisest course to include a more precise definition of the term " continental shelf " in the comment on article 1.

79. He could not see what significance the term had for States which, having no continental shelf, were unable to exploit the natural resources of the sea-bed. He was, of course, leaving aside the different question of exploitation of submarine areas from the land, the Commission having agreed at its third session that its draft articles on the continental shelf in no way affected the exploitation of submarine areas by means of tunnels from the land.

80. Sir Gerald FITZMAURICE said that the term " continental shelf " was an unscientific one and he would prefer the term " submarine areas ", or more precisely " adjacent submarine areas ". The term " continental shelf " was not a legal term but a geological one which had come to be adopted for two reasons: partly because it was a convenient expression, but mainly because of the coincidence that the edge of the continental shelf roughly coincided with the depth at which it was possible at the moment to exploit the resources of the sea-bed and subsoil of the submarine areas.

81. It might be wondered why, from the legal standpoint, it had been necessary to fix a limit at all. The answer was that it was an essential principle that no sovereignty could be exercised over a territory, whether above or below the surface, which the State claiming sovereignty was not in a position to control. If, however, science advanced sufficiently to make it possible to exploit the natural resources at much greater depth, there would be no reason at all to place any depth limit on the area of the continental shelf, at least within reasonable proximity of the coast. Indeed, had it been possible to exploit the sea-bed at greater depths, the limit of 200 metres would never have been adopted. Thus, the definition given in article 1 was unscientific and might lead to difficulties in the future. Subject to certain reservations as to drafting—the term " continental terrace ", for example, required some explanation—he supported the amendment submitted by the Chairman.

82. Mr. KRYLOV regretted that he could not support the amendment. Each science had its own terminology and jurists could not slavishly follow the scientists. Legal terminology would always lag behind scientific advance, and jurists could not change their terms after every conference on nomenclature.

83. As the Special Rapporteur had pointed out, the Chairman's terminology was vague. In any case, paragraph 1 of the Chairman's amendment to article 1 tended to define " *idem per idem* "; it said that the expression " submarine areas " referred, *inter alia*, " to other submarine areas ". The Commission had chosen the term " continental shelf " and should retain it.

84. Incidentally, much the same difficulties had been experienced in expressing the term " continental shelf " in Russian as in rendering it into Arabic.

85. Mr. AMADO said that the term " continental shelf " was a conventional one and, though not corresponding to the geological concept, had a clear connotation in the

mind of the public. He was firmly opposed to substituting any other term for it in the draft.

86. On the other hand, he was in favour of the other innovation contained in article 1, paragraph 1, of the Chairman's amendment. Jurists from the American continent appreciated the problems of those countries which had no continental shelf, and he felt that the Commission could not prevent such countries exploiting the natural resources of the sea-bed at a greater depth than 200 metres if exploitation were possible.

87. Mr. FRANÇOIS, Special Rapporteur, said that the limit at which it was technically possible to exploit the resources of the sea-bed was at the moment 60 to 70 metres and not 200 metres. The limit of 200 metres had been adopted by the Commission partly, as Sir Gerald Fitzmaurice had pointed out, because that was the point at which the slope down to the ocean bed normally began, but also because such a limit made sufficient allowance for future technical development. A fixed limit was to be preferred to the very vague limit established in the Chairman's amendment, since doubts would always persist as to the actual depth at which it was technically possible to exploit the natural resources of the sea-bed.

88. Mr. SALAMANCA said that the Commission had no proprietary rights in the term " continental shelf". The term had existed before the draft and had been used by President Truman in his famous proclamation on the subject. The Chairman's proposal to substitute the expression " submarine areas " was an improvement only from the standpoint of the English text, since in Spanish the term " plataforma " had been used and not the Spanish equivalent for " shelf ".

89. Mr. SCELLE said that, after hearing Sir Gerald Fitzmaurice, the Special Rapporteur and Mr. Amado, he was merely confirmed in his disbelief in the scientific nature of the concept of the continental shelf. There was no such thing as a continental shelf, but merely a vast expanse of sea-bed supporting the mainland. It was not surprising that difficulty was experienced in evolving a precise definition of a term which was essentially indefinable. Adoption of the concept whereby the continental shelf extended as far as exploitation of the natural resources of the sea-bed was possible would tend to abolish the domain of the high seas.

90. Sir Gerald FITZMAURICE said that, though he would hesitate to accept the statement that no exploitation of any kind was possible at the moment below a depth of 70 metres, he did not think that such a consideration really affected his argument. It had been a mere coincidence that a limit of 200 metres had been adopted, that being the depth at which, as far as could be reasonably foreseen, it might be possible to exploit the natural resources of the sea-bed. No such limit would have been adopted had it been possible to foresee the likelihood of exploitation at an even greater depth. Provided the areas to be exploited were within reasonable proximity to the coastal State, he saw no reason why a State's activities should be confined to the continental shelf.

91. An additional advantage of the term " submarine areas " was that it avoided the difficulty due to the presence of deep pockets and other irregularities in the continental shelf.

92. Mr. SANDSTRÖM pointed out that the term " submarine areas " appeared in the draft adopted by the Commission in 1953. The term, however, did not convey very much, the only fact giving it some significance being the depth limit fixed. The Commission had envisaged the possibility of adopting the depth at which exploitation was practicable as the limit of the continental shelf, but on further consideration, had decided on a limit of 200 metres. Such a limit made considerable allowance for future developments and should be retained.

93. Mr. SPIROPOULOS said that he would have preferred to retain the text of the Commission's draft, though not out of any consideration for " scientific " terminology. The determination whether a term was scientific or not was a highly subjective one. In any case, the Chairman's proposal, though apparently concerned with terminology, in fact involved an important question of substance. The only argument in favour of the 200-metre limit was that it was sufficient for the moment. Greece had no continental shelf, and he had no strong feelings on the matter of depth. He proposed to abstain from voting.

94. Faris Bey el-KHOURI said he assumed that, since all States were free to exploit the natural resources in the bed of the high seas, the depth limit of 200 metres affected only the exclusive right of coastal States to exploit such resources. Any coastal State would be free to exploit resources lying at a greater depth than 200 metres on equal terms with other States.

95. The CHAIRMAN, in reply to Mr. Scelle, pointed out that the words " adjacent to the coastal State " in his proposal placed a very clear limitation on the submarine areas covered by the article. The adjacent areas ended at the point where the slope down to the ocean bed began, which was not more than 25 miles from the coast.

The meeting rose at 1 p.m.

358th MEETING

Friday, 1 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/99/Add.1 and A/CN.4/102/Add.1) (*continued*)

The continental shelf (continued)

Article 1 (continued)

1. The CHAIRMAN, speaking as a member of the Commission, said that he wished to reply to certain arguments adduced against his amendment to draft article 1 on the continental shelf before it was put to the vote. Contrary to what was alleged, there was really no question of abandoning the term " shelf ", since it appeared in the first paragraph of article 1 as amended by him. All that his amendment did was to add two other submarine areas, the continental and the insular terrace, which, in the legislations of certain States, were included in the area over which they claimed exclusive right of exploitation, and which had, moreover, been the subject of a resolution unanimously adopted by all American States. The distinction drawn between those areas and the continental shelf was no arbitrary one and was not at variance with scientific fact.

2. The fundamental question was whether coastal States had exclusive rights of exploitation of the sea-bed only up to a certain depth. By adding the term " continental terrace " to the definition in article 1, the Commission would be granting coastal States the exclusive right of exploitation up to a greater depth than 200 metres, for the foot of the terrace was generally at a depth of 500 metres.

3. Equally important was the question of coastal States whose adjacent submarine areas, owing to their configuration, did not constitute a continental shelf. It was a matter of elementary justice that such States should also be granted the exclusive right to exploit those areas. Indeed the Commission had recognized that right at its fifth session, while acknowledging that the term " continental shelf " could not be used in that connexion (A/2456, para. 65).

4. It had been argued that governments preferred the term " continental shelf " because it possessed a certain fixity. However, the comments by governments on the draft articles showed that very few—only six, in fact—were in favour of replacing the criterion adopted in the 1951 draft, where the only limit was the depth at which exploitation was practicable. How could the Commission attribute so much weight to the views of six governments and so little to the unanimous view of the governments of twenty-one States expressed in an international conference after a month of careful study of all the relevant facts?

5. In reality his proposal involved not the introduction of a new principle, but a mere change in presentation of ideas, since the Commission, in paragraphs 65 and 66 of its report covering the work of its fifth session (A/2456), had, like the Ciudad Trujillo Conference, recognized the exclusive right of States to exploit the resources of the sea-bed in adjacent areas which, owing to their geographical configuration, could not be regarded as forming part of the continental shelf.

6. He did not wish to press the part of his amendment introducing the concept of the continental terrace, since the adoption of the second point relating to the depth at which exploitation was practical would automatically bring that area within the general concept. He would, however, request the Commission to take a decision on the right of States to exploit the natural resources of the sea-bed in adjacent waters to whatever depth was practicable. With that addition, the article could be referred to the Drafting Committee.

7. Mr. HSU recalled that he had not yet spoken on the second point in the Chairman's amendment. Though quite sympathetic to the proposal, since it sought to give equality of rights to all States, he found it rather contradictory as at present worded. What was the point of mentioning a depth of 200 metres at all if States were to have exclusive rights of exploitation to any depth at which exploitation was possible? Furthermore, he must agree with Mr. Pal that the proposal looked very much like appropriation of a part of the high seas.

8. The trouble was that the whole question of the continental shelf had not been properly handled from the first. The Commission had started with three concepts —that of the continental shelf, that of mineral resources (it had had in mind mainly petroleum deposits), and finally that of sovereignty. Those three concepts had involved the Commission in difficulties and led to an excessively long text, which neither in form nor substance could be claimed to be good law. Such difficulties could nevertheless be avoided by concentrating on the fundamental interest of the coastal State in exploiting the sea-bed and subsoil and avoiding any reference to the continental shelf, mineral resources, or the concept of sovereignty. The principles could then be expressed in the following three paragraphs:

1. A coastal State may enjoy exclusive rights of exploration and exploitation of the natural resources of the sea-bed and subsoil of the contiguous high seas to a distance of, say, 24 miles.

2. Such exploration and exploitation must not result in any unjustifiable interference with navigation, fishing or fish production.

3. Any disputes which may arise from the assertion or enjoyment of such exclusive rights shall be submitted to arbitration at the request of any of the parties.

He did not wish, however, to press his proposal at that late stage in the discussion.

9. Sir Gerald FITZMAURICE said that he had already explained why he supported the Chairman's proposal to use the term " submarine areas " rather than " continental shelf ". In one of the first articles on the subject, entitled " Whose is the Bed of the Sea? ", by Sir Cecil

Hurst,[1] the continental shelf was hardly ever mentioned, and certainly not regarded as affording any legal basis for ownership over the bed of the sea.

10. He could not agree with Mr. Hsu that recognition of the exclusive right of coastal States to exploit the natural resources of the sea-bed beyond the depth of 200 metres, on condition that the areas were in adjacent waters and that exploitation were possible, was tantamount to appropriation of a part of the high seas. Such a statement implied a complete misunderstanding of the concept of the continental shelf and of submarine areas, neither of which had anything whatever to do with the waters above them. Adoption of the second criterion in article 1, paragraph 1, of the Chairman's amendment could not in any way affect the freedom of the seas, since the sea itself was not involved.

11. A further reason for dispensing with the term " continental shelf " was the tendency to use the concept for purposes for which it was never intended, as a foundation for claims to exclusive rights not only over the sea-bed and subsoil, but over the superjacent waters, as if the area were a sort of additional contiguous zone. Should that tendency persist, many States might be drawn to reject the whole legal concept of the continental shelf. And since that tendency was encouraged by the notion that the continental shelf was a geographically definable horizontal projection, it was one of the merits of the Chairman's proposal that it dispensed with the concept of a carefully defined area and substituted the correct notion of adjacent submarine areas lending themselves to exploitation.

12. Mr. FRANÇOIS, Special Rapporteur, said that he could not agree with Sir Gerald Fitzmaurice. The Commission, at its third session,[2] had in fact adopted the criterion of a limit based on the maximum depth at which exploitation was possible, but, at its fifth session, after careful reflection and consideration of the comments by governments, had abandoned that criterion in favour of a depth limit of 200 metres (A/2456, para. 62). The very fact that it had reached such a conclusion after mature consideration was a reason for not making the radical, and rather abrupt, change which the Chairman's amendment would involve.

13. The Commission had rejected the criterion of the maximum depth at which exploitation was possible because it considered it far too vague to serve as a limit. Each country would have its own ideas on the subject and the same difficulties might arise as with the limits of the territorial sea.

14. The claim that the Commission's draft would prevent States from exploiting natural resources at a depth of more than 200 metres was incorrect. All of the members had been agreed—and the fact might well be stated in the comment on article 1—that 200 metres should constitute the limit because it represented the maximum depth at which exploitation appeared to be possible but that, should it prove possible to exploit natural resources of the sea-bed at an even greater depth, then the figure would have to be revised.

15. With regard to Sir Gerald Fitzmaurice's apprehension that States might claim rights over the superjacent waters of the continental shelf, he must point out that the definition proposed in the Chairman's amendment would not obviate that danger either.

16. Both the Chairman and Sir Gerald Fitzmaurice attached great weight to the proviso that the submarine areas must be in adjacent waters. The term " adjacent " was admittedly not without a certain significance. There must undoubtedly be continuity between the mainland and the continental shelf, and the existence of a very broad channel between the mainland and adjacent submarine areas would prevent the latter from being regarded as a continental shelf. However, by including in the definition the concept of " adjacency " it could not be the intention to establish a horizontal instead of a vertical limit for the submarine areas—an entirely new idea completely foreign to those previously adopted by the Commission.

17. Faris Bey el-KHOURI observed that it was a general principle in Syrian municipal law that the owner of a property was the rightful owner of all above it to the summit of the sky and all below it to the bottom of the earth. If the principle were applied to the high seas, which belonged to no man, it must be admitted that both the sky above them and the sea-bed and subsoil below them belonged to no man, but were rather the public property of the entire world. The bed and subsoil of the continental shelf, however, despite the fact that the waters above them were part of the high seas, had been recognized by many States as being an exception to the general rule. Though the Commission had perforce accepted that exception, it should not now allow it to be extended indefinitely by dispensing with the 200 metres depth-limit, beyond which the bed of the sea would be nobody's property, but open to all to exploit on equal terms.

18. Mr. SCELLE said that he had hitherto been under the impression that " adjacency " with reference to the continental shelf was reckoned from the limit of the territorial sea. According to the Special Rapporteur, however, it appeared to be reckoned from the coast. If that were so, presumably coastal States would have no exclusive rights over the continental shelf, if parts of the shelf within the territorial sea were separated by waters of a greater depth than 200 metres.

19. Mr. FRANÇOIS, Special Rapporteur, confirmed that adjacency was reckoned from the coast. The answer to Mr. Scelle's question could be found in paragraph 66 of the Commission's report covering the work at its fifth session (A/2456), where it was stated that submerged areas, of a depth less than 200 metres, situated in considerable proximity to the coast but separated from the part of the continental shelf adjacent to the coast by a narrow channel deeper than 200 metres, must be considered as contiguous to that part of the shelf. In other words, the question turned on the width of the channel between the two parts of the continental shelf.

[1] *British Year Book of International Law*, Volume 4, 1923–4, p. 34.

[2] *Official Records of the General Assembly, Sixth session, Supplement No. 9* (A/1858), p. 17.

20. Mr. SCELLE observed that such considerations were a further practical objection to employing the concept of the continental shelf. He was convinced that if the concept were employed, the territorial sea and part of the high seas could not fail in time to be assimilated to it. It was idle to claim that the concept did not affect the freedom of the high seas. Perhaps in theory it did not but in practice, if the sea-bed were intensively exploited, there must be interference with the freedom of the high seas.

21. Mr. AMADO said that he had been struck by the Special Rapporteur's statement that the limit of 200 metres had been fixed with an eye on the present possibility of exploitation and could be increased at a later date. If that were so, then the only objection to the Chairman's amendment could be on the question of timing; its opponents might regard the proposal as premature.

22. The Commission could not, however, ignore the problem of the continental terrace and must ask itself whether it was in the interest of the community of nations to prevent that terrace being explored and exploited, if that were necessary.

23. Mr. FRANÇOIS, Special Rapporteur, said that the Commission had fixed the limit of 200 metres merely in order to prevent each State from claiming a continental shelf of whatever size it wished. The criterion proposed by the Chairman would be subject to so many different interpretations that there would in effect be no limit to the continental shelf.

24. As for the continental terrace, exclusive rights of exploitation of that part of it which lay at a depth of less than 200 metres were already recognized under the Commission's draft articles. The question of the right to exploit any parts of it which lay at a greater depth was of no significance, since such exploitation was for the moment physically impossible. The Commission had, however, admitted that if any State could demonstrate the possibility of exploiting the sea-bed at a greater depth, the limit of 200 metres could not be retained.

25. The CHAIRMAN remarked that the limit of 200 metres might well be exceeded in some twenty to thirty years. It was a purely conventional and entirely arbitrary limit, since, as the International Committee on the Nomenclature of Ocean Bottom Features had pointed out, the edge of the shelf was sometimes at more, sometimes at less than 200 metres. Moreover, it completely ignored the geological facts. Coal, for example, was already being mined at a depth of 1,000 metres twenty-five miles from the coast of Chile.

26. In many cases the bed of the continental terrace was of greater interest to the coastal State than the bed of the continental shelf, since a large amount of valuable substance was deposited on the terrace by the action of currents and could already be exploited.

27. Mr. AMADO, observing that it was the legitimate interest of States in exploiting the resources of the sea-bed and subsoil which had induced the Commission to undertake its present task, said that though by nature a conservative he had not been convinced by the Special Rapporteur's arguments and was inclined to favour the Chairman's proposal.

28. Mr. SANDSTRÖM said that the example of the coalmines in Chile was not really significant because the shafts were sunk on land and the mines exploited from the land. He asked whether in point of fact it was possible to exploit the resources of the sea-bed from the sea at a depth of over 200 metres.

29. Mr. FRANÇOIS, Special Rapporteur, replied that up to the present there was no such exploitation.

30. Mr. SANDSTRÖM considered that the area in which exclusive rights could be exercised by the coastal State should be limited in a precise manner, and therefore preferred depth as the criterion for the limitation.

31. Mr. ZOUREK suggested that the difficulties being encountered by the Commission were probably mostly due to the Chairman's attempt to apply the rules adopted for the continental shelf, as defined by the Commission at its fifth session, to cases where there was no shelf at all.

32. The only way of exploiting the sea-bed and subsoil at a depth of over 200 metres was by starting operations on *terra firma*. In view of the legitimate interests of coastal States without a continental shelf or terrace, perhaps it would suffice to insert a separate article on the special case of where there was no continental shelf but where it was possible to exploit the sea-bed and subsoil from land. It would then be possible to incorporate the idea put forward in the comment on the Commission's existing draft, that coastal States had the right to exploit the sea-bed and subsoil of the submarine areas contiguous to their coasts by means of shafts sunk on land up to the limit where the depth of the superjacent waters admitted the exploitation of the natural resources of the areas in question.

33. Mr. SCELLE said that a special article was unnecessary because there could be no doubt whatsoever that coastal States had such a right, since the sea-bed and subsoil of the submarine areas contiguous to a coast were public property; the right was analogous to the right to fish on the high seas.

34. But before authorizing the coastal State to exploit its continental shelf the Commission should give some consideration to the fact that it might take much longer to settle differences about where the shelf began than to develop modern techniques for exploiting the subsoil from the mainland.

35. Mr. EDMONDS did not attach much importance to the question of nomenclature. The picturesque and easily comprehensible term " continental shelf " had gained currency but if for scientific reasons it should be replaced by the expression " submarine areas ", he would have no objection. The question of extension beyond the 200-metre limit also did not seem to him of great moment, since exploitation beyond that limit was improbable in the foreseeable future.

36. The important part of the Chairman's proposal was contained in paragraph 2 where the rights to be conferred over the continental shelf were rightly defined in terms of the exploitation of mineral resources as well as of the

living resources permanently attached to the bottom. He particularly favoured that provision but would also support the remainder of the Chairman's text.

37. Mr. SANDSTRÖM considered it unnecessary to make special provision for exploitation starting on land, although there was a possibility of tunnels under the sea, from two adjacent coastal States, meeting.

38. Mr. PAL said that the discussion had confirmed his view that the Commission should not go beyond the text adopted at its fifth session and that it would be dangerous to reopen the whole issue. He would therefore oppose the Chairman's proposal.

39. The high seas being common property, submarine areas could not be partitioned off for the exclusive use of the adjacent coastal State to the exclusion not only of other coastal States not possessing a continental shelf but also of landlocked States. The only way out to support the right was to treat the continental shelf as an extension of the mainland, which was the only possible justification for admitting that the coastal State had a preferential claim to exploitation. The term " continental shelf " brought out that connexion with the land, and he saw no reason for abandoning it in favour of an expression which would sever that link. He had already given his reasons for opposing further extensions of the area, by introducing the concept of exploitability.

40. Mr. SALAMANCA pointed out that Professor Lauterpacht had stated in an article[3] that claims to the continental shelf put forward by numerous States had not evoked any protests.

41. If, as had been argued, such claims violated the principle of common property, then the Commission must decide how the interests of States possessing a continental shelf and those without one could be reconciled. If in fact the real interest at stake was the exploitation of petroleum deposits, then it was necessary to ensure that access to them was not denied to the less powerful States.

42. Faris Bey el-KHOURI observed that, if the Chairman's definition were accepted, the coastal State would be in a position to prevent other States capable of exploiting the resources in that area from doing so outside the 200-metre limit, a result which he believed would be contrary to the Chairman's intention that the resources of the sea should be used to the greatest possible extent.

43. Mr. PADILLA-NERVO supported the Chairman's proposal for the reasons given by its author, by Sir Gerald Fitzmaurice and by Mr. Amado, and did not think there were any legal grounds for opposing such an amplification of article 1.

44. The CHAIRMAN considered that the Commission could now vote on his proposed addition to article 1[4] He had already withdrawn[5] the part of his amendment introducing the concept of the continental terrace, while the question of the substitution of the term " submarine areas " for the term " continental shelf " could be referred to the Drafting Committee.

45. Mr. PADILLA-NERVO pointed out that what in fact the Commission had to vote on was the Chairman's proposal to incorporate in article 1 the concept contained in the words " or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ".

The Chairman's proposed addition to article 1 was adopted by 7 votes to 5, with 3 abstentions.

46. Mr. HSU, explaining his vote, said that although he had some doubts about the Chairman's text he had supported it because it was the lesser of two evils.

47. Mr. ZOUREK could not agree that the changes proposed by the Chairman in the first part of his text for article 1, paragraph 1, were purely a matter of drafting.

48. The CHAIRMAN said that in that event the Commission must discuss the terminology to be used. Personally he favoured the expression " submarine areas " because it was appropriately general.

49. Mr. AMADO said he had understood that the whole question of terminology had been settled and that the Chairman had agreed to the term " continental shelf " being retained. Now that a vote had been taken, there was no need to reopen the discussion.

50. The CHAIRMAN observed that before putting his proposed addition to article 1 to the vote he had suggested that the question of terminology could be referred to the Drafting Committee. Mr. Zourek now opposed such a procedure on the grounds that a matter of substance was involved. That was the reason why he had opened the discussion on the question.

51. Mr. SCELLE insisted that the words " submarine areas " evoked an entirely different idea from that conveyed by the words " continental shelf " and that the decision could not be left to the Drafting Committee.

52. Mr. AMADO repeated his objection to reopening the discussion, since all members must have voted on the Chairman's proposed addition to article 1 on the assumption that, since he had admitted that the term " continental shelf " was now an accepted one, it would be retained.

53. Mr. ZOUREK suggested that the Commission's task would be simplified if it could agree to retain the term " continental shelf " and to deal in the comment with the other areas mentioned in the Chairman's proposal.

54. Mr. PADILLA-NERVO pointed out that the areas referred to by the Chairman at the beginning of paragraph 1 were to some extent the same as those covered by the final passage reading: " or, beyond that limit . . . said areas ". Perhaps the Chairman would be satisfied with the retention of the term " continental shelf " in the article and an explanation in the comment of what was

[3] " Sovereignty over Submarine Areas ", *British Year Book of International Law, 1950*, pp. 376-433.

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

[5] See para. 6, above.

meant by " continental and insular terrace or other submarine areas ".

55. Mr. KRYLOV said that although, as Mr. Amado contended, it was true that the Commission had tacitly agreed to retain the term " continental shelf ", in order to give clear guidance to the Drafting Committee it would be preferable to take a formal vote on the point. The Special Rapporteur might then be requested to prepare a passage for inclusion in the comment elucidating some of the scientific terms discussed in connexion with the Chairman's proposal.

56. Sir Gerald FITZMAURICE said that the vote on the latter part of paragraph 1 in the Chairman's text had some bearing on the question of terminology because the Commission had now decided to extend the rights of coastal States to areas which, generally speaking, lay beyond the strict limits of the continental shelf. He therefore doubted whether it would be scientifically appropriate to retain that term as the central term in the draft, instead of adopting one which would cover both the shelf itself and certain adjacent areas.

57. Mr. SANDSTRÖM, disagreeing with Sir Gerald Fitzmaurice, maintained that the expression " continental shelf " provided a better description of what was meant than the expression " submarine areas ".

58. Mr. AMADO appealed to the Chairman not to override a decision which had already been implicitly taken.

59. The CHAIRMAN pointed out that he had only asked the Commission to consider the question of terminology because of Mr. Zourek's contention that a question of substance was involved and that the matter could not be referred direct to the Drafting Committee.

60. There was no escaping the fact that his proposed addition to article 1, which had already been adopted, referred to areas beyond the continental shelf, and that fact must be taken into account in deciding on the proper term.

61. Mr. KRYLOV said that on the principle *maxima pars pro toto* the term " continental shelf " could appropriately represent other submarine areas, following the practice of the Special Rapporteur. It was linguistically impossible always to discover a comprehensive term which would embrace all the ramifications of meaning.

62. Mr. EDMONDS, while considering that the distinction was not of particular significance, was inclined to support Sir Gerald Fitzmaurice's opinion that the term " submarine areas " would be more appropriate. In order to bring an unprofitable discussion to a close, he formally proposed that in article 1 the term " submarine areas " be substituted for " continental shelf ".

63. Mr. PAL suggested that the result of the previous vote in no way precluded the retention of the term " continental shelf ". His reasons for supporting the term still held good. Stripped of that name, the claim would be deprived of even the pretence of a juridical basis.

64. Sir Gerald FITZMAURICE said the reason why the term " continental shelf " should not be retained was simply that submarine areas beyond the 200-metre limit did not form part of the continental shelf. Consequently, the Commission should use a generic term embracing both the continental shelf and other submarine areas.

65. Mr. FRANÇOIS, Special Rapporteur, pointed out that, *pace* the Chairman and Sir Gerald Fitzmaurice, at its fifth session the Commission had, in accepting the term " continental shelf ", recognized a departure from the strict geological sense of the term (A/2456, paragraph 65). From that point of view, the amendment was of no consequence.

66. Mr. SALAMANCA deprecated the continuance of a sterile discussion. He had already pointed out [6] that esoteric scientific terms had no place in the text of an article. The simplest solution would be to retain the text as drafted and to mention in the comment that the Commission had not yet decided on the application of the technical concepts involved, stressing that the provisions of the article were of a general character.

67. The CHAIRMAN insisted that the problem was essentially one of drafting—i.e., without abandoning the use of the term " continental shelf "—of harmonizing the 1953 text with the addition that had been adopted.

68. He pointed out that he had already withdrawn [7] his proposal for the use of the expression " submarine areas ".

69. Mr. SANDSTRÖM proposed that the paragraph be completed by adding to the text of article 1 of the 1953 draft (A/2456) the last part—which had already been adopted—of the Chairman's suggested paragraph 1.

70. Mr. EDMONDS repeated his proposal [8] for the substitution of the term " submarine areas " for the term " continental shelf ".

71. Mr. ZOUREK, supporting Mr. Sandström's proposal, said that once it was agreed that there was a lack of congruency between the legal definition and the geological connotation, what was little more than a technical point could be satisfactorily explained in the comment.

72. The CHAIRMAN put to the vote Mr. Sandström's proposal to complete paragraph 1 by adding to the text of the 1953 draft of article 1 the words, already adopted, " or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ".

Mr. Sandstrom's proposal was adopted by nine votes to three, with three abstentions.

73. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted against the proposal because it was inconsistent, in that it disregarded the fact that there were submarine areas beyond the 200-metre limit that did not form part of the continental shelf.

74. Sir Gerald FITZMAURICE said he had voted against the proposal for the same reason as the Chairman.

[6] A/CN/4/SR.357, para. 65.

[7] See para. 44, above.

[8] See para. 62, above.

A contradiction had now been embodied, whereas the 1953 draft had been consistent. It should be stated clearly in the comment that the expression " continental shelf " was used as a term of convenience and did not relate to areas beyond the 200-metre limit.

75. Mr. FRANÇOIS, Special Rapporteur, said he had already mentioned the two United Kingdom proposals for the article.[9] With regard to the first, the substitution of " 100 fathoms " for " 200 metres ", he would suggest that the point be met by a statement in the comment that the Commission had adopted the term " 200 metres " as being more comprehensible to those unfamiliar with the marine system of measurement, but that it would have no objection to the change if considered advisable for practical reasons. The difference in depth, amounting to 15 metres, was insignificant.

76. With regard to the United Kingdom Government's second proposal, to insert in the third line of the article the word " immediately " before the word " contiguous ", he suggested that that point also might be met by an appropriate mention in the comment.

77. Sir Gerald FITZMAURICE accepted both the Special Rapporteur's suggestions.

The Special Rapporteur's proposals with regard to the United Kingdom Government's amendments were adopted.

Article 1 as amended was adopted.

Article 2

78. The CHAIRMAN said that, in accordance with a suggestion of the Special Rapporteur, it would be advisable to take paragraph 2 of his (the Chairman's) proposal,[10] relating to the definition of " natural resources ", under article 2, with the substitution of the term " continental shelf " for the term " submarine area ".

79. Mr. SCELLE raised the question of the juridical status of that area of the sea-bed between the soil proper of the coastal State and the continental shelf. In so far as there was no absolute sovereignty, as in the case of the territorial sea, it seemed to be a zone of indeterminate legal status and the question arose whether it should be assimilated to the territorial sea or to the continental shelf. Contiguity implied absolute contact, in which case the earth and the subsoil of the territorial sea had the same juridical status and were consequently not part of the continental shelf. There was no sovereignty over that area, because sovereignty involved a totality of rights and not merely rights for a specific purpose. The situation was equivocal.

80. Mr. AMADO observed that the Chairman's proposal, in order to be acceptable, would require considerable amplification. Although open to conviction, he doubted whether such detail in the definition of " natural resources " was appropriate in a strictly juridical text.

81. The CHAIRMAN replied that at its fifth session, the Commission had decided to retain the term " natural resources ", in preference to " mineral resources ", so as to include the products of sedentary fisheries (A/2456, paragraph 70). As he had pointed out at the previous meeting,[11] there were different views as to what constituted sedentary fisheries. Some States held that they should be defined as living resources permanently attached to the bottom. The benthonic species, however, included not only such organisms (sessiles) but also those which, although in contact with the sea-bed, were at least temporarily mobile, and that covered 85 per cent of the total production of world fisheries concentrated in the superjacent waters of the continental shelf. It was certainly not the intention of the Commission to grant a monopoly in such fisheries to the coastal State. His proposal was intended to clarify that issue, which was of importance because of the character as *res communis* of the living resources of the continental shelf.

82. Mr. SALAMANCA, while appreciating the force of the Chairman's argument, urged that the concept called for a more precise definition. For instance, in the dispute between Australia and Japan, would the proposal imply withholding from Japan the right to fish for pearls on the sea-bed of the continental shelf?

83. The CHAIRMAN, in reply, pointed out that the definition did not specify from which party exclusive rights were withheld.

84. Mr. PADILLA-NERVO recalled that at its fifth session the Commission had decided that the products of sedentary fisheries should be included in the system of the continental shelf, it being understood that so-called bottom-fish were excluded (A/2456, paragraph 70). The Chairman's proposal that the expression " natural resources " should refer solely to the living resources permanently attached to the bottom was an excessive restriction of the concept of natural resources of the continental shelf, for it excluded many species properly belonging thereto and, moreover, seemed to be even more limited in scope than the definition adopted by the Commission. The Commission had certainly had in mind the important doctrinal evolution that had taken place in the concept of sedentary fisheries, in accordance with which the right of the coastal State over certain species that could not always be regarded scientifically as permanently attached to the bottom, had been recognized. Apart from that question, however, it was essential that the Commission's approach to the problem should be based on modern, scientific criteria.

85. The living resources of the continental shelf fell into three ecological groups. First, the sessile species permanently attached to the bottom such as algae, sponges, oysters, etc.; secondly, the sedentary species which lived on the bottom and had limited powers of movement, such as crabs, lobsters, clams and the like; and thirdly, organisms which, although moving through the water at certain stages of their life, were not fish proper and depended on the products of the sea-bed for nourishment and shelter and included the majority of shell-fish.

[9] A/CN.4/SR.357, para. 43.

[10] *Ibid.*, para. 44.

[11] *Ibid.*, para. 51.

86. Even the large majority of the sessile or sedentary species during their life cycle passed through a mobile stage. Oysters, coral, pearl oysters, crabs, etc., had mobile embryos which formed part of the plankton before passing on to the sessile or sedentary stage.

87. The criterion of permanent attachment to the bottom, therefore, was not valid in the determination whether a species was to be regarded as belonging to the living resources of the continental shelf, since if it were applied, no living species could be considered as belonging to the shelf. In the life of the modern fauna of the continental shelf, there was an intimate physical and biological relationship between them and the shelf, which was essentially the same for sessile and sedentary species. Every living organism needed a physical basis or substratum to its existence, whether it were solid, liquid or gas, and that substratum, in the case of sessile and sedentary species, was the bed of the continental shelf, which had a direct influence upon its marine population. That influence was reciprocal, for those organisms affected the ecological conditions of the shelf through the normal biological processes of life and death. There was therefore no major distinction to be drawn between the sessile and the sedentary organisms.

88. The relationship between the fauna inhabiting the bed of the continental shelf was characterized by three features. In the first place, the shelf represented the substratum for the benthonic species, providing them with a favourable environment for their existence and reproduction. Secondly, there was the reciprocal influence, with twofold results, between the benthos and the shelf. Thirdly, the immobility of the sessiles was merely one of the features derived from their relationship with the shelf, but it was neither the only one nor the major one.

89. Given that biological situation, the conclusion was inescapable that the majority of the benthonic species and the continental shelf should both be governed by the same juridical system. Since the sovereignty of the coastal State over the continental shelf was already a recognized juridical institution, it followed that the sessile and sedentary marine fauna should also be incorporated in that system.

90. That principle had already been recognized by various States in respect of exclusive rights in sedentary fisheries—rights which were based on the interdependent relationship between certain species and the sea-bed. How, therefore, could the basis of those rights be withheld in the case of other species which, as he had shown, presented a similar physical and biological relationship? The difference between sessile and sedentary species in respect of the sea-bed was merely a secondary difference which did not affect the fundamental dependence of both with regard to the bed of the continental shelf.

91. In that connexion, he would refer to an important piece of legislation which, although not an international instrument by its nature, had repercussions outside the country that had enacted it. Under Public Law No. 31, the " Submerged Lands Act ", passed by the Congress of the United States on 22 May 1953, the United States released and relinquished to certain States in the Union within fixed limits in the Gulf of Mexico all title to the sea-bed and subsoil beneath navigable waters, and to the natural resources of such sea-bed areas.

92. Section 2 (*e*) of the Act contained a very wide definition of " natural resources ", covering both sessile and sedentary species as well as others, while Section 9 made it clear that the natural resources of the North American continental shelf were the property of the United States and subject to its exclusive jurisdiction and control.

93. The criterion of immobility, of permanent attachment to the bottom, was inadequate for the determination whether certain fauna should be regarded as natural resources of the continental shelf, and the only valid basis for such juridical determination lay in the physical and biological interdependence of certain species and the sea-bed regarded as a substratum and habitat. He would suggest that that principle could best be enunciated in the following definition: " The marine, animal and vegetable species which live in a constant physical and biological relationship with the bed of the continental shelf ". That criterion would exclude so-called bottom fish.

94. There were two alternatives before the Commission: it could either embark on a detailed technical analysis of the problem or it could adopt the draft article as it stood, leaving consideration of the scientific aspects of the question to the experts in the General Assembly or to a special international conference, to be convened in order to deal with the whole subject.

The meeting rose at 1 p.m.

359th MEETING

Monday, 4 June 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/99/Add.1 and A/CN.4/102/Add.1) *(continued)*

The continental shelf (continued)

Article 2 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 2 of the draft articles on the continental shelf.

2. Mr. EDMONDS, referring to Mr. Padilla-Nervo's mention at the previous meeting of the United States Submerged Lands Act,[1] wished to make it clear that that statute included no expression of the foreign policy of the United States Government.

3. Section 2 included definitions of " land beneath navigable waters " and " natural resources ", which had been quoted by Mr. Padilla-Nervo. Section 9, however, made it clear that nothing in the Act was to be deemed to affect the rights of the United States to the natural resources of that portion of the subsoil and sea-bed of the continental shelf lying seaward of the area of lands beneath navigable waters, all of which natural resources appertained to the United States and were subject to its jurisdiction and control. In the general definition, the term was used as including all natural resources, while in the subsequent text, which confirmed the jurisdiction and control of the United States, reference was made to the natural resources of the subsoil and sea-bed only. Mr. Padilla-Nervo had overlooked that distinction.

4. The United States Government had repeatedly maintained that the living natural resources of the subsoil and sea-bed, as covered by that legislation, included only those in attached forms, which interpretation was confirmed in a subsequent section.

5. Reading the statute as a whole, it was clear that its one purpose was to limit the jurisdiction of the individual States of the United States over the continental shelf. The Act applied to a domestic situation in the United States. Conversely, it was declaratory of the interest of the individual states in contrast to that of the Federal Government. Within the classic territorial limit, it gave to the individual states exclusive jurisdiction over the natural resources of the sea-bed, whereas in section 1302 the Federal Government reserved to itself the natural resources of that part of the shelf to seaward of the area of lands beneath navigable waters as defined in section 1301. The definition of navigable waters related to the boundary between the United States and the individual states within the United States and had no reference whatever to any international boundary. The Act simply purported to give to the individual states within territorial waters a right that the Federal Government had previously claimed, and at the same time Congress also informed the several states that they had no rights outside that territorial limit, for the portion of the continental shelf outside territorial waters was under the jurisdiction of the Federal Government.

6. The statute, which, he would stress once again, was a purely domestic instrument, had no significance whatever with regard to the international posture of the United States Government. The position of the United States Government in various international problems was made known by declarations before international bodies, in the negotiation of treaties and agreements and in official statements by the President and the State Department. Through those various agencies, the United States had declared its attitude with regard to the natural resources of the sea-bed of the continental shelf, which was that only those living resources which were permanently attached to the bottom were an integral part of the continental shelf.

7. A study of document 36 of the Inter-American Specialized Conference, from which he would quote, led him to support the Chairman's proposal to maintain the decision made by the Commission in 1953 that natural resources included those permanently attached to the bed of the sea. Despite the fact that those attached species drew their nourishment from the surrounding water and might also be pelagic during part of their lifetime, their fixed position during the stage when they were in commercial utilization led to practical conservation problems justifying their being regarded as a special case.

8. Another practical problem calling for close consideration was that since, as Mr. Padilla-Nervo had stated, there was no interruption in the gradual transition of characteristics of the various forms from the firmly attached species to the free-swimming fish of the high seas, it was essential, if the Commission were to decide that some species should be regarded as resources of the shelf, to establish a practical distinction between such species and those species which remained resources of the sea. Omission to do so would merely promote further controversy. The distinction between attached and unattached species provided a clear-cut line of demarcation consistent with both conservation and practical requirements. If that distinction were not made, the entire situation might easily become unmanageable.

9. Mr. SANDSTRÖM said that, whereas the Commission's 1951 draft had considered only mineral resources, at its fifth session, in 1953, it had extended the definition of natural resources to include sedentary fisheries. He had opposed the change at that time and still regarded such a comprehensive formulation as unjustified. He had not intended to raise the question at the present session, but in order to avoid a further long discussion, he would join in supporting Mr. Padilla-Nervo, whose view was diametrically opposed to his own, in suggesting that the 1953 text be left as it stood.

10. Mr. PADILLA-NERVO was in entire agreement with Mr. Edmonds' interpretation of the United States Submerged Lands Act, and hoped he had made it clear at the previous meeting that it was purely a domestic and not an international instrument.[2] He had quoted that law because it contained a definition of what the Federal Government reserved to itself in relation to individual states. That was very important because the question of

[1] A/CN.4/SR.358, para. 91.

[2] *Ibid.*, para. 91.

a definition was a highly controversial one, as was shown by the inability of the Inter-American Specialized Conference to reach agreement on the subject. Paragraph 2 of the Ciudad-Trujillo resolution stated textually:

2. There is no agreement among the States here represented concerning the juridical regime of the waters which cover the above-mentioned submarine areas or concerning the question whether certain living resources belong to the sea-bed or to the superjacent waters. [3]

11. Although he had a definition in mind, he would have welcomed something on the lines of the definition of natural resources given in Title I, Section 2 (*e*), of the Submerged Lands Act, which read as follows:

(*e*) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, but does not include water power, or the use of water for the production of power;

That definition illustrated the diversity of the criteria in respect of living resources. He personally suggested the broader definition "The marine animal and vegetable species which live in a constant physical and biological relationship with the sea-bed and continental shelf, excluding bottom fish".

12. In view particularly of the difficulty of reaching agreement on a definition of species permanently attached to the bottom, he would stress again his opinion that the Commission should not itself attempt such a technical definition, but leave it to a conference of experts.

13. Sir Gerald FITZMAURICE said that he was in complete agreement with the view put forward by Mr. Edmonds. Mr. Padilla-Nervo seemed to favour a definition which would bring under the heading of the natural resources of the sea-bed any living creature in a constant physical and biological relationship with the continental shelf. He thought that conception was taken from a conclusion of the Mexico Conference of the Inter-American Council of Jurists.[4] The United Kingdom experts whom he had consulted regarded that definition as being much too wide, for it covered swimming fish such as flatfish, plaice and soles, which could not under any ordinary criteria be regarded as belonging to the sea-bed.

14. It happened that *The Times Literary Supplement* of 25 May contained a review of a book by Robert Morgan, entitled *World Sea Fisheries*, and one paragraph of that review was particularly appropriate. It read as follows:

No account of sea fisheries can be written to-day without some basic information on the physical environment and on the biological factors which dictate and control the richness of any fishery. The author provides this background in the first of the three sections into which he divides the book. He demonstrates the dependence of fish, as the last link in a long and often complicated series of food chains, upon the production of vegeable plankton, the abundance of this in turn being governed by the amount of nutrient salts in shallow waters. Nor is this all, for the quantity of nutrients becomes exhausted, and its replenishment depends on the extent of the mixing of deep oceanic water with the impoverished surface waters at the edge of the continental shelf. Thus fluctuations in the fisheries are ultimately controlled by the movements of the oceanic water masses and the degree to which these waters succeed in flowing on to the continental shelves, so enriching the areas where most of the commercial fishes are found.

15. The conception of feeding-grounds on the bed of the sea near the coast as the prime factor in the sustenance of fish was too great a simplification. The whole process involved a combination between the action of oceanic waters and vegetable substances in the shallow coastal waters. For those reasons Mr. Padilla-Nervo's concept was too wide and he would be unable to support it.

16. Mr. PADILLA-NERVO said that at the previous meeting he had attempted to make it clear that the so-called bottom fish, which included plaice, sole, halibut and others, which had a nutritional link with the sea-bed, were excluded from the definition he had referred to.

17. He repeated his suggestion that the question should be left for consideration by a specialized conference; the warning signal of Ciudad Trujillo should not be disregarded. The best course for the Commission would be to include a reference to the point in the comment along the lines of the text in paragraph 2 of the operative part of the Ciudad Trijillo resolution. He feared that if the Commission were to risk making a recommendation, the same technical discussion would be repeated in the General Assembly.

18. Mr. SCELLE said that when President Truman expressed his views first on the question of the continental shelf and secondly on fisheries, he had done so with moderation and had drawn a clear distinction between the two, which had provided a starting-point for the Commission's work in that field. But now the continental shelf was assuming such extraordinary proportions that he would like to know exactly how much free sea was left—in other words, how much of the high seas was still open for fishing. There would soon be none at all, for certain South American States had, quite legitimately, demanded that, if there were no free sea they should be compensated, and had accordingly claimed for themselves a territorial sea extending as far as two hundred miles. That appeared quite monstrous, but from the point of view of justice it was not so, because there were some continental shelves that were extremely broad and stretched out into the ocean almost indefinitely—for example, the continental shelf which started from the coasts of Australia and might stretch right up to New Guinea. At the rate they were going, and to judge by the opinion of governments and certain commercial firms, there was no reason why the process should ever stop. It was purely and simply the law of grab. The concept of Grotius was completely finished and done with.

19. He felt that the Commission had committed an abuse in encouraging the notion of the continental shelf,

[3] A/CN.4/102/Add.1, p. 2, para. 2.

[4] A/CN.4/102, Annex 1.

which he was more and more convinced was completely unacceptable.

20. Mr. SPIROPOULOS, supporting Mr. Scelle, said that the path on which the Commission had set out was a dead-end. The gradual evolution of the concept of the continental shelf had shown that the idea of exploitability, an early criterion, had itself been so exploited as to extend the continental shelf to areas that were really part of the high seas. If that process continued, they risked losing all they had gained.

21. He shared Mr. Padilla-Nervo's view that the scientific aspects of the question should be left to technical experts. The Commission had neither the necessary competence nor the time to devote to such questions, Its proper concern was with general principles. Besides, the question of the continental shelf was a *de lege ferenda* question.

22. Mr. KRYLOV agreed with the view that a definition of natural resources should be left to technical experts. All the evidence showed the difficulties of devising a satisfactory international definition.

23. The CHAIRMAN, speaking as a member of the Commission, said that, while sharing Mr. Scelle's concern at the threat to the freedom of the high seas represented by the development of the concept of the continental shelf as interpreted by many States, he was sure that Mr. Scelle would agree that it was undeniable that many States did claim sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources, and that their claims were strengthened by the lack of opposition from other States. That was a contemporary development which was bound to have repercussions in international law. The rights of the coastal State existed and therefore should be regulated. If the Commission undertook that task, it would be lending valuable support to the principle of the freedom of the seas.

24. Without going into the technical aspects of the question, he would draw attention to the report of a working group set up by committee 1 (Continental shelf) of the Inter-American Specialized Conference, the conclusion of which read as follows:

1. In relation to "submarine cables and oleoducts":

The existence of oleoducts, gas pipelines, electric power cables, and other similar installations in the continental shelf is a potential danger to navigation and fishing. Therefore, it is necessary to take adequate technical precautions to prevent accidents and damage.

2. In relation to "the benthonic environment and its elements":

The benthos is the aggregation of plants and animals normally associated in the depths of the waters. It may be considered that there are three groups in the benthos:

(a) Those that are permanently attached to the bottom;
(b) Those that walk or crawl on the bottom;
(c) Those that float or swim near the bottom.

Some organisms may belong to one of these groups at one stage of their lives and to another group at a different stage.

Some of the benthonic forms may at times draw away from the bottom. Some pelagic forms may at times be found near the bottom, but this is not their characteristic habit.

Those which attached to the bottom are the most vulnerable with respect to pollution, sedimentation, and changes in the bottom.

25. With regard to Mr. Padilla-Nervo's stress on the failure to reach agreement at Ciudad Trujillo, he wondered whether that failure ought really to be taken as a warning to the Commission. It must not be overlooked that the Ciudad Trujillo Conference had also failed to agree on the juridical regime of the superjacent waters of the continental shelf.[5] Was it proposed that the Commission should therefore abandon the decision that it had adopted in article 3? He could not conceive such a possibility, for article 3 embodied a provision that was a vital safeguard for the principle of the freedom of the high seas. The Commission's task was not to legislate, but to codify.

26. Mr. Krylov had proposed that the definition of "natural resources" should be left to technical experts. Experts had in fact reached a decision, but even if they had not, if the Commission had followed Mr. Krylov's advice, the articles on fisheries or the territorial sea would never have been drafted. The Commission had, quite rightly, not hesitated to tackle technical problems, and, if the General Assembly became conscious of the Commission's inadequacy in the scientific field, it was open to it to convene an appropriate technical conference, as it had done in 1951. Mr. Krylov's proposal was unacceptable.

27. The essential purpose of the articles was to define the rights of the coastal State in respect of the continental shelf. In granting such rights, it was essential to indicate the resources to which they extended. No major difficulty had been encountered at the fifth session with regard to the definition of sedentary fisheries or to those organisms permanently attached to the bottom. There might be different attitudes towards his own proposal and, if the Commission was not disposed to accept it as an additional paragraph to the article, the best solution might be to deal with the question in the comment.

28. Mr. PADILLA-NERVO said that, in view of the Chairman's remarks, he must point out that he had never referred to article 3. That article covered a legal question with which the Commission was fully competent to deal and with which, indeed, it should deal.

29. His own remarks had related merely to the definition of "natural resources" in article 2 and had been prompted solely by the Chairman's proposal to include a definition of the term in the article—a definition which the Ciudad Trujillo Conference had failed to reach despite the presence of a number of experts, and which the Rome Conference had not tried to reach, although it was a scientific conference. In suggesting that the Commission should not attempt to define the term, but should leave that task to a specialized conference, he had not wished to imply that he would be unwilling to discuss the question if the Commission decided to do so. In the latter event, as he had already mentioned, he would propose to the Commission another criterion for defining the term, in place of that proposed by the Chairman.

[5] A/CN.4/102.Add.1, p. 2, para. 2.

30. Mr. KRYLOV thought that the Commission should not rely on the opinion of American experts, but should have its own experts to advise it. If the Commission attempted to deal with the question of definition, it would never complete its session's work. The best course was to defer further consideration of the term " natural resources ".

31. Mr. FRANÇOIS, Special Rapporteur, pointed out that in paragraph 70 of its report covering the work of its fifth session (A/2456), the Commission had made quite clear what was meant by natural resources of the sea-bed, which included those permanently attached to the bed, but did not include fish which occasionally had their habitat at the bottom of the sea or were bred there, or such objects as wrecked ships and their cargoes lying on the sea-bed. Accordingly, what the Chairman was proposing was, in effect, merely to include in the article what was, already stated in the comment. If the Chairman were prepared to withdraw his proposal there would be no need for any change at all.

32. Mr. Padilla-Nervo's proposal, on the other hand, would involve a change of position on the part of the Commission, in that the latter, after already specifying in the comment what it meant by " natural resources ", would then decide to refer the matter to experts.

33. Mr. PADILLA-NERVO said that he had made no proposal on that point, but only a suggestion. What he had proposed at the previous meeting, however, was that, if the Commission did not embark on a detailed technical analysis of the problem, article 2 should be left as it stood.[6]

34. The CHAIRMAN withdrew his proposal.

35. Mr. HSU raised the question of the use of the term " sovereign rights " in article 2. He objected to it for two reasons. In the first place, it was a pompous term which was liable to be misunderstood and had to be qualified by a reference to exploration and exploitation. The idea could be just as well expressed by the term " exclusive rights ", which would dispense with the need for the rather clumsy phrase " for the purpose of ".

36. In the second place, the introduction of the concept of sovereignty had no conclusive majority behind it. During the discussion seven members had spoken against it and only six in favour of it. When it came to the vote, however, one of the opponents had been absent and one had decided to abstain, with the result that the concept had been adopted by a very narrow majority.[7]

37. In view of those considerations he proposed that the epithet " exclusive ", which was clear and non-controversial, be substituted for the word " sovereign " in draft article 2, and that the words " for the purpose " be deleted.

38. Mr. SCELLE agreed with Mr. Hsu's proposal. The concept of sovereignty seemed to him devoid of all significance when used in so restricted a context as for the purpose of the exploration and exploitation of the sea-bed.

39. Faris Bey el-KHOURI said that he, too, could attach no meaning to the idea of sovereign rights over the bottom of the high seas.

40. Mr. ZOUREK said that the Commission had debated the question of the appropriate term in the context at length at its fifth session, and he hoped that it would not embark on a long discussion of it again. He was in favour of keeping the text of article 2 as it was. The term " sovereign rights " was perfectly in place in the context. If the Commission were to use the term " exclusive rights " it would merely be saying the same thing in another way, and the exclusive rights would in any case be based on sovereignty. The Commission's draft text seemed to him the only way of placing the coastal State's rights in the continental shelf on a sound legal foundation in the event of the articles being adopted in the form of an international convention. Incidentally, the rights were only potential ones, since it was impossible at the moment to exercise them beyond a certain depth.

41. Mr. FRANÇOIS, Special Rapporteur, said the discussion was tending dangerously towards a third reading of the draft articles. The Commission had already debated them on second reading and was now reviewing them mainly in order to see whether they conflicted at all with the other draft articles on the regime of the high seas. It would be recalled that, after certain States had expressed a wish that the concept of sovereignty be introduced into the article, the Commission had debated the question at length and had finally adopted the term " sovereign rights ".[8] If it suddenly decided at that stage that the term was not correct, it would be going back on its previous decisions without any new element to justify such action. He was strongly opposed to any change in the text.

42. Mr. SANDSTRÖM agreed with the Special Rapporteur. The term " sovereign rights " was a compromise solution reached after a long and lively discussion. He did not want to go back on that compromise.

43. Sir Gerald FITZMAURICE observed that it was very difficult to find an ideal term to apply to the bed of the sea in such a connexion. In both drafts, it was to be noted, the terms used were qualified by the words " for the purpose of exploring and exploiting its natural resources ", or a similar phrase. In the draft article 2 adopted by the Commission at its third session, the expression " control and jurisdiction " had been used. If, however, the article referred only to control and jurisdiction, some doubt might persist as to whether the coastal State actually had proprietary rights over the resources of the continental shelf. The term " sovereign rights " made that point perfectly clear, and would avoid all ambiguity if retained.

44. Mr. SCELLE said that he would not have pressed the point had not Mr. Hsu drawn attention to the very slender majority by which the term " sovereign rights "

[6] A/CN.4/SR.358, para. 94.

[7] A/CN.4/SR.198, para. 38.

[8] A/CN.4/SR.215, para. 40.

had been adopted. He did not feel very strongly on the choice between the two epithets. It was largely a matter of taste.

45. He must take issue with the Special Rapporteur on one point, however. The Commission had not hesitated in the past to make changes in its drafts. Indeed, he had the impression that the Commission sometimes made changes merely to please a government, rather than because they were any real improvement. It was a matter of regret to him that the Commission had to make proposals to the General Assembly of the United Nations as to what it wished to be done with its drafts. The role of a commission of experts should end when it submitted its proposals to the appropriate body. Perhaps the Commission's Statute might be amended to enable it to do likewise, instead of having two or three discussions on the same question. The moment for making such a proposal might not yet have arrived, but he was convinced that it would come one day.

46. Mr. HSU said that Sir Gerald Fitzmaurice had made some very reasonable remarks on the subject. But if the object was to make it clear that the coastal State had proprietary rights over the continental shelf, why not say so in so many words? Why drag in the concept of sovereignty? As Mr. Scelle had pointed out, it was a question of taste, and the term " sovereign rights " was in bad taste.

47. Mr. SPIROPOULOS recalled that the term " sovereign rights " had been finally adopted, on his proposal, at the Commission's fifth session [9] in order to escape from a deadlock created by the introduction of the concept of sovereignty over the bottom of the sea, but, of course, he was not very enthusiastic about the term. The majority by which it was adopted might have been narrow but it was nevertheless a majority. As a matter of fact, the epithet " sovereign " really added nothing. When a State exercised a right on land, sea or air, it was exercising a sovereign right. And the exact nature of the rights it exercised in the context was made quite clear in article 6, paragraph 2. If the Commission really wished to substitute the epithet " exclusive " he would have no objection, since it conveyed exactly the same idea.

48. The CHAIRMAN put to the vote Mr. Hsu's proposal that the word " exclusive " be substituted for the word " sovereign " in draft article 2 and that the words " for the purpose " be deleted.

Mr. Hsu's proposal was rejected by 9 votes to 3, with 3 abstentions.

49. Mr. FRANÇOIS, Special Rapporteur, said that there was a further point to discuss in connexion with draft article 2. The United Kingdom Government had drawn attention (A/CN.4/99/Add.1, page 71), to the fears of certain scientific societies that the terms of the articles might enable the coastal State to place unnecessary restrictions upon bona fide scientific research upon the shelf itself, and had suggested the insertion of provisions safeguarding the general right to undertake such exploration and research. It had further suggested, in connexion with draft article 5, the addition of the words " or exploration in the waters above the shelf ".

50. He himself had raised the question in his report (A/CN.4/97, paras. 53-57), quoting the text of two resolutions adopted by the International Council of Scientific Unions and proposing the text of an article designed to dispel the misgivings of scientific societies. Since the coastal State exercised exclusive rights over the bed of the shelf, it was naturally not bound to tolerate research work by nationals of other States on that bed. On the other hand, there could be no question of its forbidding scientific research in the waters over the shelf.

51. It would be noted that he had included in his text the proviso that " tests with new weapons may be conducted only with the approval of the coastal State ". Since the Commission, after a lengthy discussion, had decided to make no reference to atomic tests in connexion with the pollution of the high seas,[10] it might be better not to make any reference to tests of new weapons in draft article 2. The Commission should, however, make the other two points quite clear in its text.

52. Mr. SANDSTRÖM considered that the ideas expressed by the Special Rapporteur were implicit in the terms of draft articles 2 and 3. He doubted the need to give any further explanation in the commentary.

53. Mr. PAL said that whereas the right of the coastal State to prohibit foreign research on the bed of the shelf was implicit in article 2, the fact that it had no right to prevent research in the superjacent waters was quite explicit in article 3. He saw no need for any further explanation.

54. Sir Gerald FITZMAURICE said that scientific bodies in the United Kingdom—in particular, the Royal Society—had raised the question about the continental shelf rather than the superjacent waters, in connexion with the existing text of article 2, because they were alarmed about the possible consequences to fundamental research with regard to the sea-bed itself, as had been brought out clearly in the resolution adopted by the International Council of Scientific Unions in April 1954 and reproduced in paragraph 55 of the Special Rapporteur's report (A/CN.4/97). They were perturbed at the prospect of a coastal State's exercising its sovereignty over the sea-bed and refusing to permit scientific research. Such action would not be in the general interest, because fishery conservation and the best methods of exploiting sedentary fisheries required research, and such research had already been carried out on the continental shelf.

55. The sovereignty of the coastal State must of course be accepted, as well as the possibility that the coastal State might refuse to permit such research, but the Commission might well include in its comment a clause stating that it was not the intention to encourage States to impede scientific research in the biology and geology of the continental shelf, and expressing the hope that States would not exercise their sovereignty in an unreasonable or vexatious manner. Since it was probable that most coastal States would not wish to do so, that stipulation

[9] A/CN.4/SR.215, para. 40.

[10] A/CN.4/SR.346, para. 40.

need not be expressed in an article, but a reference in the comment would reassure the association of scientists. Since they had submitted resolutions to the United Nations, their apprehensions should be taken seriously.

56. Mr. SANDSTRÖM agreed with that view.

57. Faris Bey el-KHOURI observed that if the Commission had adopted the proposal to substitute the word " exclusive " for " sovereign " in article 2, there would have been no grounds for such apprehensions.

58. Mr. HSU said that the stipulation suggested was not really necessary, since all members of the Commission agreed that the sovereign rights referred to were not, strictly speaking, sovereign rights.

59. Mr. AMADO agreed with the Special Rapporteur that a passage on the subject should be included in the report.

It was agreed that a passage on the lines suggested by Sir Gerald Fitzmaurice should be included in the comment on article 2.

60. Mr. ZOUREK said that he assumed that the reference to tests with new weapons would be omitted.

It was so agreed.

61. Mr. FRANÇOIS, Special Rapporteur, referring to paragraph 42 of his report (A/CN.4/97), pointed out that the Commission had included an article referring to sedentary fisheries in the text adopted at its third session.[11] It had subsequently altered its position, and had held that sedentary fisheries should come within the scope of the articles on the continental shelf. In taking that decision, the Commission had had regard only to fisheries involving species permanently attached to the sea-bed. However, as the Commission had stated in the report on the work of its third session, fisheries were also regarded as sedentary because of the equipment used —e.g., stakes embedded in the sea-floor. At its fifth session, that aspect of the question had been overlooked by the Commission. He had therefore suggested that the wording of the original article 3 should be inserted, as set out in the two sub-paragraphs of paragraph 42 in his report, subject to an exception in the case of fish permanently attached to the bed of the continental shelf.

62. Sir Gerald FITZMAURICE thought that a different question was being raised in paragraph 42. The Special Rapporteur seemed to be speaking of the definition of sedentary fisheries, which did not include fish not permanently attached to the sea-bed but caught by traps on the sea-bottom.

63. Mr. FRANÇOIS, Special Rapporteur, explained that he intended to deal in the proposed article with species caught by equipment fixed in the sea-floor and to refer to the continental shelf articles as regards species permanently attached to the sea-bed.

64. Mr. PAL said that at its third session the Commission had accepted the idea that sedentary fisheries were subject to the freedom of fishing, which was included in the concept of the freedom of the high seas. At its fifth session, it had abandoned that idea and had thought of including sedentary fisheries under the continental shelf, but had not done so in express terms. It was now being asked to repair that omission. It was now to take sedentary fisheries out of the freedom of the high seas and place them under the continental shelf. Such an extension of the concept of the continental shelf was an infringement of the freedom of the high seas, and he objected to it.

65. Mr. SANDSTRÖM believed that the Special Rapporteur was referring rather to sedentary fisheries exploited for a considerable period, in which the fishers had acquired a form of prescriptive right. That was perfectly acceptable ; such fisheries had long existed in Swedish waters. He could conceive of similar equipment being used on the continental shelf, and its use would be entirely justified.

66. Mr. FRANÇOIS, Special Rapporteur, said that there might be some difference of opinion as to how the idea should be expressed. His proposal might be referred to the Drafting Committee. Its purpose was to safeguard long-existing rights, often exercised by indigenous fishers, even outside the three-mile limit. Some reference to the point was required, as there was none in the existing text. The omission had already been pointed out by Mr. Mouton and Professor Böhmert.

67. Mr. SCELLE remarked that it was a doctrine of long standing.

68. Mr. PAL said that when the Commission had come to deal with the continental shelf, it had wished to leave the existing freedom of the high seas unaffected, and at its third session had not included sedentary fisheries in its definition of the continental shelf. At its fifth session, it had not included sedentary fisheries in the articles themselves, but had referred to them in the commentary. That had been the thin edge of the wedge. The Special Rapporteur, however, had expressly included them in the natural resources covered by the present article 2. While the rights in sedentary fisheries already exercised were safeguarded, there seemed to be an infringement of the freedom of fishing for other nations, as the coastal State now appeared to be given exclusive rights under article 2.

69. Mr. FRANÇOIS, Special Rapporteur, said that he was proposing to re-establish the original article 3, which in the 1951 draft did not come under the continental shelf, but under " related subjects ". The proposal might, however, be examined in greater detail by the Drafting Committee, which would undoubtedly find some way of meeting Mr. Pal's objection.

70. The CHAIRMAN said that Mr. Pal was probably thinking of the criterion adopted by the Commission at its third session, when it had been referring only to the mineral resources of the continental shelf, whereas at its fifth session it had extended the idea to include sedentary fisheries.

71. Mr. PAL objected that there had been no separate article dealing with sedentary fisheries in the text prepared

[11] *Official Records of the General Assembly, Sixth session, Supplement No. 9 (A/1858), p. 20.*

at the fifth session. The dominant idea, when dealing with the continental shelf, had been that the freedom of the high seas should be left unaffected; and sedentary fisheries were already covered by the freedom of fishing, one of the aspects of the freedom of the high seas. He could not see on what principle it was now proposed to take them out of the freedom of fishing and give them to the present owner of the continental shelf. To do so would be an encroachment on the freedom of the high seas.

72. In reply to a question by Mr. AMADO, Mr. FRANÇOIS, Special Rapporteur, explained that the article dealing with sedentary fisheries had not been retained in the draft prepared at the fifth session as the Commission had overlooked fisheries regarded as sedentary because of the equipment used—e.g., stakes embedded in the sea floor—and had paid attention only to the fishing of species permanently attached to the bed of the sea.

73. Mr. SANDSTRÖM said that he assumed that the phrase " provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals" in paragraph 42, sub-paragraph 1, of the Special Rapporteur's report (A/CN.4/97) was intended to imply that nationals of States other than the coastal State might use equipment at places where they would not disturb the nationals who had been fishing there for a considerable time.

74. Mr. ZOUREK observed that conflicts might arise between the coastal State and other States when nationals of the latter tried to fish by means of stakes embedded in the sea-floor of the continental shelf at places where nationals of the coastal State already used similar equipment.

75. The CHAIRMAN, speaking as a member of the Commission, doubted whether regulation was properly in context, since the proposal about the continental shelf referred only to exploration and exploitation. Regulation might be more properly referred to in connexion with conservation.

76. Mr. FRANÇOIS, Special Rapporteur, said that the subject was related to the question of the natural resources of the continental shelf, but he had proposed to include it as an article in the series concerning fisheries rather than in those concerning the continental shelf.

77. The CHAIRMAN suggested that article 2, with the Special Rapporteur's proposal relating to sedentary fisheries, be referred to the Drafting Committee.

It was so agreed.

Article 3

78. Mr. FRANÇOIS, Special Rapporteur, drew attention to the comment by the United Kingdom Government on articles 3 and 4 (A/CN.4/99/Add.1, page 71). He himself believed that the point raised by the United Kingdom Government had been stated as clearly as possible in the commentary.

79. Sir Gerald FITZMAURICE was inclined to agree with the Special Rapporteur. The reason for the United Kingdom comment had undoubtedly been a dislike of the tendency to extend the rights of coastal States in the continental shelf to claims to exclusive rights in the superjacent waters and a belief that, in view of that danger, the stipulation should be made clearer.

80. Mr. SCELLE said that the wording of the article and the Commission's intentions were entirely clear. Difficulties might, however, arise in course of time, because it was difficult to see how freedom of navigation could be maintained over the continental shelf if exploitations became very numerous and closely spaced.

81. The CHAIRMAN said that that danger was covered by article 6.

82. Mr. SCELLE maintained that the wording of article 6, particularly the phrase " unjustifiable interference ", was practically meaningless.

83. Mr. AMADO said that it would be very difficult to prevent States, which naturally wished to increase their wealth, from trying their utmost to increase their power too.

84. Mr. SCELLE doubted whether a small State would obtain the same treatment as a large one. There was only one safeguard: the article on arbitration. Even if that were accepted, it might give dubious satisfaction.

It was decided to refer article 3 to the Drafting Committee.

The meeting rose at 6.30 p.m.

360th MEETING

Tuesday, 5 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/97, A/CN.4/99/Add.1) *(continued)*

The continental shelf (continued)

Article 4

1. The CHAIRMAN invited the Commission to consider article 4 of the draft articles on the continental shelf.

Article 4 was adopted without comment.

Article 5

2. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom Government had suggested that article 5 should mention pipelines as well as submarine cables (A/CN.4/99/Add.1). The omission of any reference to pipelines, however, had been deliberate, and the reason for it was to be found in paragraph 76 of the comment on the text (A/2456). If Sir Gerald Fitzmaurice pressed the point, a reference might more appropriately be placed in the comment than in the article itself. It would be to the effect that the same rules would apply to pipelines as to submarine cables, but that the Commission had thought that, owing to the difficulties which might arise, coastal States might impose even more stringent conditions than they were authorized to impose for cables.

3. Sir Gerald FITZMAURICE said that he would be perfectly satisfied with a reference in the comment.

4. Mr. PAL observed that article 34, paragraph 2, of the articles concerning the regime of the high seas adopted in 1955[1] dealt with the same subject, and the same language might be used. Paragraph 1 of that article had been taken from article I of the 1884 International Convention for the Protection of Submarine Telegraph Cables. Paragraph 2 had been added to make it quite clear that the coastal State was obliged to permit the laying of cables and pipelines on the floor of its continental shelf, but that it could impose conditions as to the track to be followed, in order to prevent undue interference with the exploitation of the natural resources of the sea-bed and the subsoil.

5. The CHAIRMAN suggested that a passage to that effect should be included in the comment on article 5.

It was so agreed.

6. Mr. FRANÇOIS, Special Rapporteur, said that there was a further suggestion by the United Kingdom (A/CN.4/99/Add.1) to the effect that the words " or exploration in the waters above the shelf " be added at the end of the article. In his own opinion, that question had already been disposed of by the Commission's decision with regard to scientific research.[2]

7. Sir Gerald FITZMAURICE agreed with the Special Rapporteur.

It was decided to refer article 5 to the Drafting Committee.

Article 6

8. Sir Gerald FITZMAURICE said that the United Kingdom Government had commented (A/CN.4/99/Add.1) that the phrase, in paragraph 2, " a reasonable distance " for safety zones was rather vague. Since the margin of safety for shipping must at all times be generally the same, regardless of whether the installation concerned was in an open stretch of sea or in a narrow strait, it was proposed that the words " at a reasonable distance " should be followed by the words " not exceeding 400 metres ". The idea, therefore, was that a distance of 400 metres was about the maximum required to establish a margin of safety for ships passing installations. The distance should be specified, so that the masters of ships would know that everything outside the zone would not be affected by the terms of article 6.

9. Mr. FRANÇOIS, Special Rapporteur, explained that the stipulation had originated from a report submitted to the International Law Association, in which the need for a safety zone had been indicated for the first time; expert opinion had then proposed 500 metres. The Commission had been in favour of including a stipulation, but had been unable to agree that the distance should be exactly 500 metres; it had preferred to use the phrase " at a reasonable distance " in the article and to refer to the precise figure of 500 metres in the comment. As the members of the Commission had no expert knowledge of the subject, that figure might be retained. There seemed no reason for inserting in the article the figure of 400 metres suggested by Sir Gerald Fitzmaurice; in fact, if any figure were to be inserted in the article, that of 500 would be preferable, since the Commission had already twice accepted it in the comment. A reference to 400 or 500 metres in the comment, however, would still be the better course.

10. Sir Gerald FITZMAURICE thought that it was of no great importance whether 400 or 500 metres was the figure used; indeed, he would prefer 500 metres. The experts had probably felt that some fixed distance was required. It should be remembered that, although legal experts would of course be familiar with the comment, the average mariner was unlikely to study it. Furthermore, there might be a number of installations in a certain area, and masters of ships should know how close they might sail. A specified distance was therefore desirable, and there would be some merit in embodying it in the article.

11. Mr. AMADO said that he had always opposed vague phraseology. Who was to define " a reasonable distance ", and how? On the other hand, it might be dangerous to fix a specified limit, and it had been for that reason that the Commission had originally accepted the vaguer phrase. While he would not press the matter, he favoured the inclusion of the reference to 500 metres.

12. Mr. SPIROPOULOS thought that the matter was being given more importance than it deserved. The Commission had already discussed it and had decided not to incorporate the reference to 500 metres in the text, since it was a somewhat arbitrary figure. The distance for the safety zones around installations would probably depend

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[1] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), p. 13.

[2] A/CN.4/SR.359, para. 59.

largely on their size. The issue should, however, preferably be referred to in the comment, as it would be dangerous at the present stage of international law to refer to it in the text of the article.

13. Sir Gerald Fitzmaurice was certainly right in saying that the masters of ships would wish to know how close to installations they might sail, but, as in the case of the regime of the territorial sea, each State might be left to fix the safety zone in its own regulations. The evolution of international law would undoubtedly enable a more precise reference to be embodied in the article at a later stage. The text should therefore be retained as it stood; the phrase " about 500 metres " might be included in the comment.

14. Mr. SANDSTRÖM agreed with Mr. Spiropoulos. The disadvantage of specifying a maximum distance for the safety zones was that States would almost always adopt the maximum. If the reference were included in the comment, States would probably accept a narrower safety zone.

15. Another argument against specifying the distance in the text of the article was that installations might be of different kinds and might accordingly require different safety zones.

It was decided that a reference to the specific distance for the establishment of safety zones around installations of the continental shelf should be included in the comment.

16. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom Government had proposed the insertion of a new paragraph to read: " If such installations are abandoned or disused, they are to be removed entirely " (A/CN.4/99/Add.1). He himself did not think that such a new paragraph was necessary, as its substance was already covered in article 6, paragraph 1. Obviously the abandonment or disuse of installations would constitute unjustifiable interference with navigation and fishing. A reference to the United Kingdom suggestion might be included in the comment.

17. Sir Gerald FITZMAURICE could not agree that the point was obviously covered by paragraph 1, but admitted that it was implicit in it. Installations did not interfere with navigation only if they were in use. They were troublesome to remove, and might readily be abandoned, but would still be dangerous to navigation. In that case, some special provision was surely desirable, perhaps at the end of paragraph 4 rather than in a new paragraph. He would not, however, press the point if the Commission agreed with the Special Rapporteur's objection.

18. The CHAIRMAN suggested that the United Kingdom proposal should be mentioned in the comment on paragraph 1.

It was so agreed.

19. Mr. FRANÇOIS, Special Rapporteur, said that the United Kingdom Government had suggested that in paragraph 5 the words " or where interference may be caused in " be inserted before the words " sea lanes ", since the present wording might prove too restrictive. He opposed that suggestion, since it was a fact that installations did in every case cause some interference with navigation. The passage in paragraph 77 of the commentary for the fifth session (A/2456), which had been drafted by Mr.—now Sir Hirsch—Lauterpacht, brought out the point very clearly and should therefore be retained in the new commentary.

20. Sir Gerald FITZMAURICE explained that the suggestion did not involve the deletion of the phrase " narrow channels ", but would make the article read as follows:

> Neither the installations themselves, nor the said safety zones around them, may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

The reason for the suggestion was that some sea lanes were very wide and often lay near the continental shelf of a coastal State precisely where that State would wish to construct installations. While the construction of installations should obviously not be prohibited altogether, they should not be permitted where they caused interference with navigation. He would not, however, press the point.

21. Mr. SPIROPOULOS supported the proposed insertion, since the comment would be inconsistent with the text if it were not inserted. According to the text, installations might not be established on recognized sea lanes. That being so, it was hard to see how it should be stipulated in the comment that installations must not result in interference with shipping. The confusion seemed to have arisen from the omission of the word " étroits " after " chenaux " in the French text. The French and English texts ought to be brought into line. The insertion suggested by Sir Gerald Fitzmaurice should be accepted, because, if the sea lanes were very wide, the installations would not cause interference, and if they were narrow, the installations would be logically excluded.

22. The CHAIRMAN suggested that the French and English texts be referred to the Drafting Committee for collation.

It was so agreed.

23. Mr. PADILLA-NERVO asked whether Sir Gerald Fitzmaurice's suggestion had been accepted. He himself supported it.

24. The CHAIRMAN replied that it was his understanding that the suggestion had been accepted.

25. Mr. FRANÇOIS, Special Rapporteur, said that he had wondered whether some provision should be made for coastal States to enforce customs measures on the continental shelf, but would leave that point until the Commission had dealt with the relation between the continental shelf and the contiguous zones.

It was decided to refer article 6 to the Drafting Committee.

Article 7

26. Mr. FRANÇOIS, Special Rapporteur, drew attention to the comment by the United Kingdom Government and the revised draft suggested by it (A/CN.4/99/Add.1). The gist of the comment was that it was very

often difficult to establish an exact median line and that States should therefore be given a certain amount of latitude. The application of an exact median line was a matter of considerable technical complexity, and the most satisfactory course therefore would be to apply only the principle. The revised draft amounted to the insertion, in the fourth line of paragraph 1, of the words " usually determined ", after " such States is ", and of the words " by the application of the principle of " before " the median line ", with the addition of a third paragraph, dealing with the marking of the lines on large-sca'e charts. He himself believed that the first insertion would be superfluous, in view of the proviso " unless another boundary line is justified by special circumstances ". The second insertion would be acceptable, though it might be preferable to retain the existing text and incorporate the idea in the comment, since it would always be difficult to determine the median line exactly, and States might prefer to rely on negotiation. The additional paragraph would be acceptable.

27. Mr. SPIROPOULOS agreed that the word " usual " was pleonastic. Either the phrase "unless another boundary line is justified by special circumstances " or the word " usually " would be superfluous, and so the present text should be retained.

28. Sir Gerald FITZMAURICE was inclined to agree that the insertion of the word " usually " would be superfluous and that the phrase Mr. Spiropoulos had quoted, and which was already in the text, covered the point raised by the United Kingdom Government. What that government had in mind, however, was the fact that special circumstances would be the rule rather than the exception, owing to the technical difficulty of applying an exact median line and to the possibility that such application would be open to the objection that the geographical configuration of the coast made it inequitable, because, for example, the low-water mark, which constituted the baseline, was liable to physical change in the course of time by silting. The point should be made in the comment that exceptional cases were liable to arise fairly frequently.

29. Mr. ZOUREK said that the United Kingdom Government's comment and Sir Gerald Fitzmaurice's remarks brought out the defects in the present text of article 7. In practice, the principle of the median line would always be applied unless another boundary line was justified by special circumstances, if no State took the initiative in negotiations or if the other party to the negotiations did not accept an agreement. The main emphasis should therefore be laid on negotiations between the States.

30. As Sir Gerald Fitzmaurice had pointed out, geographical factors would very often determine the median line between the continental shelves of adjacent States. Although it was unlikely that negotiations between such States would be unsuccessful, as both had an interest in settling the matter, the principle should always be applied unless other circumstances justified some departure from it. The article should therefore stipulate, first, the principle that the delimitation of the boundary should be determined by agreement between the parties concerned, and, secondly, that only if negotiations broke down should the principle incorporated in article 7 be applied.

31. Mr. FRANÇOIS, Special Rapporteur, remarked that the text as it stood met Mr. Zourek's point precisely.

32. Mr. AMADO agreed with Mr. Zourek that the main emphasis should be on negotiation between the States concerned; but that was clearly implicit in the text of the article as it stood.

33. Mr. ZOUREK agreed, and observed that he was not suggesting any change in the basic principle. On the other hand, the emphasis on negotiation, taking due account of geographical circumstances, as Sir Gerald Fitzmaurice had stressed, should be brought out strongly.

34. Mr. SPIROPOULOS suggested that the Commission was splitting hairs. Mr. Zourek's point would be valid only if the article laid stress on possible disagreements between States; that might be referred to in the comment.

35. Mr. SANDSTRÖM agreed, and suggested that Mr. Zourek's point might be met by inserting a sentence in the comment, beginning: " In the absence of agreement, the median line shall be . . ."

36. The CHAIRMAN thought that the passage might be drafted to start with a proviso that, in case of dispute, the boundary of the continental shelf should be settled by agreement; and thereafter the remainder of the statement.

37. Mr. ZOUREK supported the Chairman's suggestion.

38. The CHAIRMAN thought that the same might be done with the comment on paragraph 2.

39. Mr. PADILLA-NERVO asked whether paragraph 2 prohibited directional borings at the boundary line of the continental shelf appertaining to two adjacent States. In other words, was the boundary determined by a line perpendicular to the base?

40. The CHAIRMAN said that directional boring might be undertaken only by agreement between the States concerned.

41. Mr. SANDSTRÖM said that fixing a perpendicular line would not solve the difficulty, but the Commission had already agreed that directional boring might be undertaken by agreement between the States concerned.

42. Mr. FRANÇOIS, Special Rapporteur, pointed out that the State which owned the sea-bed also owned its subsoil, and another State could therefore not enter the former's continental shelf without mutual agreement.

43. The CHAIRMAN observed that that was the very purpose of delimiting the boundary line.

44. Sir Gerald FITZMAURICE, reverting to the United Kingdom's proposal for the addition of a third paragraph to article 7, said that it would usefully reproduce article 14, paragraph 2, of the draft articles on the regime of the territorial sea, which dealt with the delimitation of the territorial sea of two States whose coasts were opposite each other.[3]

[3] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), p. 19.

45. Mr. SPIROPOULOS agreed, although he was not wholly convinced. In territorial waters, masters of vessels needed to know exactly where they were, but that did not necessarily apply to the continental shelf, as the superjacent waters were the high seas, except where there were installations and fisheries.

46. Mr. PADILLA-NERVO also supported the addition of the paragraph suggested by the United Kingdom Government.

47. Mr. SANDSTRÖM asked what purpose would be served by marking the lines on officially recognized charts.

48. Sir Gerald FITZMAURICE replied that the lines would be useful for fishermen engaged in sedentary fisheries, for oil boring and for placing installations.

49. Mr. SANDSTRÖM observed that he had asked his question because in the case of the territorial sea the matter of sovereignty arose; in the case of the continental shelf, however, there seemed to be no practical value in marking the lines.

50. Mr. SPIROPOULOS replied that marking had some importance for adjacent States, but they might well determine the boundary by mutual agreement. He would not, therefore, press for the adoption of the United Kingdom Government's proposal.

51. Sir Gerald FITZMAURICE pointed out that the lines might be of use to foreign fishermen who were allowed, under licence, to participate in sedentary fisheries and would therefore need to know where the continental shelf of one State ended and that of another began. If, however, the Commission really felt that the proposal had no practical utility, he would not press it, although he was not convinced that that was so.

52. Mr. FRANÇOIS, Special Rapporteur, proposed that a passage be incorporated in the comment to the effect that it might perhaps be useful if the lines were marked on the largest-scale charts available and officially recognized.

It was so agreed.

It was decided to refer article 7 to the Drafting Committee.

Article 8

53. Mr. KRYLOV, without desiring to reopen the discussion on compulsory arbitration, wished nevertheless to stress, in view of the misconceptions of the author of a letter to *The Times* of 2 June, that he was not always opposed to compulsory arbitration, which in certain cases was perfectly justifiable. Indeed, some treaties concluded by the Government of the Soviet Union, for instance those concerning narcotic drugs, contained an arbitration clause. With narcotic drugs, the eradication of a recognized evil called for strong measures, but the issues in the case of fisheries and the continental shelf were quite different; there the remedy of compulsory arbitration was out of proportion to the issues at stake.

54. The Special Rapporteur had apprehended the danger of the compulsory arbitration provisions,[4] while other members too at the fifth session had doubted the appropriateness of compulsory arbitration as a solution to disputes over the continental shelf.[5] It must not be forgotten that fisheries and the continental shelf were subjects that were new in the field of international law.

55. There was bound to be a long debate on compulsory arbitration in the sixth committee of the General Assembly so he supported Mr. Spiropoulos' view [6] that the Commission ought not to take any decision on the subject in connexion with the continental shelf. He would vote against article 8.

56. Mr. SPIROPOULOS shared Mr. Krylov's view, but for rather different reasons. The provision in the article was a vague formula, similar to that to be found in many international conventions, and had little to do with arbitration in the true sense of the word, for the application of the principle depended entirely upon mutual consent. It might be argued that the provisions contained an obligation, but it was by no means watertight, because nothing in the draft text could compel an unwilling party to accept the arbitral procedure. Unlike the optional clause of Article 36 of the Statute of the International Court of Justice, article 8 was purely decorative; it looked well, but had no practical value. In the draft articles on fishing the Commission had set up a balanced system which would work well in practice. The present draft article, however, was in a different category.

57. He failed to see how the inclusion of the article could affect the issue in any dispute. It presumed the good faith of the parties, and if good faith were lacking, the article would simply be non-operative.

58. Mr. KRYLOV suggested that Mr. Spiropoulos was exaggerating, for, as he himself had pointed out, there were cases when compulsory arbitration was of proved value.

59. Mr. LIANG, Secretary to the Commission, said that, in view of its importance—as instanced by its length—the comment to the article should not be overlooked (A/2456, paras. 86-90). It was there stated (para. 86) that the article represented " a general arbitration clause, providing that any disputes which may arise between States concerning the interpretation or application of the articles should be submitted to arbitration at the request of any of the parties ". It was further stated (para. 87) that the Commission did not propose the adoption of a convention on the continental shelf. It was therefore erroneous to suggest that the article imposed compulsory arbitration. That issue would arise only if the article were adopted together with the others dealing with the continental shelf. What was certain, however, was that the Commission's decision at its fifth session was the establishment of the principle of arbitration.

60. A study of the substance of the article in the light of the comment showed that compulsory arbitration was not the sole and exclusive method recommended for the settlement of a dispute. In the final result, compulsory arbitration might be adopted, but it would not be by

[4] A/CN.4/SR.203, para. 10.

[5] *Ibid., passim.*

[6] *Ibid.*, paras. 13-15.

the exclusion of other procedures. Those considerations led him to suggest that, once the text of the article had been adopted, the comment should be brought into line with it, and that the Commission's attitude to the issue, whether it stood on its 1953 position or whether it envisaged the insertion of the draft acticles in a convention on the continental shelf, should be clearly defined.

61. Mr. SANDSTRÖM deprecated any denigration of the draft. Its basis was obviously the presumption of the parties' good faith. Difficulties might arise, but a compulsory arbitration clause would exert a beneficial influence. A further reason for the inclusion of such a clause was the fact that the Commission was engaged in defining new rights in a field where there was a considerable conflict of rights.

62. Mr. Spiropoulos had exaggerated the grounds for his opposition. The draft articles on the continental shelf should be completed by an arbitration clause, just as in the case of those on fisheries.

63. Faris Bey el-KHOURI said that the Secretary's remarks had done little to dissipate his doubts with regard to the article. The Commission had no concern with cases where the parties to a dispute agreed upon means for a settlement. The problem arose only in the absence of such agreement, and experience had shown that ways of settling their differences could always be found by the States concerned.

64. He had always held that a single compulsory solution could not be imposed upon States, save that of recourse to the International Court of Justice, an international body created for that very purpose, which by its composition was immune from external, non-juridical pressure. Arbitral procedure could be applied only on the basis of mutual consent. It was by no means the only possible solution, and suffered from the drawback that the members of the arbitral commission could not possibly enjoy the same independence of judgment as the members of the International Court of Justice.

65. Mr. SCELLE, replying to the Secretary and to Mr. Sandström, said that in the existing state of affairs the provisions of article 8 had no practical value whatever. Since there was no intention of proposing the adoption of a convention on the continental shelf—for which he was thankful—the article amounted to nothing more than a simple desideratum, the enforcement value of which was precisely nil. That being so, governments were at complete liberty to adopt whatever measures they pleased in respect of the exploration and exploitation of the shelf.

66. The draft articles would allow the more powerful States freely to exploit the weaker ones—granting perhaps, if they felt generous, a small consideration. In the meantime, the high seas were being whittled away and before long, enormous areas of them would be exploited at will by the large, powerful States. In the case of Australia and Japan, no draft convention could possibly affect the outcome if the former country were to claim sovereign rights over the whole of the continental shelf off its coasts. The Commission had taken the wrong road and he declined to follow it. He had noticed from a perusal of the record of the debates in the Australian Parliament that some members, basing themselves on the Commission's recommendations, had claimed such sovereign rights as he had mentioned. That, no doubt, was a great honour to the Commission. Nothing the Commission had done, however, justified such claims. All it had done was to codify certain desiderata.

67. The existing situation was that the concept of the continental shelf was being interpreted by each State as it pleased. It might be that he and the Commission contemplated the future with a different eye; in any event, he had no hope of persuading it to recognize the truth of his contention. All he could do was regretfully to dissociate himself from the decisions it had taken on the subject of the continental shelf.

68. Mr. ZOUREK said that the provisions of the article would undoubtedly raise difficulties in the way of its acceptance by governments. In his view, the draft articles on the continental shelf should not include any statement of principle on compulsory arbitration, for without an agreement on its implementation between States parties to a dispute it could have no practical value.

69. On the other hand, States willing to accept the principle of compulsory arbitration were faced with a wide choice of method; he need only mention the General Act for the Pacific Settlement of International Disputes of 1928, revised in 1949, the optional clause in Article 36 of the Statute of the International Court of Justice, or the numerous bilateral conventions for the peaceful settlement of international disputes. In such circumstances no difficulties would arise for those States which were prepared to accept compulsory arbitration, but he was convinced that parties to a dispute who were unwilling to adopt any such solution for a settlement would not accept the provisions of article 8. The question of acceptability was of great importance, for the Commission's recommendations would pass into the corpus of international law only if accepted by States. He accordingly proposed that the article be deleted.

70. Mr. EDMONDS said that he was unable to follow the argument of those who considered that draft article 8 provided for compulsory arbitration. The text merely stated that " any disputes . . . should be submitted to arbitration "; in other words it made a suggestion. That interpretation was borne out by the comment on the draft article (A/2456, paras. 86-90). Furthermore, the absence of any detailed provisions, such as those contained in articles 31-33 on the conservation of the living resources of the high seas,[7] to govern the composition of the arbitral body and the criteria that it should adopt, strengthened the impression that the Commission was not thinking in terms of compulsory arbitration when it framed draft article 8. The draft article did not do much more than express a pious wish that States should resort to arbitration.

71. Mr. AMADO said that it was possible to find support for almost any argument in the commentary quoted by Mr. Edmonds. For instance, in paragraph 87

[1] *Official Records of the General Assembly, Tenth session, Supplement No. 9* (A/2934), pp. 12 and 13.

the provision for arbitration was presented as essential if the principle of the freedom of the seas and peaceful relations between States were not to be threatened. In the very next paragraph, however, the view of certain members was quoted to the effect that such a provision would increase the possibility of certain States' putting pressure on weaker States and in effect curtailing their independence. Again, while article 8 provided only that disputes concerning the interpretation or application of the articles should be submitted to arbitration, paragraph 90 of the commentary appeared to go much further.

72. It was only with great reluctance that he, a jurist of a country which had embodied the principle of compulsory arbitration in its very constitution, opposed the retention of draft article 8. There was, however, no point in it. The most that had been said in its favour was that it expressed a desideratum and could do no harm. He could not vote for its retention.

73. Mr. SANDSTRÖM pointed out that the words " should be submitted " in the English text of the draft article did not mean the same thing as the words " seront soumis " in the French text, which expressed a clear intention to establish compulsory arbitration. That arbitration was intended to be compulsory also appeared from the penultimate sentence in paragraph 87 of the commentary, where it was stated that States " should be under a duty " (in the French text " soient tenus ") to submit any disputes to arbitration.

74. The Commission had made considerable progress since it had stated in the report covering the work of its fifth session that it did not propose the adoption of a convention on the continental shelf (A/2456, para. 87). He thought it was now the view of the Commission that such a convention should be adopted. The Commission's task was to submit proposals and it should not concern itself unduly with the question whether those proposals would be acceptable to certain States. In his opinion, it was essential to make provision for compulsory arbitration in the draft, and he would shortly submit a formal proposal that the Commission make detailed provisions for arbitration on the lines of articles 31-33 on the conservation of the living resources of the sea.

75. Mr. HSU said that when the regime of the continental shelf had been raised as a preliminary question, the Commission, acting on the assumption that it was called upon to recommend new law and realizing that an extension of the privileges of the coastal State was involved, had felt that a system of arbitration must be established to protect the rights of the countries using the high seas. But when the question had come formally before the Commission, the general impression had been that it had merely to codify and elaborate a body of rules which were already established law. Later, however, when confronted in its draft report with the implications of that impression, the Commission had been unable to accept them and had deleted whole passages from the draft, though leaving certain vestiges, such as the term " sovereign rights " and the idea that it was not necessary to adopt a convention on the continental shelf. That explained why the draft articles, in their present wording, could be taken either as principles recommended to the General Assembly for incorporation in a convention, or merely as an elaboration of existing law.

76. The Commission could either revise and expand the text on arbitration on the lines of articles 31-33 on the conservation of the living resources of the high seas —a task which would take far too long—or could state in the commentary that the draft articles constituted recommendations and not a codification of established law. If article 8 were recommended with a view to the adoption of a convention, there would be no need to redraft it, since the convention, when adopted, would provide for compulsory arbitration. As the article stood, however, it did not provide for compulsory arbitration and its opponents were quite justified in claiming that it could be conveniently deleted. At all events, the Commission should make clear in its report whether the draft articles were intended as recommendations or as codification of existing law.

77. Mr. SALAMANCA observed that the commentary lent itself to various interpretations of the meaning of the draft articles. Mr. Edmonds had submitted one interpretation, while Mr. Sandström had rightly pointed out that unless clear criteria were laid down, the concept of arbitration contained in draft article 8 would be very imprecise and general. In paragraph 88 of the commentary, the members of the Commission had apparently had in mind Article 33 of the Charter of the United Nations, and in paragraph 89, the draft on arbitral procedure which it had submitted to the General Assembly.

78. There were three courses open to the Commission. It could either delete article 8 altogether, as Mr. Zourek had proposed, or supplement it with more detailed provisions governing the machinery and procedure of arbitration, as Mr. Sandström proposed. The third alternative, which he himself wished to propose, was to replace the reference to arbitration by a reference to the various means of settlement enunciated in Article 33 of the Charter, and at the same time to indicate in the commentary that compulsory arbitration was desirable if all the parties to the dispute had agreed thereto in a convention regulating arbitration procedure with regard to the continental shelf.

79. As Mr. Spiropoulos had already pointed out,[8] draft article 8 was vague and gave no indication of the type of arbitration to be adopted. He was prepared to accept its deletion, but would prefer the solution he had just proposed.

80. Mr. PADILLA-NERVO said that, before voting on draft article 8, the Commission must be perfectly clear as to whether the article established compulsory arbitration or merely urged countries to resort to arbitration. Before hearing the debate, he had gained the impression from the commentary on draft article 8 that the Commission had in mind a compulsory system of arbitration. The last two sentences of the Spanish text of paragraph 87 of the commentary certainly appeared to make arbitration compulsory, and paragraph 88

[1] See para. 56, above.

confirmed that impression. The fact that no provision was made for the machinery and procedure of arbitration, as in draft articles 31-33 on the conservation of the living resources of the high seas, did not necessarily mean that the Commission had not had compulsory arbitration in mind when framing draft article 8. Moreover, although the need to seek a solution by other means was not explicitly stated in draft article 8, as it was in draft article 31, the idea was implicit that if the parties to a dispute agreed to seek other means of peaceful settlement, arbitration should be regarded as the last resort and, in that sense, would be compulsory.

81. Sir Gerald FITZMAURICE agreed that the English text was misleading. The article was intended to establish compulsory arbitration, although it did not go into details regarding the machinery and procedure for arbitration.

82. Such detailed provisions were always useful, but were not essential. A large number of treaties signed during the last forty years merely contained a provision that disputes would be submitted to arbitration, it being implied that the parties to the dispute were bound to co-operate in making the appropriate arrangements. While detailed provisions made the process of arbitration more certain, he did not think that their absence necessarily affected the obligatory character of arbitration.

83. Since the greater part of the draft relating to the regime of the high seas did no more than codify existing law, the Commission had previously agreed that it was not necessary to make general provision for arbitration in the whole of the draft. Where, however, the articles could be said to be creating new law, there might be some ground for providing for compulsory arbitration. The articles on the conservation of the living resources of the sea were a clear case of that kind. The proposals were completely new and were designed to serve as a basis for an international convention. The articles on the continental shelf, on the other hand, were a borderline case. Though they clearly did not form an entirely new system, they did deal with a comparatively new subject and one which was particularly open to misuse. Rights over the continental shelf were already serving as a basis for illegitimate claims to areas of the high seas. It would therefore be useful to retain draft article 8 or at least the principle of compulsory arbitration, subject to drafting changes. Such a step would facilitate general acceptance of the articles by certain States.

84. It had, however, been claimed that retention of the article would equally impede acceptance of the draft by other States. He failed to appreciate the cogency of that argument unless the States in question wished to be in a position to take unilateral action on a new matter without the risk of others resorting to arbitration.

85. It had also been argued as a reason for not retaining the article that countries were always free to resort to arbitration if they wished. Experience showed, however, that it was precisely those countries that were unwilling to accept an obligation to arbitration that were also unwilling to resort to arbitration voluntarily. If no provision on the lines of draft article 8 were included, he feared that States would resort to arbitration very rarely indeed.

86. Mr. FRANÇOIS, Special Rapporteur, said that it was clear that the reason for the difference of opinion was the discrepancy between the French and English texts. It was obvious from the French text that the Commission had intended to establish compulsory arbitration; indeed, the commentary was comprehensible only on that understanding. He did not consider it essential for all details regarding machinery and procedure to be included. In other cases, the Commission had been content to indicate the general course to be followed, leaving the details to be elaborated by a conference.

87. Though he would probably vote for the retention of draft article 8, he was less enthusiastic than Sir Gerald Fitzmaurice as to its value. The Commission was generally agreed that provision for arbitration should be made only in quite special cases, such as that of the conservation of the living resources of the high seas. He doubted, however, whether the continental shelf constituted such a special case and, though resort to arbitration in disputes regarding it, as also in other disputes, was undoubtedly desirable, it was not necessary to state the fact in an article. The Commission could, for instance, omit all mention of arbitration in the draft articles in cases other than the quite special ones, pointing out in the commentary that it had not dealt with the question because it regarded it as a matter to be handled by an international conference when establishing a convention.

88. Faris Bey el-KHOURI said that draft article 8 clearly provided for compulsory arbitration, while not excluding prior recourse to other means of peaceful settlement. He would have preferred the article to mention arbitration only as a last recourse giving priority to other means of settlement, and in particular to reference of the dispute to the International Court of Justice. The efficacy of such a procedure had been demonstrated by the recent judgment of the International Court of Justice in the fisheries case between the United Kingdom and Norway, which had been generally accepted as a rule of law. He therefore proposed that article 8 provide for reference of disputes to the International Court of Justice.

89. Mr. SPIROPOULOS said that his earlier remarks had been misinterpreted. As a Greek jurist, he could not fail to support the principle of compulsory arbitration. Unfortunately, draft article 8 on the continental shelf, unlike draft article 31 on the conservation of the living resources of the sea, established an imperfect system of arbitration in that it provided no means of compelling States, whether acting in bad or in good faith, to resort to arbitration. Although the system of arbitration provided for by the article was undoubtedly a compulsory one, very few States would resort to arbitration as a result of it.

90. He was willing to retain the draft article as an enunciation of a principle of law, on the understanding that when States drew up a convention on the continental shelf, they could adopt provisions governing the machinery and procedure for arbitration on the lines of those contained in article 31 on the conservation of the living

resources of the high seas. Incidentally, reference of disputes to the International Court of Justice might be regarded as included in very broad terms in " arbitration ".

91. Mr. EDMONDS agreed that his case was not supported by the French and Spanish texts of article 8. He could not, on the other hand, agree that the statement in paragraph 87 of the commentary that " States... should be under a duty to submit to arbitration any disputes arising in this connexion " necessarily meant that arbitration was compulsory. As a judge, he would be most reluctant to place such an interpretation on the text. He fully agreed, however, with Mr. Padillo-Nervo that the Commission must be quite clear as to whether draft article 8 was to contain mere guidance or a legal requirement. In any case, the commentary on the draft article should be brought into line with the article itself.

92. Mr. SANDSTRÖM said that, although there was a difference between the case of the continental shelf and that of the conservation of the living resources of the high seas, it was merely a difference of degree. The need for expert opinion was not so great in the first case as in the second.

93. He supported Faris Bey el-Khouri's proposal that disputes be referred to the International Court of Justice. If that proposal were rejected, he would vote in favour of retaining draft article 8 as it stood.

94. The CHAIRMAN, speaking as a member of the Commission, said that the obligation to resort to arbitration as contemplated in draft article 8, though not as essential as in the case of disputes concerning the living resources of the high seas, was none the less necessary, since the rights granted to the coastal State over the continental shelf were liable to affect other rights of other States. It was with that consideration in mind that he had included in the last paragraph of his proposal for a preamble to the draft articles on the continental shelf the qualification " without prejudice to the rights of other States in accordance with the principle of the freedom of the sea ",[9] thereby recognizing the duality of the law where the continental shelf was concerned.

95. Those who opposed the inclusion of draft article 8 had good ground for their view—namely, that they were against any system of arbitration in the regime of the high seas. On the other hand, those who supported arbitration in disputes over the conservation of the living resources of the high seas should logically be in favour of it in disputes concerning the continental shelf, since in both cases the coastal State enjoyed rights which might affect the rights of other States. If the Commission had had more time at its disposal, he would have liked to complete the article by the addition of detailed provisions governing the machinery and procedure for arbitration, similar to those in articles 31-33 on the conservation of the living resources of the high seas, in place of a mere statement of principle. He would not, however, press that point, though as it stood the system of arbitration established was imperfect.

96. Speaking as Chairman, he said that the Commission had before it the following proposals: the first and farthest removed from the substance of the original, by Mr. Zourek, that draft article 8 be deleted,[10] the second, by Sir Gerald Fitzmaurice, that it be retained substantially as it stood,[11] the third, by Faris Bey el-Khouri, that it be retained in amended form specifying that disputes should be referred to the International Court of Justice,[12] the fourth, by Mr. Salamanca, that it be retained in amended form referring States to the means of peaceful settlement of disputes set out in Article 33 of the Charter, the reference being amplified in the comment on the draft article.[13]

97. Mr. SANDSTRÖM proposed that the article be amended to read as follows:

> Any disputes which may arise between States concerning the interpretation or application of these articles shall, at the request of any of the parties, be submitted either to the International Court of Justice or to arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

The article would then be in harmony with article 31, paragraph 1, on the conservation of the living resources of the high seas.

98. Mr. SALAMANCA pointed out that, if the article were thus amended, arbitration would no longer be compulsory, which was what he himself had originally proposed. If Mr. Krylov and other members of the Commission accepted Mr. Sandström's amended version, he would withdraw his own proposal.

99. Faris Bey el-KHOURI remarked that Mr. Sandström's amendment could be presented in a different form, so that the article would read:

> Any disputes which may arise between States concerning the interpretation or application of these articles shall, failing agreement between the parties to seek a solution by another method of peaceful settlement, be submitted either to the International Court of Justice or to arbitration.

The drafting could, however, be left to the Drafting Committee.

100. Mr. KRYLOV said that he could accept Mr. Salamanca's proposal, since it made resort to arbitration optional. He could not accept Mr. Sandström's proposal, however, as it retained the principle of compulsory arbitration.

The meeting rose at 1.05 p.m.

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

[10] See para. 69, above.

[11] See para. 83, above.

[12] See para. 88, above.

[13] See para. 78, above.

361st MEETING

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

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

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

The continental shelf (continued)

Article 8 (continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Padilla-Nervo's amendment was adopted.

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

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

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

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

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

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

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

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

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

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

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

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

Article 1: Juridical status of the territorial sea

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 1 was adopted.

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

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

Article 2 was adopted.

Article 3: Breadth of the territorial sea

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commission had not been able to reach an agreed formula.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

362nd MEETING

Thursday, 7 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-7) (*continued*)

Article 3: Breadth of the territorial sea (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 3 of the draft articles on the regime of the territorial sea.

2. Mr. KRYLOV, reverting to the Anglo-Soviet fisheries agreement, which he had mentioned at the previous meeting,[1] said he was convinced that such a settlement represented the best solution of the problems arising out of the breadth of the territorial sea.

3. Perhaps the most interesting aspect of the new agreement was the exchange of notes in which each Government stated its views on the delimitation of territorial waters. According to *The Times* of 5 June, Lord John Hope, Parliamentary Under-Secretary of State, Foreign Office, had stated that the Agreement signed in Moscow on 25 May permitted fishing vessels registered in the United Kingdom to fish in an area, defined in the agreement, up to a distance of three miles from low-water mark on the Soviet Union coast. In reply to a question whether there was recognition by both parties that three miles was the normal breadth of the territorial waters, Lord John Hope had said that he would not wish to give the impression that the Soviet Union Government recognized three miles as the normal limit. In its view, that was a direct concession to the United Kingdom Government.

4. He had quoted that agreement as an example of the way in which, by making mutual concessions, two great Powers had resolved difficulties that had arisen in respect of the breadth of the territorial sea. The agreement accepted the fact that no single solution of general application was possible. Nevertheless, despite the diversity of views on the question in the Commission, every effort should be made to reach an agreed decision.

5. Three amendments to the draft article had been submitted by the Special Rapporteur,[2] Mr. Zourek[3] and Mr. Hsu[4] respectively. The Special Rapporteur's proposal could not be regarded as satisfactory. Quite apart from the awkward drafting of the opening phrase of paragraph 1, the conception of the three-mile breadth of the territorial sea was erroneous; he need only quote the United States cartographer Boggs, who had ascertained that 65 States did not recognize that limit.

6. Paragraph 2 was too vague, because customary law was not an absolute conception of general application, for it varied with individual countries.

7. Paragraph 3 was defective in its second part. The Anglo-Soviet fisheries agreement had acknowledged the juridical validity of the concepts adopted by each party. The Special Rapporteur, however, had laid down a limit of three miles and implied that any limit in excess of that figure was unworthy of consideration. The principle of the freedom of the high seas was traditionally acknowledged, but human evolution demanded that principles should change, and that concept was in the process of becoming as out-of-date as the uniform of a general in a Gainsborough portrait. The philosophy of Grotius, which Mr. Scelle had mentioned,[5] had indisputable literary value, but of all his precepts the best adapted to the circumstances of contemporary life was *suum cuique*.

8. Mr. Zourek's proposal opened well, although it would be advisable to bring the last phrase of paragraph 3, referring to the delimitation of the territorial sea between three and twelve miles, into greater prominence. Moreover, the text would gain by the transfer of the mention of the " real needs of the coastal State " from paragraph 3 to paragraph 1; Mr. Hsu's proposal referred specifically to " economic and strategic needs", but whether that was a better version could not be decided without further consideration.

9. In his paragraph 2, Mr. Zourek referred to the conflicting principles of the rights of the coastal State and the freedom of the high seas. Those two concepts could be reconciled only by the application of common sense inspired by a desire to reach agreement. The drafting of the paragraph might be tightened up, but in substance it was acceptable.

10. As to paragraph 3, he would recall that Mr. Amado's proposal at the previous session[6] had tackled the problem on broad lines within the limits of three and twelve miles.

11. With regard to Mr. Hsu's text, the first paragraph was acceptable, with the exception of the final proviso. The fact had to be faced that, if there was a desire for settlement, States would reach a satisfactory agreement; if the desire was lacking, no solution was possible. With regard to paragraph 2, he had already amply made clear

[1] A/CN.4/SR.361, para. 101.

[2] *Ibid.*, para. 65.

[3] *Ibid.*, para. 68.

[4] *Ibid.*, para. 76.

[5] A/CN.4/SR.359, para. 18.

[6] A/CN.4/SR.311, para. 63.

his views on arbitration; that provision provided no way out of the difficulty.

12. The Commission must apply its best efforts to seeking a precise and unequivocal formula which would recognize the sovereign rights of the coastal State in respect of areas adjacent to its coasts, with the proviso of a reasonable limitation of the breadth of the territorial sea in which those rights would be exercised.

13. Mr. EDMONDS said that, in view of the lengthy discussion that had been devoted to the question at the previous session,[7] he would confine himself to re-stating certain basic principles. In the first place, it should not be overlooked that the Commission's objective was the codification of international law. Existing juridical provisions and practice, therefore, should be the starting-point in the study of any subject that it undertook. The principle of the freedom of the high seas had received general recognition over a long period of time, and the doctrine of the territorial sea was a derogation from that principle. It followed that the breadth of the territorial sea should be a minimum, because by its nature the territorial sea was an encroachment upon the high seas and the common rights applicable thereto. If every State had the right to appropriate areas of the high seas without restriction, that freedom would be completely destroyed.

14. The three-mile limit had been generally recognized by thirty States, whose fleets represented some 80 per cent of world shipping resources. No other territorial delimitation had received such widespread recognition. In codifying the rule of law, the Commission should state the majority rule, referring to any deviations therefrom in the comment to the article. On the basis of law, the only limit to the breadth of the territorial sea accepted by a large number of States was that of three miles.

15. The claim to an extension of that limit had been based mainly on the fisheries needs of the coastal State. Since, however, the Commission had formulated articles protecting the rights of the coastal State in that respect, that claim had been met.

16. While reserving the right to revert to the subject at a later stage, he would for the moment merely reiterate that the limit of three miles for the breadth of the territorial sea should be incorporated in the draft article.

17. Mr. HSU, referring to Mr. Krylov's comment on his proposal, said that paragraph 1 seemed acceptable to him (Mr. Krylov) up to the phrase " within the limits of three and twelve miles ". But if he deleted the last phrase and ended the paragraph at that point, there would be a hiatus, for some provision ensuring the recognition of the freedom of the high seas in the belt between the three- and twelve-mile limits was called for. The gap might be filled by the substitution of some phrase such as " subject to limitation by the principle of the freedom of the high seas ". It was on that point that the difficulty arose, and he would ask Mr. Krylov how he proposed to establish workable criteria for the application of that principle.

18. Sir Gerald FITZMAURICE said that his own view that the three-mile limit for the breadth of the territorial sea should be embodied in the draft article because it was the correct rule of international law was well known to the Commission. He would be prepared, however, to accept the Special Rapporteur's proposal as accurately reflecting the existing situation on the assumptions on which it was based.

19. Without re-stating in full the arguments in favour of the three-mile limit that he had deployed at length at the previous session [8]—and in that respect he entirely endorsed Mr. Edmonds' remarks—he would revert to certain specific points that, in the light of the discussion, called for mention. If the view that there was no general agreement among States on the three-mile limit as the correct determination of the territorial sea were accepted, it must equally be recognized that there was no agreement on any other numerical limit. It followed that no State was bound to recognize any other limit, with the resulting situation that States were obliged to accept the three-mile limit as a minimum—that was not in dispute—and that there was no legal basis for a claim to any limit in excess of that figure. There was an illuminating passage in the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case, which 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 upon international law.[9]

That finding was frequently overlooked, particularly by those who endorsed an extension of the three-mile limit based on a purely unilateral appreciation of individual national needs. The Court had stated the position correctly, and its finding quite disposed of the theory that a State could claim whatever breadth of the territorial sea it pleased in accordance with what it regarded as its needs.

20. What were the limitations to the power of the coastal State that had been proposed? Mr. Zourek had suggested the operation of the principle of the freedom of the high seas. As to that, he (Sir Gerald Fitzmaurice) would support Mr. Hsu in asking by what criterion was any alleged infringement of that principle to be decided? What was to be the criterion by which, for instance, a six-mile limit would not constitute an infringement, whereas a nine-mile limit would do so, or a nine-mile limit or twelve-mile limit would not do so, but a fifteen- or twenty-mile limit would? And so on. In practice, such a test was of no value whatever.

21. Further, Mr. Zourek's claim that his proposal would eliminate disputes and ensure certainty was equally baseless, because the text of his paragraph 2 seemed really to turn in a circle. There was no certainty whatever, because any State could maintain that any

[7] A/CN.4/SR.295, paras. 44-68; SR.308, paras. 43-76; SR.309-315; SR.316, paras. 1-9.

[8] A/CN.4/SR.309, 312 and 314.

[9] I.C.J. Reports, 1951, p. 132.

limit in excess of three miles was an infringement of the principle of the freedom of the high seas.

22. As Mr. Edmonds had rightly pointed out, any claim to a breadth greater than three miles was a derogation from the principle that the use of the high seas was open to all. It was clear that the right of a coastal State to a territorial belt must be recognized, but it had always been accepted that that belt should be as narrow as was consistent with the needs of the coastal State. Since the three-mile limit had received widespread recognition over a very long period, it was impossible to establish a logical basis for claims in excess of that figure. The finding of the International Court of Justice in the Anglo-Norwegian Fisheries case, which stated a rule of international law, led to the inescapable conclusion that the only logical solution to the problem was to recognize a fixed limit to the territorial sea. Failing that, there were no valid grounds for any claim more than another.

23. Consequently, unless another *fixed* limit could be regarded as valid, and as being *alone* valid, the limit automatically remained at three miles. He could not accept Mr. Zourek's contention that the three-mile limit had not been accepted over a considerable period of time as a basis for international law. Mr. Zourek had asserted that there was an older limit of four miles.[10] That assertion, however, was based on a misunderstanding of an historical fact, for both the three-mile limit and the Scandinavian four-mile limit proceeded from fundamentally the same idea of the nautical league, though based on different interpretations. In support of that statement he would recall his reference at the previous session[11] to the articles on the subject by Wyndham Walker[12] and H. S. R. Kent.[13] Throughout the nineteenth century the nautical league had been the accepted breadth of the territorial sea, and in practical usage both mariners and the local authorities of coastal States had applied the three-mile limit rule in the conduct of their business.

24. Mr. Zourek had said that in the mid-nineteenth century certain Latin-American countries had claimed a limit of six miles.[14] He would be interested to know what was the authority for such a statement, for it had certainly not been applied to United Kingdom shipping and he was aware of no case in the nineteenth century of a Latin-American State actually asserting jurisdiction within any limit over three miles.

25. With few exceptions, the rule of the three-mile limit had been recognized until the Hague Codification Conference in 1930, when claims to a greater width were put forward by various countries. It was perhaps an unfortunate consequence of codification conferences that accepted rules, which had given rise to no difficulties, were undermined by the submission of exaggerated claims inspired by motives of bargaining. The position was that the three-mile limit was undoubtedly adhered to in practice. Unless, therefore, it could be shown that a greater distance for the breadth of the territorial sea was accepted by States, any claims for such limits were derogations from the existing rule and had no validity in law.

26. With regard to supposed national needs as a justification for such claims, they did not constitute valid criteria. If a three-mile limit was found satisfactory by some States, there was no reason why it should be rejected by others. The root of the problem was that the States that rejected that limit were anxious to exercise exclusive fishing rights over a wider area. If the question of national needs were postulated, and if States were granted specific rights in the contiguous zone and, in addition, certain unilateral rights in respect of conservation measures in areas of the high seas, no State could justifiably claim to need a breadth of the territorial sea exceeding three miles. Further, a claim based on security needs was quite irrelevant, for a twelve-mile limit provided no greater security than a three-mile limit. It was quite erroneous to suggest that, whereas the great Powers could be satisfied with a three-mile limit, smaller States required a wider territorial belt. It was the contrary that was the case, for to patrol a larger territorial sea would require greater resources and, in time of war, enforcement of the laws of neutrality was an extremely burdensome affair. Moreover, an enemy would have no greater respect for even a twenty-mile than for a three-mile limit.

27. In conclusion, he repeated that, although he was convinced that the principle of the three-mile limit should be embodied in the article, he would accept the Special Rapporteur's proposal because it accurately reflected the existing situation and the logical consequences of the lack of general agreement.

28. Mr. PAL said that if the Commission agreed with the illuminating statement made by Sir Gerald Fitzmaurice, its course was quite clear; it was an international rule that the breadth of the territorial sea was three miles and there was no reason to depart from it. However, even Sir Gerald Fitzmaurice did not appear to be quite at ease in accepting the three-mile limit. Moreover the comments of governments, some of which claimed a territorial sea breadth of six miles, nine miles or even more, indicated that the three-mile limit was far from being universally accepted. The statement contained in paragraph 1 of the revised draft of article 3 proposed by the Special Rapporteur[15] did not, therefore, reflect the existing state of international law and was not factually correct. The three-mile limit was not universally accepted, and he did not believe that the Commission would accept it either.

29. Were the Commission to accept the third paragraph of the same proposal, it would be completely stultifying itself. According to that paragraph, while States had the power to extend the limit beyond three miles the

[10] A/CN.4/SR.361, para. 79.

[11] A/CN.4/SR.309, para. 32.

[12] Wyndham Walker: "Territorial Waters: the Cannon Shot Rule", *British Year Book of International Law, 1945*.

[13] H. S. R. Kent: "The Historical Origins of the Three-mile Limit", *American Journal of International Law*, October 1954.

[14] A/CN.4/SR.361, para. 79.

[15] A/CN.4/SR.361, para. 65.

extension would not be binding on any other State. What point could there be in making an extension which other States were not bound to accept? He could not see what contribution such a statement would make to the formulation of international law.

30. Sir Gerald Fitzmaurice had referred to the statement in the judgment of the International Court in the Anglo-Norwegian Fisheries case that the validity of the delimitation of the territorial sea with regard to other States depended on international law.[16] The Court had not said, however, that the international law was that the breadth was three miles. It was precisely the task of the Commission to find out what the international law on the matter was.

31. From the comments of certain governments which had reviewed the background of the question, it emerged that the breadth of the territorial sea had been based on three considerations. The first was the ability to control or occupy the area claimed; that consideration, with the general advance in transport and communications, no longer applied. The second was that of security, which the advance of science had also rendered meaningless. The third, that of economic necessity, still applied, however, and could constitute a criterion for fixing the limit of the territorial sea. The breadth of their territorial sea would often be a question of life and death for States, especially the less powerful ones, and he must accordingly protest against the assumption that States which accepted the three-mile limit were acting in good faith and that those which claimed a wider limit were not. A country such as Iceland, whose whole economy was dependent on fishing, could not be regarded as acting in bad faith if it claimed a broad strip of territorial sea in which to exercise exclusive fishing rights. If a coastal State claimed a wider limit, its good faith must be presumed.

32. He was no more happy about Mr. Zourek's proposal than he was about that of the Special Rapporteur. If, as stated in paragraph 1 of Mr. Zourek's proposal, a coastal State in fixing the breadth of its territorial sea was exercising its sovereignty, it was difficult to understand why its decision should not be binding on other States. Furthermore, according to the proposal, the breadth of the territorial sea must not infringe the principle of the freedom of the high seas. Yet, as Sir Gerald Fitzmaurice had pointed out, the very existence of the territorial sea was an infringement of the freedom of the high seas. It was in fact a compromise between the necessities and interests of the coastal State and the general concern of all States with the freedom of the seas. Since such a compromise had been accepted at one stage, why could not the nations, in view of the changed circumstances, strike another compromise on a wider limit?

33. The CHAIRMAN drew attention to the following proposal by Mr. Sandström to replace draft article 3:

1. Every coastal State is entitled to a territorial sea with a breadth of at least three miles.
2. The breadth of the territorial sea may not exceed twelve miles.
3. If, within these limits, the breadth of a State's territorial sea is not determined by long usage, it must not exceed what is necessary for satisfying the justifiable interests of the State, taking into account also the interests of the other States in maintaining the liberty of the high seas and the breadth generally applied in the region.
4. In case of a dispute the question shall, at the request of one of the parties, be referred to the International Court of Justice.

34. Mr. SCELLE considered that the criticisms levelled against draft article 3 were exaggerated. Prior to the submission of the Special Rapporteur's proposal, the draft article, though still open to improvement, had constituted the best text possible in the circumstances. It described the existing state of affairs, laid down a minimum and a maximum limit, and offered a sound rule of law capable of serving as a basis for an international convention couched in quite strict terms.

35. If no fixed limit were set, there would be no limit to encroachment on the high seas. The diplomatic Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific held by Chile, Ecuador and Peru at Santiago in 1952 was a striking example of the extremes to which the theory of the sovereign right of States to fix the limit of their territorial sea could lead. At that conference the limit had been fixed not at three or twelve miles, but at a minimum of 200 miles, and the States concerned had formed a veritable alliance to enforce respect for their claim if it were not freely accepted. The Declaration on the Maritime Zone issued by the conference was most illuminating:

1. Governments are under an obligation to secure the necessary conditions of subsistence for their peoples and to provide them with the means for their economic development.
2. Consequently, it is their duty to provide for the conservation and protection of their natural resources and to regulate the exploitation of those resources to the best advantage of their respective countries.
3. It is therefore also their duty to prevent exploitation of the said resources outside their jurisdiction from jeopardizing the existence, integrity and conservation of this wealth to the detriment of nations which, owing to their geographical position, possess in their seas irreplaceable sources of subsistence and vital economic resources.

In view of the above considerations the Governments of Chile, Ecuador and Peru, being resolved to conserve and secure for their respective peoples the natural resources of those parts of the sea which wash their coasts, make the following declaration:

(I) Owing to the geological and biological factors governing the existence, conservation and development of the marine flora and fauna in the waters which wash the coasts of the States Parties to this declaration, the former breadths of the territorial sea and the contiguous zone are inadequate for the conservation, development and exploitation of these resources, to which the coastal States are entitled.

(II) The Governments of Chile, Ecuador and Peru accordingly proclaim, as a principle of their international maritime policy, the exclusive sovereignty and jurisdiction to which each of them is entitled over the sea which washes the coasts of their respective countries, to a minimum distance of 200 nautical miles from the said coasts.

(III) Exclusive sovereignty and jurisdiction over the zone specified also includes exclusive sovereignty and jurisdiction over the sea-bed and subsoil.

[16] I.C.J. Reports, 1951, p. 132.

(IV) In the case of island territory, the zone of 200 nautical miles shall be established all round the island or group of islands. If an island or group of islands belonging to one of the States Parties to the Declaration is less than 20 nautical miles from the general maritime zone of another said State, the maritime zone of such island or group of islands shall be bounded by the parallel through the point where the land frontier between the two States meets the sea.

(V) The present declaration implies no disregard for the necessary limitations on the exercise of sovereignty and jurisdiction imposed by international law in favour of innocent and inoffensive passage by ships of all nations through the specified zone.

(VI) The Governments of Chile, Ecuador and Peru declare their intention of concluding agreements or conventions for the application of the principles stated in this Declaration, which will lay down general rules for regulating and protecting hunting and fishing within their respective maritime zones and for controlling and co-ordinating the exploitation and utilization of any other kind of natural products or resources of common interest in the said waters.

36. Thus, the three States claimed exclusive sovereignty and jurisdiction not only over the waters, but also over the bed and subsoil of the sea for a *minimum* distance of two hundred miles. And that the latter claim was no idle one had been shown by the arrest of the whaling fleet of a Greek shipowner *outside* the 200-mile limit.

37. Sir Gerald Fitzmaurice, while adopting a position similar to his own, had said that such extreme claims had no foundation. Personally he was not sure that that was true. In equity they were probably well founded, since it was only equitable that States which had no continental shelf should be able to claim some equivalent. Even States such as the United Kingdom and the United States of America, which had so far adhered to a three-mile limit, might well claim a far broader territorial sea at some future date, if fishing and whaling conditions made it desirable. As the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case had made clear, the question of the territorial sea was one of vital necessity, in the true sense of the term. Some States might feel the need for a broad territorial sea and others not, but the claims of the former, though only claims, were not necessarily unjustified. As was recognized by article 4 of the French Civil Code, the lack of any clear legal provision governing the matter was no justification for brushing a claim aside.

38. Referring to Mr. Sandström's proposal, he observed that it was on much the same lines as, but at the same time an improvement on, draft article 3 and the Special Rapporteur's text. He would, however, prefer paragraph 4 of the proposal to be qualified by the proviso " unless the parties agree to some other means of peaceful settlement ", as in the case of draft article 8 on the continental shelf. He fully supported the proposal, as one in perfect accordance with existing international law, but which contributed at the same time to its development.

39. Failing its adoption by the Commission, he was prepared to retain draft article 3 as it stood. But he was quite unable to accept any proposal containing the rule that coastal States had a sovereign right to fix the breadth of their territorial sea.

40. Mr. SANDSTRÖM, referring to his own proposal, said that after a period in which there appeared to be agreement on a three-mile limit, the situation had degenerated into almost complete anarchy. It being no longer possible, in his opinion, to revert to the three-mile limit as a general rule, it was necessary to make a fresh start. Draft article 3 represented a step in the right direction, and the Special Rapporteur's proposal was an improvement on it, though it still left certain gaps. In particular, the provision in paragraph 3 left the question of the legal validity of a limit fixed under that paragraph rather in the air. In his own proposal he had accepted the maximum and minimum distances laid down in the other two proposals and had incorporated three criteria mentioned by other speakers—namely, that where the breadth of the territorial sea was determined by long usage it should be accepted; that it was necessary to satisfy the justifiable interest of the State, a consideration suggested by Mr. Spiropoulos;[17] and that the extension of the territorial sea should not prejudice the freedom of the high seas. To supplement those three criteria he had added a fourth, that of the breadth generally applied in the area. In the Mediterranean, for instance, almost all countries accepted a breadth of six miles. Such a figure would not be an absolute standard, but merely an element to be taken into account.

41. He had no objection to adding the clause proposed by Mr. Scelle to paragraph 4 of his proposal.

42. Mr. PAL said that Mr. Sandström's proposal marked an improvement on the other texts and was acceptable, subject to drafting changes. While the ideal course would be to fix a uniform breadth for the territorial sea, such a solution, to judge from the comments of governments, appeared to be impossible. There were two points in the proposal that needed clarification. The first was the term " long usage " in paragraph 3 of the proposal. Quite apart from the question of the exact meaning of the epithet " long ", he wondered what was to be understood by " usage ". If a State had claimed a territorial sea of a certain breadth without there being any occasion either for acceptance or for opposition by other States, would such a state of affairs be considered to constitute long usage? Would the exercise of exclusive fishing rights in the area over a certain period of time be regarded as adequate evidence of long usage?

43. The second point requiring clarification was in paragraph 4. It was not clear from the text whether a judgment in a dispute would settle the matter once and for all and apply also to States not parties to that dispute. It would be asking too much of a coastal State to oblige it to refer to the International Court of Justice every time a State chose to challenge its claim.

44. Mr. PADILLA-NERVO said that he had not stated his position at the seventh session, but would do so now. The three-mile limit had never been uniformly observed, even at the time when its application had been most widespread. Many important States had never applied it at all, and many exceptions had been made even by

[17] A/CN.4/SR.361, para. 100.

those States which had customarily used it. It was therefore legitimate to suggest that it was a case of *de facto* jurisdiction, rather than of a rule derived from a settled juridical conviction.

45. The existence of a rule of international law limiting the territorial sea to three miles depended in the final analysis on the extent to which States did or did not accept that limit. The present situation left no room for doubt. The fact that only one-quarter of the States which had coasts accepted it showed clearly that the three-mile limit was not valid as a single standard, and, as Gidel had pointed out, was not a rule in international law. He therefore found it difficult to understand the logic of the principles adopted by the Commission at its seventh session. Several governments referred in their comments to the inconsistencies between paragraphs 1 and 2 and paragraph 3 of the Commission's text; indeed that was the main criticism levelled by them. In explanation the Commission had been told merely that the governments had failed to grasp what had been intended, but no convincing argument had been adduced to show the consistency of the three principles laid down.

46. To state that a breadth of between three and twelve miles for the territorial sea was not a violation of international law could only mean that international law permitted the breadth to be fixed between those limits. It was wrong in law to speak of a right and at the same time to deny the corresponding obligation to respect that right. To accept such a thesis with regard to the territorial sea would lead to an absurdity. If international law granted a State the right to fix a certain breadth for its territorial sea and simultaneously granted another State the right to deny the validity of such a limit, the impossible legal situation would arise where two diametrically opposed and irreconcilable rights would emerge from the same rule. As Mr. Spiropoulos had rightly pointed out, that would create a situation in which there was not and could not be a juridical solution, because two equally valid rights confronted each other.[18] It was hard to conceive of any solution more conducive to the creation of fresh disputes.

47. The Special Rapporteur had recalled the decision in the Nottebohm case[19] that while certain acts by States might be consistent with international law, other States were not obliged to recognize them as valid. As Mr. Spiropoulos had pointed out, that might be true in cases concerning nationality and other similar fields, when the grant of identical rights to two different parties did not create conflicting situations or created situations which were not irreconcilable. It could not apply to the territorial sea. Two equally legitimate but inconsistent rights could not exist at the same time; the dispute would have to be solved in favour of one party or the other.

48. The Special Rapporteur had said that the Commission had proposed no new solution, but had depicted the existing situation, however unfortunate it might be. He himself did not believe that such a situation of systematized legal anarchy really existed. Assuming that a dispute arose between a State claiming a breadth of six miles for its territorial sea and another State which did not accept that unilateral decision, the International Court of Justice obviously could not find that both parties were in the right. Assuming that the dispute was couched in the simplest terms—i.e., without the complication of historical reasons—the solution might be as follows: if the Court found that the six-mile limit was justified, that would mean that in its opinion the claim to the six-mile limit was in conformity with international law and therefore valid *vis-à-vis* all States; if it rejected the claim for the six-mile limit, that would mean that only the traditional three-mile limit was in conformity with international law.

49. The difficulty in which the Commission found itself arose from the fact that it had had to recognize as existing fact that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles and that a great many States had established a wider limit. The Commission had then, however, refused to accept the legal consequences necessarily following such recognition. It was a fact that most States in practice had extended their territorial sea to breadths between three and twelve miles. Instead of frankly recognizing that the deliberate and coincident practice of a majority of States produced legal effects creating a new rule in international law, since it simply reflected what most States had done already, the Commission had reintroduced the three-mile rule, and the Special Rapporteur had repeated it in his proposal at the present session. In reality, according to the Special Rapporteur, only the three-mile rule could be regarded as standard.

50. The reservations in paragraphs 2 and 3 of the Special Rapporteur's proposal were obvious enough. Even if the Commission had not recognized them explicitly, they would still continue to exist. The proposals adopted by the Commission and those now submitted by the Special Rapporteur implied that only the three-mile limit could be supported *erga omnes*—in other words, that only the three-mile rule constituted a rule of international law.

51. In his own opinion, the only practical way to approach the problem was to recognize frankly the possibility that States might fix a different breadth for their territorial sea within a given maximum, instead of trying to solve it by trying to set a uniform breadth. Geographical, geological, biological, economic and security factors influencing States differed so much that a uniform breadth for the territorial sea could not possibly meet their real needs. For example, if the claims of certain Pacific States for an extension of their territorial sea to 200 miles were examined, the fact must be taken into consideration that the ocean off their coasts was 5,000 miles in breadth and so they were claiming only about four per cent of those waters, whereas in the English channel the claim to the three-mile limit implied a claim to about twenty per cent of the waters between the two coastal States. He cited that instance, not because he was proposing a breadth of 200 miles for the territorial sea, but as an example of the way different geographical conditions had to be taken into account in fixing the

[18] A/CN.4/SR.361, paras. 89-91.

[19] I.C.J. Reports 1955, page 4.

breadth of the territorial sea. His argument was not a new one. A somewhat similar argument for allowing each State to fix the breadth of its own territorial sea within reasonable limits had been adduced by the Swedish Government at the Hague Conference for the Codification of International Law and also by Dr. Alvarez, a judge of the International Court of Justice, in his individual opinion in the Anglo-Norwegian Fisheries case.[20]

52. The practice of States themselves as an expression of their needs was the best way of indicating how the problem could be solved. No defined breadth for the territorial sea today had the support of more than one-quarter of the States having coasts, but the great majority of such States had in common a certain minimum and a certain maximum breadth. That point of coincidence might, and indeed did, constitute a basis for a juridical rule.

53. One impediment to a solution of the problem was the practice of starting from the false belief that the rule of international law on the territorial sea should have a precise content—i.e., that the breadth should be uniform for all States. It had been argued that no new rule involving a breadth of six, nine or twelve miles enjoyed the same authority as the traditional limitation to three miles. That did not mean that no rule on the breadth of the territorial sea existed. The rule was, however, of variable content, subject to a given maximum. It was not infrequent to find in international law a rule without a precise content but with variable limits or establishing a form of guidance. That was precisely the case with the law on the breadth of the territorial sea. There did exist a genuine rule that permitted States to fix the breadth of their territorial sea variably, but within a certain maximum limit.

54. As Sir Gerald Fitzmaurice had pointed out earlier, the International Court of Justice had laid down that the determination of the breadth of the territorial sea always had an international aspect. Determination of the breadth of the territorial sea depended in part on domestic law and was in part subject to international law. Obviously, a State had no unrestricted right to determine the breadth of its territorial sea nor could it exercise its right arbitrarily. The opinion of the International Court of Justice cited by Sir Gerald Fitzmaurice was extremely pertinent in that connexion. It would be preferable to adhere to the Court's opinion in the matter.

55. Of course the main problem was to determine the maximum breadth of the territorial sea to be authorized by international law. Obviously the ideal solution would be that it should be determined by a multilateral convention, but the lack of such a convention was no hindrance to the assertion that an authentic rule did exist. The three-mile limit had not come into existence as a result of a convention, but by the coincident practice of a majority of States. At a later stage, a majority of States had made it their coincident practice to derogate from the three-mile rule. There seemed no justification for a State's being required to adduce historic title or special motive to do what a majority of States had already done. That constituted an authentic rule established in precisely the same way as any other rule in international law—namely, by the wish of the States. If the rule in effect was for a breadth of three to twelve miles for territorial waters, no convention was necessary. The coincident practice of States would suffice, as it had sufficed for establishing the three-mile rule.

56. Another impediment to a solution was the attempt to consider the determination of the breadth of the territorial sea as a problem of progressive development of international law. Almost always when the problem was approached the question was asked what the breadth of the territorial sea should be, and innumerable reasons were given for one breadth or another. The trouble was that all those reasons were never pertinent to the establishment of a single standard, since the needs and circumstances of States varied throughout the world. So long as an attempt was made to impose a criterion on all States on the basis of its alleged intrinsic merits, the problem would never be solved. The solution lay in terms of what the majority of States had already adopted. In any rule it adopted, the Commission should reflect the real situation—that of coincident practice.

57. To sum up, first, it would be vain to try to find a uniform solution—namely, to try to fix a precise breadth for all States. Secondly, there existed an authentic legal rule relating to the breadth of the territorial sea, not fixing it precisely, but conferring on States authority to fix different breadths within certain reasonable maximum limits. Thirdly, the basis for that rule was to be found in the will of the majority of States shown through coincident practice. Fourthly, the content and the limits in that rule were given by the elements common to the practice of the great majority of States—i.e., by the fact that almost all particular delimitations fell within certain maximum limits. Fifthly, based on that rule, each State had the right to fix at its own discretion its territorial sea within the maximum limits laid down by the rule. Sixthly, that authority enjoyed by States constituted a subjective legal right based on an existing rule of international law, and therefore that right might be claimed *erga omnes*.

58. Thus, States were not obliged to produce historic titles or invoke special motives to set the breadth of their territorial sea at more than three miles, so long as they remained within the maximum limit authorized by the rule of international law derived from the common elements of the practice of States.

59. Mr. SPIROPOULOS said that at the previous meeting he had with some hesitation proposed that article 3 be re-drafted[21] on lines very similar to those now put forward by Mr. Sandström. Mr. Sandström's first paragraph was more or less identical with what he himself had proposed. In the second paragraph he had proposed that a breadth greater than three miles be recognized if it were based on a legitimate interest of the coastal State; that was somewhat similar to Mr. Sandström's paragraph 3. His own final clause would have

[20] I.C.J. Reports 1951, p. 150.

[21] A/CN.4/SR.361, para. 100.

contained a compulsory arbitration clause, which corresponded to Mr. Sandström's paragraph 4, providing for recourse to the International Court of Justice. At the previous meeting he had been simply throwing out a suggestion, to which he had not wished to commit himself. Mr. Sandström had apparently taken up some of the ideas thus thrown out, and his text might be accepted, although without any great enthusiasm. If the Commission wished to draft a rule, Mr. Sandström's proposal appeared to be the best of those formulated and likely to meet with the approval of a majority of the Commission, whereas the Special Rapporteur's proposal [22] was unlikely to obtain much support.

60. The expression " long usage " in paragraph 2 of Mr. Sandström's proposal might be challenged. Mr. Sandström had obviously been thinking of the four-mile limit, which had been virtually accepted for the Scandinavian countries.

61. The expression " the justifiable interests of the State ", however, gave him greater pause. True, he himself had used the term " legitimate interest of the coastal State ", but with considerable hesitation, because he had been fully aware that it was so vague that any court or tribunal faced with a dispute might be placed in a very difficult position when it came to interpret it. Such a concept was quite new in international law.

62. The concept of the three-mile limit had been based, not on the special interests of any State, but on the range of cannon at the time it had been formulated. A State involved in a dispute before an international tribunal would probably find it very hard to explain exactly why it was claiming a six-mile limit. It might very well be that the real reason was merely a wish to imitate other countries. For example, at the Hague Conference, Italy, Rumania and Yugoslavia had claimed a breadth of six miles for their territorial sea, and shortly afterwards Greece had extended its three-mile limit to six miles. It might or might not be significant that Greece was in the same geographical area. Mr. Sandström had obviously had such instances in mind when he had used the phrase " the breadth generally applied in the region " in paragraph 3 of his proposal.

63. Another reason for wishing to extend the breadth of its territorial sea might be the fact that a country was mainly dependent on fisheries; but that was certainly not true in the Mediterranean.

64. The interests of national defence could hardly be relied on nowadays for a claim to extend the breadth of the territorial sea. Modern science had made the protection likely to be given by the territorial sea meaningless in wartime, while in peacetime there was really no difference from the point of view of protection between a territorial sea of three, six or twelve miles. It seemed entirely probable that States, especially newly formed States, claimed a broader territorial sea merely in a spirit of imitation. Consequently, a tribunal would be in a very delicate position if it had to insist that a State must prove a legitimate or justifiable interest for extending the breadth of its territorial sea beyond three miles. The tribunal might also have to impose a breadth which, in the words of Mr. Sandström's text, " generally applied in the region ".

65. The trouble with the system advocated by Mr. Sandström was that no uniform rule could be applied, but each State must be left to determine the breadth of its own territorial sea, subject to the control of an international organ, which would be the International Court of Justice. The subjective rule adopted by the State in question would thus become objective law after the Court had rendered its decision. As Mr. Pal had argued, if the Court handed down such a decision *erga omnes*, the claim would be maintained not only against the State which had brought the dispute before it, but against all States.

66. If the Commission was unable to accept any article based upon the proposals before it, he himself would favour reverting to the proposal put forward by Mr. Amado at the seventh session,[23] somewhat modified to the effect that the Commission would not take a final decision but would leave that to a diplomatic conference to be convened by the General Assembly. Mr. Amado's proposal had not in fact wholly reflected the real international situation with regard to the territorial sea. His own new proposal was as follows:

(*a*) In paragraph 1, delete the words " traditional " and " to three miles " and replace the word " limitation " by " delimitation ".

(*b*) In paragraph 2, replace the words " does not justify " by the words " does not permit ".

(*c*) In paragraph 3, delete the phrase beginning " considers that international law . . ." and substitute the following text: " notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less ".

(*d*) Add the following new paragraph: " The Commission considers that the breadth of the territorial sea should be fixed by an international conference ".

Article 3, as amended, would then read as follows:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an 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, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

67. Mr. AMADO said that the discussion so far had led him to the conclusion that a realistic depiction of the situation must involve some amendment of the proposal which he had submitted to the Commission at its seventh session,[24] in order to allow for the fact that the breadth

[22] *Ibid.*, para. 65.

[23] A/CN.4/SR.309, para. 14, and A/CN.4/SR.310, para. 51.

[24] *Ibid.*

of the territorial sea depended on international practice, not on subjective or on objective rules of international law. That was a fact that no eloquence could demolish, and one which could not prejudice any interests. He proposed, therefore, that a new paragraph should be added to his previous text, to the effect that international practice recognized the right of coastal States to determine the breadth of their territorial sea within fixed minimum and maximum limits.

68. Faris Bey el-KHOURI remarked that, under its terms of reference, the Commission was called upon to codify international law and to promote its progressive development. After all the Commission's discussions, consultations with governments and reading of their observations, it had found that there was nothing to codify with respect to the breadth of the territorial sea. It could not adopt the three-mile limit as a uniform standard, because it was not generally accepted, and, indeed, a majority of States had claimed a greater breadth and had not been challenged. The Commission could take any figure—three, six or twelve miles—as a basis, purely as guidance for the General Assembly, but it obviously could not impose its opinion on States which regarded themselves as sovereign and independent in the matter unless they bound themselves by a convention. The Commission might limit itself to giving a picture of the situation, as had been done in the text submitted by Mr. Amado at the seventh session and by the Special Rapporteur at the present one. Or the Commission could give a specific figure, which might lead the General Assembly to convene a diplomatic conference to determine a precise limit. He suggested tentatively, as a basis for discussion, a breadth of six miles.

69. Mr. SALAMANCA observed that he had supported Mr. Amado's original proposal at the seventh session, but when Mr. Amado had accepted the Special Rapporteur's amendment, he had voted against the final text. That text had been purposely adopted in order to elicit comments from governments. The situation had now completely changed, and had become one *de lege ferenda*.

The meeting rose at 1.05 p.m.

363rd MEETING

Friday, 8 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-7) (*continued*)

Article 3. Breadth of the territorial sea (continued)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 3, drew attention to the text submitted by Mr. Amado,[1] which read as follows:

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. International practice accords to the coastal State the right to fix the breadth of its territorial sea between these minimum and maximum limits.

2. Mr. KRYLOV said that the question Mr. Hsu had asked him at the previous meeting[2] had been virtually answered by other speakers. Any further information that Mr. Hsu might wish he would give to him personally, in order not to hold up the Commission's proceedings.

3. Mr. SALAMANCA said that he could see very little difference between Mr. Spiropoulos' proposal and the text adopted at the seventh session. He asked wherein the difference lay.

4. Mr. SPIROPOULOS replied that there were very important differences.

5. In paragraph 1 he had deleted the words " traditional " and " to three miles ", because they were unnecessary, as all members were now agreed on the ideas implicit in those phrases. His own text was therefore more general.

6. In paragraph 2 the words " does not permit " had been substituted for the words " does not justify ". That small change had been made because the new wording was more accurate.

7. In paragraph 3 the phrase beginning " considers that international law... " had been deleted and a new text substituted reading " notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less ". That was the important change. The reference to international law had been deleted and the simple fact stated that many States did not recognize a breadth greater than three miles when that of their own territorial sea was less. In other words, he had deleted the somewhat hazardous statement of international law and replaced it by a statement of fact.

8. Paragraph 4 was a new one, required to complete the text. It implied that the Commission did not wish

[1] A/CN.4/SR.362, para. 67.
[2] A/CN.4/SR.362, para. 17.

to offer a solution at the present stage, but preferred to leave it to an international conference.

9. Sir Gerald FITZMAURICE observed that all the texts submitted, except those by Mr. Spiropoulos and the Special Rapporteur, had a similar tendency, which caused him a good deal of concern in relation to the scheme of the Commission's work as a whole.

10. Mr. Sandström's text was skilfully drafted and seemed at first sight to be eminently reasonable. On further analysis, however, the proposal would be seen to tend in practice and, in fact, almost inevitably to lead to an extension of the breadth of the territorial sea to twelve miles. The first two paragraphs were tantamount to an invitation to States to extend their territorial sea to the maximum. It was well known that States, like individuals, had a tendency to claim the maximum rights available to them. If States were told that they might not exceed a breadth of twelve miles, the general effect would be that they would all claim the twelve miles.

11. Mr. Sandström might seem to have provided some safeguards against such claims in his third and fourth paragraphs, but those safeguards would undoubtedly prove quite illusory. They hinged on satisfying the "justifiable interests" of States. Mr. Spiropoulos had rightly pointed out [3] that any court asked to place a construction on a criterion which was entirely unsuited to legal analysis would be in a very difficult position. The criterion might be political, economic or social, but it would certainly not be legal. Justifiable interests would in most cases be economic; in particular, the needs of fisheries. But there was hardly any maritime State that did not have a considerable proportion of its population dependent on fisheries, and most States had an interest in fish as part of their food supply. Thus, every State would be able to show a "justifiable interest".

12. Mr. Spiropoulos had also correctly pointed out [4] the dangers inherent in the phrase "the breadth generally applied in the region". If one or more States in a certain region claimed a breadth of twelve miles for their territorial sea and the remainder followed suit, the International Court of Justice would be faced with claims based on the plea that the breadth of twelve miles was generally applied in the region.

13. The question also arose of how the International Court of Justice was to distinguish between the needs of one State and those of another. If it granted one claim, it was hard to see on what basis it could deny another. It would be placed in a most invidious position. True, there might be a very few cases where there was a very great need for an extension of the territorial sea—for example, for countries totally dependent on fishing—but in general there would be no reason why one State should have a greater need than another. No State in South America or Asia would be likely to admit that it had less need for such an extension than another State in the same region. The International Court of Justice would therefore very speedily have to grant to a great many States what it had granted to one State. Thus, there would be a tendency towards a general recognition of the twelve-mile maximum and the safeguards would prove illusory in practice.

14. If any proposal such as Mr. Sandström's were adopted it would have repercussions on the Commission's entire scheme of work in that domain. That work must be considered as a balanced whole. The acceptance of rules for fisheries and for unilateral measures of conservation largely depended on the other parts of the scheme being equally reasonable. He could foresee the effect on opinion connected with fisheries, even if not on governments, if the twelve-mile limit were accepted. The opinion would be that if all States received a breadth of twelve miles with exclusive fishing rights, they should have no right to impose unilateral conservation measures outside their territorial waters. The work regarding the contiguous zone would also be frustrated, since such a zone would not be accepted over and above the twelve miles of territorial sea. Even the articles on the continental shelf would be regarded as an exemple of a tendency tow ards taking over continually wider stretches of water, since there was a tendency to seek to assert exclusive rights to the waters over the continental shelf.

15. Mr. Pal had said that this must presume good faith on the part of States in the exercise of their claims.[5] No one questioned that, but good faith was really an irrelevant issue. States acted in accordance with their interests, and if they were able to plead a plausible doctrine for asserting exclusive rights they would do so. Thus, if the tendency to extend the territorial sea were accepted, many countries would contemplate a further step with regard to the continental shelf.

16. In such circumstances it would be preferable to refer the matter to the General Assembly as a question still open. He agreed that the Commission could codify only what existed in international law; some members of the Commission believed that a definite rule of international law concerning the breadth of the territorial sea did exist, but others believed that States might take whatever they wished. If the Commission could not agree, it would do better to inform the General Assembly that it could not state what the rule was. Mr. Spiropoulos' text, subject to some drafting changes, should be preferred, as it correctly depicted the situation and did not prejudice any other views.

17. He doubted whether Mr. Amado's attempt to depict the situation was quite accurate, particularly his paragraph 3. It was possible to say that, in accordance with the practice followed by many States in recent times, the breadth of the territorial sea was fixed between the minimum and maximum limits. Mr. Amado's text, however, implied the somewhat debatable point that international law accorded a right to fix the breadth of a territorial sea at more than three miles. It was true that some members of the Commission did believe that, but others did not. Mr. Spiropoulos' text gave a truer picture of the situation.

[3] A/CN.4/SR.362, para. 61.

[4] A/CN.4/SR.362, paras. 62-64.

[5] A/CN.4/SR.362, para. 31.

18. Mr. HSU, after thanking Mr. Krylov for his offer of further information, said Mr. Sandström had made an honest effort to solve the problem. The proposal in his paragraph 4 came close to the suggestion he himself had made at a previous meeting.[6] He still preferred arbitration to reference to the International Court of Justice, because when a dispute arose arbitrators could be chosen who were familiar with the situation.

19. Though he had no strong objection to reference to the International Court of Justice, it did introduce the question of criteria, and there Mr. Sandström's draft was disappointing. The phrase "justifiable interests" was far too vague and merely postponed the issue. If the Commission should ever reach any conclusions about the criteria, it should specify them.

20. A more serious weakness in Mr. Sandström's text was the introduction of the terms "long usage" and "breadth generally applied in the region". Many countries would find them extremely difficult to accept, and if it departed too far from the text adopted at the seventh session (A/2934) the Commission would have to reopen the whole question. Mr. Sandström's text, if adopted at all, would require a great deal of revision.

21. Mr. Amado's proposal in part reflected the position which he, Mr. Hsu, had taken at the previous session.[7] He would therefore have liked to support it. The whole question had, however, been reopened by paragraph 3 in Mr. Amado's text. It raised an issue that the Commission would never be able to settle unless it enforced its decision by a majority of one or two voters. That, however, was not the best course to adopt at the present stage.

22. Mr. Spiropoulos' text, too, introduced new matters which would require almost interminable discussion.

23. The Commission should do its best to find a solution of the problem by proposing recourse either to arbitration or to the International Court of Justice; it should not confess failure by referring the problem to the General Assembly. If the idea of referring the matter for solution by juridical methods on the basis of the text adopted at the seventh session were not accepted, the only alternative would be that suggested by Mr. Spiropoulos—namely, that States should be allowed to decide for themselves. That, however, was merely a lesser evil.

24. Mr. SCELLE supported Mr. Sandström's text. It was hard to understand the misgivings it had apparently inspired. At the previous session the Commission had come near to the truth by noting that the territorial sea could not have a fixed and uniform breadth. It had been recognized that, quite legitimately, to meet the needs of States, the breadth might vary between three and twelve miles. It had also been recognized that the contiguous zone was simply a device for multiplying the breadth of the territorial sea and that the continental shelf, which might run for hundreds of miles, was another similar device. The territorial sea could not, therefore, have any fixed limit.

25. Sir Gerald Fitzmaurice had expressed the fear that all States would claim the maximum breadth, but twelve miles was quite insignificant in comparison with the hundreds of miles to which the continental shelf might in some cases extend.

26. The idea of giving the International Court of Justice final jurisdiction with regard to the breadth of the territorial sea had been criticized. It was wrong, however, to imagine that there would be any abrupt change. The Court would have to intervene only after a long period —namely, after a convention had come into force; and, as yet, that was a very remote prospect. Even when a convention had been prepared, there would be a period for the discussion of reservations. The Court would come into play only at a third stage, when governments which had chosen that method of pacific settlement of disputes under Article 33 of the United Nations Charter referred claims to it under the convention.

27. No jurist could suppose for one moment that disputes with regard to the territorial sea would not be political, at least in part. And in that case, the Security Council would undoubtedly intervene. Article 33 of the Charter gave a whole list of means for the pacific settlement of disputes. The Security Council had an undoubted right to influence the choice of means and to give its advice as to which should be used. Article 35, paragraph 1, of the Charter provided that any Member of the United Nations might bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or the General Assembly. Thus, there were no fewer than three articles in the Charter showing that the Security Council would always have a right to intervene. That implied that the Security Council should always intervene whenever there was a political aspect to a dispute referred to the International Court of Justice. Mr. Sandström's text certainly gave the Court the right to intervene immediately, but that was not what would actually occur whenever a serious dispute had political aspects. The political organ would consider it before there was any judicial intervention. Any dispute would thus have to pass through many stages before the Court intervened.

28. Mr. Sandström's text left the right amount of latitude. The Commission was not called upon to impose rules, but merely to give the General Assembly advice on the best solutions. He was not wholly in agreement with the wording of Mr. Sandström's proposal, but in substance it was by far the best of those before the Commission. The other proposals seemed to evade the Commission's responsibilities.

29. Mr. SALAMANCA maintained the position that he had taken at the seventh session,[2] that the three-mile rule was not a part of international law. Most States had departed from it and had adopted distances of four, six, nine, twelve or more miles. Each State had fixed the breadth of its territorial sea for itself and that expansion constituted present international practice.

30. The twenty powers supporting the three-mile limit had assumed a *de facto* jurisdiction with regard to any

[6] A/CN.4/SR.361, para. 76.

[7] A/CN.4/SR.308, paras. 60-64.

[8] A/CN.4/SR.313, para. 51.

other breadth. They had constituted themselves the sole legislators for the breadth of the territorial sea and the remaining fifty maritime States should, in their opinion, have no right to fix distances exceeding three miles.

31. Even if the three-mile limit had ever been part of customary international law, that law had been amended by the international practice of more than fifty States. All the members of the Commission had noted that fact and all the proposals before the Commission recognized it. The twelve-mile limit was referred to in paragraph 2 of the Commission's original draft; there was a reference to a limit of between three and twelve miles in Mr. Zourek's proposal; the Special Rapporteur's draft accepted the twelve miles as did those of Mr. Hsu, Mr. Amado and Mr. Sandström. The twelve-mile limit seemed to be the reasonable maximum. In the Special Rapporteur's proposal that distance might or might not be recognized. In Mr. Sandström's proposal conditions were placed upon the right to extend the limit to twelve miles, and in Mr. Zourek's no claim could lie against the declaration of the breadth, whatever it might be. In Mr. Hsu's proposal the twelve-mile limit would be valid, subject to recognition by States maintaining a narrower belt.

32. If the Commission accepted twelve miles as a reasonable distance, it should state as much explicitly. The Commission could not recognize qualified rights for one or more States. If a State had jurisdiction over a breadth of three miles, similar jurisdiction should be recognized for others over any breadth between three and twelve miles. The claims to the continental shelf and to fisheries and the opportunity for having recourse to all methods of pacific settlement should be taken into account.

33. In fact, neither the General Assembly nor the suggested diplomatic conference could actually solve the problem; time alone would bring the solution. If a State refused to accept the three-mile limit and extended its territorial sea to a breadth of twelve miles, the only thing that it need do to impose that limit would be to apply continuous police measures. If a coastal State had sufficient power, it would finally impose the limit it had chosen. Every means of peaceful solution might be used for States to establish or reconcile opposing interests in accordance with their needs. The right to extend the territorial sea had been and continued to be an attribute of the State, a right unilateral by origin, based on the maxim cited by Mr. Zourek at the seventh session:[9] " terrae potestas finitur ubi finitur armarum vis ". In accordance with that maxim, the coastal State established its *de facto* jurisdiction over the territorial sea.

34. The two groups of States—the twenty maritime Powers which recognized the three-mile limit and the fifty or more States which recognized a limit exceeding three miles—must reconcile their interests; but, in order to do so, a maximum distance to which a coastal State might be entitled must be recognized.

35. Turning to the more recent proposals before the Commission, he observed that he had not been completely satisfied by Mr. Spiropoulos's reply to his inquiry about the difference between his text and that adopted by the Commission at its seventh session. His strongest objection at the seventh session had been that the Commission could not impose an obligation on any State, and all that it could in fact do was to say that the problem was insoluble. Mr. Amado's proposal was the most conciliatory, but the most likely to attract amendments. If it were not amended, Mr. Amado's proposal would be acceptable, but it would undoubtedly be changed by the reintroduction of paragraph 3 of the draft article adopted at the seventh session, and that would mean simply returning to the impasse reached at that session. The draft adopted by the Commission at its seventh session had been intended to elicit comments from governments to help the Commission prepare a final draft. Unfortunately, the comments had been of little help, since no government had been able to make any constructive suggestion in response to what had merely been a description of the existing situation.

36. If the Commission accepted the idea that the twelve-mile limit was not contrary to international law, he did not see why, when the Commission was required to come to a decision, it could not state explicitly: " Every State is entitled to extend the breadth of its territorial sea to twelve miles ". He would move that as an amendment.

37. In his opinion, the right to extend the breadth of the territorial sea to twelve miles would carry the day in the General Assembly, despite the influence of the twenty Powers which recognized the three-mile limit. The General Assembly would undoubtedly be convinced by actual practice, which the Commission in fact recognized but was unwilling to state.

38. There could be no exceptions to positive law except " abus de droit ", which had been implicitly provided for in Mr. Sandström's draft. Sir Gerald Fitzmaurice had objected that if a maximum of twelve miles were fixed, all States would claim it. That argument was irrelevant, because the limits were in fact already fixed. If a State extended its territorial sea to more than three miles and, in so doing, infringed upon an established interest, that would undoubtedly be an *abus de droit*, but, as Mr. Pal had pointed out,[10] the bad faith of a State which claimed a wider limit should not be presumed. It was very possible that peaceful solutions would be reached and that the extension of the territorial sea would not infringe on any really well-established interest, and it was inconceivable that a small State would extend its territorial sea with the deliberate purpose of infringing the interests of other maritime powers.

39. The Commission should therefore take an explicit decision. If it refused to recognize the right to extend the territorial sea to twelve miles, it should simply state that it was unable to solve the problem. Paragraph 4 of Mr. Spiropoulos' draft was tantamount to a criticism of the whole of it. Rather than adopt that paragraph, the Commission should simply take no decision whatever.

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

[10] A/CN.4/SR.362, para. 31.

40. Mr. AMADO said that the discussion was carrying the Commission back to the position in which it had found itself at the previous session, when the text adopted had simply been a reflection of existing international practice. On that occasion his proposal had been accepted after amendment by the special Rapporteur.[11]

41. The question to be resolved was the fixing of the maximum and minimum territorial limits within which international usage recognized the jurisdiction of the coastal State. Sir Gerald Fitzmaurice had urged that the three-mile limit was an inviolable rule of international law. That assertion, however, was rejected by many States, which advanced claims for various distances up to twelve miles. It had to be remembered that the original limit was four miles and that the three-mile limit had been instituted by powerful States whose nationals wished to engage in fishing as close as possible to the coast of other States. That delimitation, by promoting the development of fisheries, had certainly been of practical value to the human race. The situation had changed, however, and the facts of the existing situation could not be disregarded.

42. He had been quite unable to understand Mr. Hsu's criticism of his proposal; he seemed to have entirely misconceived the whole situation. While appreciating the attitude of those, like Sir Gerald Fitzmaurice, who in all sincerity were opposed to any extension of the three-mile limit, it had to be admitted that—without going so far as to recognize any right that could be upheld under international law—the actual situation was that international practice did recognize that a coastal State was entitled to fix the breadth of its territorial sea between a minimum of three miles and a maximum of twelve miles. No State had ever contested the right of the Mediterranean countries to fix the limit of their territorial sea at six miles or that of the Soviet Union to a limit of twelve miles.

43. Paragraph 3 of his proposal simply stated what was an incontestable truth. He had not attempted to go any farther than a strictly factual statement of the existing situation. He was not prepared to amend the text of that paragraph, although it would admittedly be less categorical if it read " International practice recognizes the existence of the fixing by the coastal State," etc. Paragraph 2 of Mr. Spiropoulos' proposal made, in effect, the same provision as his (Mr. Amado's) paragraph 3, but went even farther in implying that international law permitted an extension of the territorial sea up to twelve miles.

44. He was regretfully forced to conclude that once again the Commission would find itself unable to submit to the General Assembly a general formula in respect of the breadth of the territorial sea which would be both satisfactory and acceptable.

45. Mr. PAL said that in the course of the discussion some reference had been made to the contiguous zone.[12] That seemed to him irrelevant, for if the contiguous zone were regarded as an area extending to a distance of twelve miles from the baseline from which the breadth of the territorial sea was measured, then if the territorial sea were extended to twelve miles the contiguous zone would disappear.

46. With regard to the proposals of Mr. Amado and Mr. Spiropoulos, he preferred the former's paragraph 1, for it was advisable to retain the mention of the numerical limit of three miles for the territorial sea. Despite lack of uniformity, its deletion would amount to disregard of what was a main trend in the practice of international law. Paragraph 2 of both Mr. Spiropoulos' and Mr. Amado's proposals was identical with paragraph 2 of the draft article.

47. As regards paragraph 3 his preference went to Mr. Amado's proposal, although the use of the word " accords " implied the admission of the right in question. It must not be forgotten that in origin the three-mile limit was also based on the claim of a coastal State, which had in the course of time received recognition by other States.

48. There was a need for some such provision as that contemplated in Mr. Spiropoulos' paragraph 4. It should, however, be modified to read " The Commission considers that the breadth of the territorial sea should, if possible, be fixed at a uniform breadth by an international conference." It could not be denied that there ought to be uniformity in that respect, but since there was apparently no chance of the nations' agreeing on a uniform breadth, a provision on those lines ought to be included in the draft.

49. Mr. ZOUREK said that, after studying the various proposals before the Commission in the light of the two basic principles, the interest of the coastal State and the freedom of the high seas, he had reached the conclusion that if the claim of the coastal State to fix an arbitrary limit to its territorial sea could not be sustained, it was equally erroneous to suggest that a claim to a six-mile or twelve-mile limit would constitute an infringement of the principle of the freedom of the high seas.

50. Some proposals introduced other specific numerical limits and, while appreciating the possible advantage of a uniform limit, he would regard such a provision as dangerous, for, as Sir Gerald Fitzmaurice had pointed out, the establishment of a maximum would amount to an invitation to States to claim that maximum as the breadth for their territorial sea. Moreover, a fixed limit had the disadvantage that it precluded any flexibility of application in the face of future contingencies, such as an imperative and urgent need of the coastal State.

51. Mr. Sandström's proposal, which tended to stress the legislative aspects of the question, suffered from the inadequacy of its paragraph 3. In the first place, it would be extremely difficult to provide a satisfactory legal definition of " long usage "; he had only to remind the Commission that the concept of the continental shelf, which was only ten years old, was described by some writers as already part of international law.

52. The main drawback to paragraph 3, however, was that it tended to disqualify limits greater than three miles. The three-mile limit having been established on a legal basis in paragraph 1, paragraph 3 put other numerical

[11] A/CN.4/SR.315, para. 79.

[12] See para. 24 above.

limits on a quite different footing, since it placed them in a lower category as mere claims and stated that any claims within three and twelve miles must satisfy certain criteria. But a breadth of six, nine or twelve miles was just as much a part of international law as a breadth of three miles.

53. The discussion showed that the Commission was inclining towards a solution similar to that adopted at the previous session—namely, the adoption of a text that would simply reflect the existing international situation. That was noticeable in the proposals of Mr. Amado and Mr. Spiropoulos. As to the former, he had some doubts with regard to the specific mention of the limitation of the territorial sea to three miles, for the reason that there was no unanimity of practice in respect of either a four-, a six- or a twelve-mile limit. Mr. Pal's preference for the retention of the reference to the three-mile limit was not based on solid fact; despite the figures quoted by Mr. Edmonds at the previous meeting,[13] an analysis of the Special Rapporteur's report (A/CN.4/97/Add.2) showed that only eleven States rigidly applied the three-mile limit and that six adopted the three-mile limit while claiming a larger contiguous zone. The practice of seventeen out of seventy-one States could hardly be described as general international usage.

54. Paragraph 2 in the proposals of both Mr. Amado and Mr. Spiropoulos suffered from the fact that it restricted future freedom, although the former's text was less unacceptable. With regard to paragraph 3, Mr. Spiropoulos seemed to have taken a definitely pessimistic attitude, for he had made no attempt to suggest a solution of the problem. Moreover, the last part of the paragraph was incorrect. It was not true that many States did not recognize a breadth greater than three miles when that of their own territorial sea was less, for a four-mile limit, for example, was not contested by States that had fixed the breadth of their own territorial sea at three miles. Nor did he think there were many States which would contest a limit of six or twelve miles. Since his own view was that there was no difference in legal validity between any of the various limits claimed, he favoured paragraph 3 of Mr. Amado's proposal.

55. The CHAIRMAN drew attention to the protracted nature of the discussion on article 3 and urged the desirability of disposing of it at that meeting.

56. Mr. KRYLOV proposed that after the Chairman had stated his own views, the general discussion on article 3 should be closed.

It was so agreed.

57. The CHAIRMAN, speaking as a member of the Commission, said that the problem of the breadth of the territorial sea was complicated by the fact that the purpose of the coastal State in extending its territorial sea beyond the three-mile limit was the exploitation and conservation of the living resources of the adjacent sea. That led to his first basic conclusion that the problem should not be treated in isolation, but in relation to the other areas of the sea and in the light of the rights that had been recognized as appertaining to the coastal State in respect of exploitation and conservation of living resources.

58. Until recently, there had been no recognition either of the exclusive rights of the coastal State over the resources of the sea-bed and subsoil of the continental shelf and other submarine areas, or of the right of the coastal State to adopt conservation measures unilaterally in view of its special interest in the maintenance of the living resources in the areas of the high seas adjacent to its territorial sea. Now, however, if the claim of the coastal State to an extension of its territorial sea were based on one of those State rights, its claim would be recognized. That opinion had been reflected in several replies from governments.

59. Recognition of those rights, of course, would solve the problem only in the two cases he had referred to. There was, however, a third situation, in which the coastal State claimed an exclusive right in respect of the living resources outside the traditional limits of the territorial sea. That was the only case that raised serious difficulties, and it had been considered by the Commission. The difficulties, however, were not insuperable. The extension of the territorial sea was not a question falling within the exclusive competence of the coastal State. That principle, based on a recent finding of the International Court of Justice, was not only the starting point for any study of the problem, it was also the key to its solution.

60. In specific circumstances international law recognized the validity of claims by the coastal State for the extension of its territorial sea. The validity of a claim based on " historic rights " was indisputable, as had been shown in the Anglo-Norwegian Fisheries case[14] with reference to the Scandinavian countries. Moreover, the fixing by the States in one and the same region of a common territorial breadth of the sea, without objections being raised, as in the case of the Mediterranean countries, also seemed to be a circumstance that those States could rely upon as against other States.

61. There were two further situations which gave rise to no difficulties. The first was where States had mutually agreed to recognize a specific extension of their territorial sea; the second was where a State was obviously bound to recognize the breadth fixed by another State for its territorial sea, if it claimed an equal or greater breadth itself.

62. In all other cases, the validity of an extension of the territorial sea beyond the traditional limit had to be examined in the light of the two major interests involved, the interest or special needs of the coastal State and the interest or acquired rights of other States.

63. As to the first, there was no doubt that the existence of an interest or national need justified a claim of that kind by the coastal State. In reality, the " historic rights " of certain States that were recognized as justifying the extension of their territorial sea originated as interests or special needs of those States. It was logical to grant the same rights to States which, unable to invoke

[13] A/CN.4/SR.362, para. 14.

[14] I.C.J. Reports, 1951, p. 116.

" historic rights ", nevertheless had interests that were vital for their economy or for the nutritional needs of their populations. Those ideas had been discussed by the Commission, which had accepted them in principle.

64. The problem in respect of the interests and rights of other States was not so simple, but could be solved according to the principles of international law. There again, there were two criteria—that of the general interest in the utilization of the living resources of the sea, and that of the right acquired by a State other than the coastal State to the exploitation of specific zones of the high seas. The first was the only one that might raise serious difficulties. A balance had to be struck between the two interests involved, the special interest of the coastal State and the general interest in the utilization of the living resources of the area in question. That problem could be solved in accordance with the circumstances of each particular case or else by fixing a reasonable maximum limit, beyond which no claim would be valid.

65. The second criterion did not give rise to such difficulties. Where a coastal State extended its territorial sea beyond the traditional limit and appropriated areas of the high seas which had been exploited by a State other than the coastal State, or by nationals of that State, from time immemorial and without interruption, the other State would hold an historic right or title of the same kind and validity as that relied upon in some cases by the coastal State itself for the extension of its territorial sea.

66. It would be recalled that at the previous meeting Mr. Padilla-Nervo had referred[15] to the individual opinion of Judge Alvarez, of the International Court of Justice, that although the right of a State to determine the extent of its territorial sea must undoubtedly be recognized, that right was limited by certain fundamental principles, such as *abus de droit* and historic rights. Thus the criterion was perfectly in accordance with international law, which not only recognized the historic right of States to extend their territorial sea, but also recognized the right of other States to prevent the coastal State from extending its territorial sea in those parts of the high seas where other States had been engaged in fishing from time immemorial.

67. In brief, the problem of the breadth of the territorial sea was complex, but not insoluble. Recognition of the rights of a coastal State over the continental shelf and in the contiguous zone was a contribution to its solution. The latter two hypotheses alone still required solution, or, in the final analysis, only the former. But recourse to, and the procedures of, international law for the peaceful settlement of any disputes that might arise between States was still available for that purpose. He would vote in accordance with those ideas.

68. Speaking as CHAIRMAN, he proposed that Mr. Zourek's text[16] be voted on first as farthest removed in substance from draft article 3 adopted by the Commission at its seventh session. Since the proposals of Mr. Amado and Mr. Spiropoulos differed from the others in that they were not couched in the form of articles enunciating rules of law, but were rather descriptions of the legal situation, he thought that they should be voted on after all the other proposals.

69. Mr. PADILLA-NERVO could not agree that the proposals of Mr. Amado and Mr. Spiropoulos fell into a separate category. That of Mr. Amado, for instance, could be expressed in the form of an article by deleting the words " The Commission considers that " from the beginning of paragraphs 1 and 2 of the proposal.

70. Mr. SPIROPOULOS pointed out that the Assembly's rules of procedure referred merely to proposals or amendments and drew no distinction between articles and other types of proposal. There was no reason why a proposal should not be a simple statement of facts. Both his and Mr. Amado's texts could be regarded as amendments to draft article 3. Since amendments were voted on before the proposals to which they related, it would avoid confusion and the danger of abuse if all the texts before the Commission were treated as amendments to draft article 3.

71. Mr. LIANG, Secretary to the Commission, said that the nature of the proposals made by Mr. Amado and Mr. Spiropoulos lent support to the Chairman's view that they fell into a different category from the others. It was clear from the commentary on draft article 3 (A/2934, footnote 14, page 16) that it had been the Commission's intention to draft an article in the accepted sense of the term. The proposals or amendments—since in the General Assembly's rules of procedure the distinction between the two for purposes of voting was rather hazy—put forward by the Special Rapporteur, Mr. Hsu, Mr. Zourek and Mr. Sandström were in article form. As the discussion proceeded, however, a different approach had developed and Mr. Amado and Mr. Spiropoulos had submitted proposals which were more on the lines of draft article 3. It would be difficult to vote on both categories of proposals at once. The Commission might first try to frame an article and, failing that, content itself with expressing an opinion.

72. Mr. KRYLOV agreed with Mr. Padilla-Nervo.

73. Mr. HSU suggested taking the various proposals in the order in which they had been submitted, in accordance with rule 93 of the Assembly's rules of procedure.

74. Mr. AMADO said that if the Commission wished to vote only on texts couched in the form of articles, he would resubmit his proposal in the following amended form:

1. International practice is not uniform as regards limitation of the territorial sea to three miles.
2. International practice does not authorize the extension of the territorial sea beyond twelve miles.
3. The coastal State may fix the breadth of its territorial sea between these minimum and maximum limits.

75. After a short discussion, the CHAIRMAN proposed that the texts of Mr. Zourek, Mr. Amado, Mr. Salamanca, Mr. Sandström, Mr. Hsu, the Special Rapporteur and finally Mr. Spiropoulos, be put to the vote in that order.

[15] A/CN.4/SR.362, para. 51.

[16] A/CN.4/SR.361, para. 68.

It was so agreed.

76. The CHAIRMAN invited the Commission to vote on Mr. Zourek's proposal.[17]

77. Faris Bey el-KHOURI moved that each paragraph be voted on separately.

It was so agreed.

78. The CHAIRMAN put paragraph 1 of Mr. Zourek's proposal to the vote.

Paragraph 1 was rejected by 8 votes to 6, with 1 abstention.

79. The CHAIRMAN put paragraph 2 of Mr. Zourek's proposal to the vote.

Paragraph 2 was adopted by 9 votes to 2 with 4 abstentions.

80. Mr. SANDSTRÖM, explaining his abstention, said that, while he had nothing against the principle enunciated in paragraph 2, it was difficult to vote either for or against it without knowing in what context it would come.

81. The CHAIRMAN put paragraph 3 of Mr. Zourek's proposal to the vote.

Paragraph 3 was rejected by 7 votes to 3, with 3 abstentions.

82. The CHAIRMAN put Mr. Zourek's proposal as a whole to the vote.

Mr. Zourek's proposal as a whole was rejected by 8 votes to 3, with 3 abstentions.

83. Mr. PADILLA-NERVO said that he had voted in favour of the individual paragraphs and the proposal as a whole because it recognized the right of a coastal State, in the exercise of its sovereign powers, to fix the breadth of its territorial sea, and placed no limit on the territorial sea beyond what it was reasonable to claim.

84. Mr. ZOUREK explained that his proposal had been based on two fundamental principles, that of the sovereign powers of the coastal State over a belt of sea washing its shores and that of the freedom of the high seas. Once paragraph 1 had been rejected, however, the sense of the proposal was completely destroyed, and he had therefore been compelled to vote against his own proposal as a whole.

85. Mr. KRYLOV said that he had voted for the proposal for the same reasons as Mr. Padilla-Nervo.

86. Mr. FRANÇOIS, Special Rapporteur, said that, although in agreement with the principle enunciated in paragraph 2 of Mr. Zourek's proposal, he had been obliged to vote against the proposal as a whole since otherwise it might have been adopted as the Commission's draft article 3 on the territorial sea over the head of all the other proposals.

87. Mr. KRYLOV moved that Mr. Amado's revised proposal[18] be voted on paragraph by paragraph.

After some discussion, *it was agreed* that Mr. Amado's revised proposal should be put to the vote as a whole.

88. The CHAIRMAN put Mr. Amado's revised proposal to the vote.

Mr. Amado's revised proposal was rejected by 8 votes to 7.

89. Mr. SALAMANCA withdrew his proposal.[19]

90. Mr. KRYLOV moved that paragraph 3 of Mr. Sandström's proposal[20] be voted on separately.

It was so agreed.

91. The CHAIRMAN put paragraphs 1 and 2 of Mr. Sandström's proposal to the vote.

Paragraphs 1 and 2 were adopted by 11 votes to 2, with 2 abstentions.

92. Mr. PADILLA-NERVO said that he had had no alternative but to vote against the two paragraphs together because he considered that every coastal State, in the exercise of its sovereign powers, had the right to fix the breadth of its territorial sea.

93. The CHAIRMAN put paragraph 3 of Mr. Sandström's proposal to the vote.

Paragraph 3 was rejected by 9 votes to 3, with 3 abstentions.

94. Mr. SANDSTRÖM said that paragraph 4 of his proposal was meaningless when divorced from paragraph 3; he accordingly withdrew it.

95. The CHAIRMAN put to the vote Mr. Sandström's proposal as a whole.

Mr. Sandström's proposal as a whole was not adopted, 7 votes being cast in favour and 7 against, with 1 abstention.

96. Mr. ZOUREK moved that paragraph 1 of Mr. Hsu's proposal,[21] as far as the words " three and twelve miles ", be voted on separately.

97. The CHAIRMAN pointed out that the substance of the first paragraph, as far as the words " three and twelve miles ", was practically identical with the text already rejected. To vote upon it separately would therefore be tantamount to reconsidering a vote of the Commission.

It was *agreed* that Mr. Hsu's proposal should be put to the vote as a whole.

98. The CHAIRMAN put Mr. Hsu's proposal to the vote.

Mr. Hsu's proposal was rejected by 9 votes to 3 with 2 abstentions.

99. The CHAIRMAN put the Special Rapporteur's proposal[22] to the vote.

The Special Rapporteur's proposal was rejected by 7 votes to 5, with 2 abstentions.

100. Mr. SALAMANCA moved that Mr. Spiropoulos' proposal[23] be put to the vote paragraph by paragraph.

It was so agreed.

[17] A/CN.4/SR.361, para. 68.

[18] See para. 74, above.

[19] See para. 36, above.

[20] A/CN.4/SR.362, para. 33.

[21] A/CN.4/SR.361, para. 76.

[22] A/CN.4/SR.361, para. 65.

[23] A/CN.4/SR.362, para. 66.

101. The CHAIRMAN put paragraph 1 of Mr. Spiropoulos' proposal to the vote.

Paragraph 1 was adopted by 11 votes to 1, with 3 abstentions.

102. The CHAIRMAN put paragraph 2 of Mr. Spiropoulos' proposal to the vote.

Paragraph 2 was adopted by 9 votes to 3, with 1 abstention.

103. The CHAIRMAN put paragraph 3 of Mr. Spiropoulos' proposal to the vote.

Paragraph 3 was adopted by 9 votes to 3, with 3 abstentions.

104. The CHAIRMAN put paragraph 4 of Mr. Spiropoulos' proposal to the vote.

Paragraph 4 was adopted by 9 votes to 1, with 5 abstentions.

105. The CHAIRMAN put Mr. Spiropoulos' proposal as a whole to the vote.

Mr. Spiropoulos' proposal was adopted by 9 votes to 2, with 4 abstentions.

106. Mr. AMADO said that he had voted for the proposal because it had become clear that the Commission could not frame an article enunciating rules of law, since by doing so it would be running ahead of the times. The only alternative was to return to a simple recommendation.

107. Mr. SALAMANCA said that he had voted against the proposal because it was contradictory and solved nothing.

108. Mr. ZOUREK said that he had voted for paragraph 1 of the proposal. Having then voted against paragraphs 2 and 3, for reasons which he had previously made clear, he had abstained from voting on the proposal as a whole. The statement in paragraph 3, in particular, was not entirely correct.

109. Mr. SCELLE said that he had adopted a negative attitude towards the proposal because its adoption constituted an abandonment by the Commission of the role that it ought to fulfil.

110. Mr. SANDSTRÖM said that he had voted for the proposal because the only course that remained open to the Commission was to acknowledge its inability to recommend any solution.

111. Mr. KRYLOV said that he had voted for the proposal because he believed that when one could not have what one wanted, one had to make the best of what was left.

112. Mr. SPIROPOULOS said that the only merit he could claim as author of the proposal was that of having foreseen the defeat of the other proposals. His text was, in fact, based on Mr. Amado's original proposal at the Commission's seventh session, as adapted by the Special Rapporteur.[24]

113. Faris Bey el-KHOURI said that the Commission's decision confirmed the opinion he had already expressed that it was impossible for the Commission to agree on the text of an article.

114. Mr. EDMONDS said that it was impossible to maintain that a law could not be codified because the prevailing rule was not observed by every jurisdiction or party. He believed that there was a rule of international law on the subject, and that the Commission, by refusing to recognize that law and leaving the breadth of the territorial sea to be fixed by an international conference, had forsaken its duty of codifying international law.

115. Mr. HSU said that he had abstained from voting on the proposal, not because he was opposed to it in substance, but because he regretted that the Commission had to make a confession of failure.

116. The CHAIRMAN, speaking as a member of the Commission, said that he would not explain his vote, as he had not voted on anything affecting the substance of the question.

117. Speaking as CHAIRMAN, he did not feel that the Commission need have any apprehension concerning the general reaction to its failure to reach a final solution after studying the problem of the territorial sea for five years. The responsibility for such failure lay not with the Commission itself, but with the anarchy that reigned on the subject among the various Members of the United Nations. The Commission had, in fact, shown a greater sense of responsibility than other bodies which had made categorical pronouncements on the breadth of the territorial sea that did not correspond to any generally accepted view.

The meeting rose at 2 p.m.

[24] A/CN.4/SR.315, para. 79.

364th MEETING

Monday, 11 June 1956, at 4.50 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU,

Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Date and place of the commission's ninth session (item 11 of the agenda)

1. Mr. LIANG, Secretary to the Commission, announced that the Commission, at a private meeting, had decided to hold its ninth session at Geneva for a period of ten weeks beginning on 23 April 1957.

Representation at the General Assembly

2. On the proposal of the CHAIRMAN, it was *agreed* that Mr. François, the Commission's Rapporteur for the current session, who had been its Special Rapporteur on the regime of the high seas and the regime of the territorial sea since the beginning of its work on those subjects, should attend the eleventh session of the General Assembly and furnish such information on the Commission's draft as might be required in connexion with the Assembly's consideration of the law of the sea.

Regime of the high seas (item 1 of the agenda) (A/2456) (*resumed from the 361st meeting*)

Single article on the contiguous zone (resumed from the 349th meeting)

3. The CHAIRMAN invited the Commission to consider the following amendments submitted by Mr. Hsu to the single article on the contiguous zone adopted by the Commission at its fifth session (A/2456, para. 105):

1. Instead of the words " or sanitary " read " sanitary or anti-subversive " so that the phrase in question will read " of its customs, fiscal, sanitary or anti-subversive regulations ".

2. Add the following paragraph:

Where fishing is the main livelihood of the coastal population, a State may exclude foreign fishermen from fishing within a reasonable limit. In the event of disagreement as to whether such fishing is the main livelihood of the coastal population or as to whether the limit set for exclusion is reasonable, the matter shall be referred to arbitration as provided in article 31.

4. Mr. HSU said that, in view of the adoption by the Commission at its previous meeting of an article on the breadth of the territorial sea, it appeared to be the appropriate moment to reopen the question of the single article on the contiguous zone.

5. As regards his first proposal, he had deliberately selected the term " anti-subversive " in order to avoid the much broader connotation of the term " security ".

6. As regards his second proposal, he said that thus far the Commission had discussed fisheries solely from the standpoint of the conservation of the living resources of the high seas, leaving certain aspects untouched. It was only proper that the numerous States whose coastal population depended for their livelihood mainly on fishing should have the right to exclude foreign fishermen from the contiguous zone. Since, however, such action would involve sacrifices by foreign fishermen, the right must be subject to certain conditions. The exclusion must be based on need, and the coastal State must not prejudice unduly the interests of States which had hitherto fished in the area. In other words, fishing must be the main source of livelihood of the coastal population and the zone must be kept within a reasonable limit. Those were the criteria on which an arbitral commission would base its award in the event of a dispute. The idea of a " reasonable limit " by itself would have been too vague, but, taken in conjunction with the question of need, it should prove a satisfactory criterion. The principle enunciated in the paragraph, though not, of course, an existing rule of international law, was one which he considered that the Commission should recommend. Were the Commission to leave the question open, it would be failing in its duty to codify the law of the high seas and the territorial sea.

7. Mr. FRANÇOIS, Special Rapporteur, referring to Mr. Hsu's first proposal, recalled that the Commission had not seen fit to accept a proposal with similar implications, put forward by Mr. Hsu at the Commission's seventh session.[1] Since the position had not changed since then, he saw no reason to reconsider the proposal, though he would listen with interest to the views of other members.

8. Mr. Hsu's second proposal had very serious implications, and he must point out that the Commission's whole work on the question of the conservation of the living resources of the high seas had been designed to make such a proposal unnecessary. The Commission had always taken the view that the grant of exclusive rights of fishing to the coastal State outside the territorial sea would be a grave encroachment on the freedom of the seas. As Mr. Hsu himself admitted, the requisite conditions for the exercise of the right were rather vague—whence the provision for arbitration. There appeared, however, to be no real criteria on which an arbitral commission could base its award. He did not think that it was at all a good system to grant the coastal State almost unlimited rights and then simply provide that, in the event of disagreement, the matter would be settled by arbitration.

9. Sir Gerald FITZMAURICE regretted that, after giving Mr. Hsu's proposals serious consideration, he was obliged to oppose both of them.

10. The first proposal appeared to be already answered by the Commission's decision not to include immigration regulations in the scope of the article on the contiguous zone.[2] Control over subversive activities was one reason, though not the only reason, for exercising control over immigration, and the view had been taken that there was, in practice, nothing to prevent countries from carrying out the fairly close interrogations to which immigrants were sometimes subjected either at its ports or within the territorial sea.

[1] A/CN.4/SR.308, paras. 43 and 61.

[2] A/CN.4/SR.349, para. 25.

11. With regard to the second proposal, he fully agreed with the Special Rapporteur on the need for criteria. An arbitral tribunal called upon to settle a dispute of the nature envisaged in Mr. Hsu's proposal might find itself in a most invidious position. Whereas measures for the conservation of fisheries were a technical matter on which it was possible for an arbitral tribunal to reach scientific findings, it would be extremely difficult for an arbitral tribunal to determine whether or not fishing was the main livelihood of a coastal population. Very precise criteria would be required and they would not be easy to find.

12. He had, however, a more fundamental objection to the second proposal—namely, that it was quite out of keeping with the concept of the contiguous zone. The Commission was, he thought, agreed that the contiguous zone was a zone in which the coastal State might be given certain rights of control over foreign shipping for specific purposes connected with the maintenance of law and order, but that it was a zone in which it had no sovereign rights such as that of the total exclusion of foreign fishing vessels. According to all legal conceptions, foreign fishermen could be totally excluded by a coastal State, if at all, only from waters over which it enjoyed actual sovereignty. That was the very point which distinguished the concept of the contiguous zone from that of the territorial sea, and Mr. Hsu's second proposal constituted a very dangerous step towards confusion of the two.

13. Mr. SALAMANCA said that he partly agreed with Sir Gerald Fitzmaurice. The term " anti-subversive " in Mr. Hsu's first proposal, having a non-international flavour, could not be used in a text adopted by the Commission. In the case of minor immigration problems, it was unnecessary for the coastal State to exercise control in the contiguous zone, and in the case of major problems of security, as in a veritable invasion, it could invoke the right of legitimate defence under article 51 of the Charter.

14. Referring to Mr. Hsu's second proposal, he recalled that the Commission had taken quite clear decisions on a number of criteria to govern fishery questions. Irrespective of his own attitude towards those criteria, he considered it impossible to reopen the debate on them by considering Mr. Hsu's second proposal.

15. Mr. PAL entirely agreed with Sir Gerald Fitzmaurice and Mr. Salamanca in their opposition to the first amendment proposed by Mr. Hsu. To introduce the word " anti-subversive " would open the door to abuse of the contiguous zone. The very reason which had prevailed with the Commission when it had decided to remove the word " immigration " from the article should deter it from accepting the proposed amendment.

16. He also agreed that the article on the contiguous zone was not the proper place for Mr. Hsu's second proposal. That fact, however, did not affect the merits of the proposal. If it was otherwise acceptable, and in his opinion it was acceptable, it could easily be shifted to its appropriate place. A somewhat similar proposal had been advanced by Mr. Edmonds regarding abstention from fishing in connexion with conservation measures.[3] The Commission had not taken a decision on that proposal but had apparently referred it to the drafting committee. As the two proposals did not differ very greatly in merit, there seemed no reason why Mr. Hsu's proposal should not be given the same treatment. The idea underlying Mr. Edmonds' proposal regarding abstention was that money had been spent for a meritorious purpose and that special consideration should therefore be given to the spender by practically giving him a monopoly of fishing in the area. Mr. Hsu's proposal was prompted by a much more broad-based and humanitarian consideration, dealing as it did with the livelihood of a coastal population. He would be willing to support that proposal in order to show his appreciation of the motive underlying it.

17. Mr. ZOUREK pointed out that the proposal dealing with the principle of abstention had not been sent to the Drafting Committee, but the Special Rapporteur had been asked to prepare a text on the principle for the Commission's consideration.[4]

18. Mr. SANDSTRÖM said that the proviso that the limit set for exclusion should be reasonable was not explicit enough; it was far too vague to be acceptable.

19. Mr. EDMONDS said that since Mr. Hsu had proposed the insertion of the word " security ", he had given it serious consideration. " Security " was a very broad term; " anti-subversive " a very much broader one. No doubt Mr. Hsu was trying to meet a particular problem very close to his heart, but no one knew what " anti-subversive " meant; in modern usage its meaning had been extended to cover any act which one did not approve or condone. But the broad issue involved was whether the use of the contiguous zone should be extended beyond the very narrow purposes laid down for it by the Commission. The reasons which justified the article on the contiguous zone were contrary to the general principle of freedom of the high seas, and accordingly nothing should be added to that rule which was not absolutely necessary or of which the meaning was not absolutely clear. Mr. Hsu's first proposal, therefore, was not acceptable.

20. With regard to Mr. Hsu's second proposal, there was no connexion whatever between it and the proposal dealing with abstention from fishing as one of the measures which had been proposed to conserve the resources of the sea. More broadly, and in general terms, Mr. Hsu's proposal was precisely the reverse of everything the Commission had done about fisheries, and its adoption would require the Commission to reconsider all the articles on that subject. He appreciated the sincerity of Mr. Hsu's motives, but, for the reasons stated, his second proposal also was not acceptable.

21. Faris Bey el-KHOURI suggested that Mr. Hsu should by now be convinced that it would be better to withdraw his first proposal. Infiltration by subversive

[3] A/CN.4/SR.356, para. 41.

[4] *Ibid.*, para. 90.

aliens was better dealt with on a State's territory or even within its territorial sea than in the contiguous zone.

22. Most Middle Eastern States would welcome the first part of Mr. Hsu's second proposal, but he could not accept the reference to arbitration. If a vote could be taken on the two sentences separately, he would support the first sentence; but if the proposal were voted on as a whole, he would have to oppose it.

23. The CHAIRMAN, speaking as a member of the Commission, said that he too had at one time raised the security issue, but as almost the entire Commission had been against it in connexion with the contiguous zone he had decided to withdraw his proposal.[5] He would advise Mr. Hsu to do the same, as the Commission was opposed to the inclusion of such vague terms when the remaining terms were so definite.

24. He agreed with Sir Gerald Fitzmaurice that Mr. Hsu's second proposal was not a concept that could properly be embodied in the principle of the contiguous zone. The interests protected in the contiguous zone should be strictly limited. Mr. Hsu's proposal was inconsistent with the concept of the contiguous zone as the Commission understood it.

25. He suggested that Mr. Hsu should not press for a vote, but leave it to the Rapporteur to decide whether a passage should be included in the Commission's report in connexion with the section on conservation.

26. Mr. HSU accepted the Chairman's suggestion. The Commission might discuss his second proposal again under abstention from fishing in connexion with conservation measures when the Commission reverted to the subject.

27. He could not, however, agree with Sir Gerald Fitzmaurice about the legal position. His proposal differed from the proposal on the contiguous zone that had been accepted and clearly dealt with a new contiguous zone, because it was not limited to twelve or twenty miles, for instance, but was subject to change according to circumstances.

28. As regards his first proposal, in reply to Mr. Edmonds he would say that, as applied to the contiguous zone, the concept of subversion could not be brought within the criterion of security. Subversion implied under-cover activities, whereas action by a State taken against a coastal State would be regarded as in the field of security proper. He would not press his first proposal although none of the arguments members had adduced against it appeared to him convincing.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-7) (*resumed from the previous meeting*)

Article 4: Normal baseline and *Article 5: Straight baselines*

29. Mr. FRANÇOIS, Special Rapporteur, said that the only comment dealing solely with article 4 was the suggestion of the Government of the Union of South Africa—namely, that the seaward edge of the surf should in certain cases be taken as the point of departure in measuring the breadth of the territorial sea. That method of measuring the territorial sea was apparently completely unknown and had never been proposed from any other source. It might be practical for the South African coast, but it was certainly not so for any other. The South African Government might reintroduce such a proposal at the future diplomatic conference, but the Commission was quite unqualified to discuss it.

30. The Swedish Government's comment dealt with both article 4 and article 5, which might therefore be taken together. Its suggestion that the lines constituting the outer limits of internal waters should serve as the baselines for measuring the territorial sea might fit Scandinavian conditions, but in fact the question was merely one of presentation, and for countries where such conditions were not present the Commission's approach would undoubtedly be more practical.

31. The Belgian, Swedish and United Kingdom Governments considered that the inclusion of the criterion " economic interests " was not justified. In the earliest drafts it had not been included, and the only criteria had been the geographical ones referred to in the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case.[6] The experts who had met at The Hague in 1953 [7] had thought that criterion somewhat vague and had wished to complete the article by accepting a maximum limit for the straight baselines and a maximum for the distance from the coast. That approach had been criticized by governments as a departure from the Court's decision, because the Commission had accepted neither maximum baselines nor a maximum distance from the coast, but had accepted the criterion of economic interests. The Commission had reconsidered the text and had by a majority decided to follow the Court's judgment more closely.

32. The new draft was again being criticized. Some governments had said that it was wrong to introduce the criterion of economic interests on the same footing as the configuration of the coast, because that had not been the Court's intention; that the Court had only meant that when suitable conditions were present, the system of straight baselines should be accepted; and, in addition, that account might be taken of certain economic interests in drawing the baselines; but it had never meant to place economic interests on the same footing as the other criteria. There might be some good grounds for that view, and the Commission might again decide to delete the criterion of economic interests and to include in the comment a passage to the effect that economic interests were not on the same footing as the other criteria.

33. The United Kingdom Government had again brought up the matter of the right of innocent passage through waters which by the use of straight baselines had newly become internal waters. Sir Gerald Fitzmaurice had made some concessions and had stated that

[5] A/CN.4/SR.349, paras. 28 and 47.

[6] I.C.J. Reports 1951, p. 116.

[7] A/CN.4/61/Add.1.

he would be satisfied if the right of passage were recognized through waters which previously had been open to navigation. The Commission had thought that some compromise might be found.

34. The Norwegian Government had proposed the deletion of the provision concerning drying rocks and drying shoals, as it did not appear in the judgment of the Court. The Commission, not wishing to give an undue extension to the system of straight baselines, had taken the view that only land permanently above high-water level should be taken into account and had therefore discarded drying rocks. It was true that the Court had taken account of them.

35. The United Kingdom had commented that the Commission might consider stating explicitly in the articles the principle that baselines could not be drawn across frontiers between States, by agreement between those States, in a bay or along a coastline in such a way as to be valid against other States. He did not entirely understand the implications of that comment.

36. The Yugoslav Government had submitted a comment which might more appropriately be considered in connexion with article 10: Islands.

37. Mr. SANDSTRÖM said that he did not propose to take up the Swedish Government's suggestion that articles 4 and 5 should be combined, or that the lines constituting the outer limits of internal waters should serve as the baselines for measuring the territorial sea. He could well appreciate the Special Rapporteur's attitude, which had naturally sprung from the particular conditions of the Netherlands coastline. Given a normal coastline, however, and not one broken by numerous bays and fjords and off which there were many small islands, it would be easier to take the ordinary system as a basis. He would, therefore, submit the following amendments to paragraph 1 of article 5:

1. In the first sentence, delete the words " 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."
2. In the second sentence, delete the word " special," if necessary.
3. At the end of the third sentence add the following phrase " taking into account, where necessary, certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage "
4. Delete the last sentence.

38. Sir Gerald FITZMAURICE said that, in view of Mr. Sandström's statement, he would make no comment on the Swedish Government's observations with regard to articles 4 and 5.

39. On the question of economic interests, he fully endorsed Mr. Sandström's proposal, which would bring the provision of the article into conformity with the finding of the International Court of Justice in the Anglo-Norwegian Fisheries case.[8] Recalling his inability at the previous session to vote for article 5, precisely on account of the reference to economic interests,[9] he said that the Special Rapporteur had correctly explained that the Court's decision had not postulated economic interests as a ground *per se* for establishing a baseline system independently of the low water mark. The Court's view had been that, if a straight baseline system could be justified on other grounds, then economic interests might be taken into account in drawing particular straight baselines.

40. With regard to the right of innocent passage in new internal waters, he would put forward a proposal, which could be adopted either as a new paragraph 3 to article 5 or as a passage in the report, and the text of which was as follows:

> Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously consisted of territorial waters or high seas, a right of innocent passage through those waters shall be recognized by the coastal State in all those cases where the waters have normally been used for international traffic or passage.

41. With regard to the question of baselines drawn to and from drying rocks and drying shoals, the criticism that the Court had not mentioned that point was irrelevant; for neither, in not mentioning it, had it condemned the principle formulated in the article. The question had not arisen in the Anglo-Norwegian Fisheries dispute, for to the best of his recollection all the baselines had been drawn between terminal points that were visible at all states of the tide. Drawing a baseline amounted in effect to drawing a line across waters, which was not discernible except by reference to its terminal points. The only indication available to the mariner was a line on the chart, and the indication of terminal points was, therefore, essential. Moreover, they obviously must be visible at all states of the tide. The matter was one of great importance to shipping. There was no question of imposing any restrictions on the rights of the coastal State. In the majority of cases, there would always be a permanently uncovered terminal point near to a drying rock or a drying shoal. If that were not so, the rocks or shoals in question would be at such a distance from the coast as to have no relationship with the land, in which case, as the Court had indicated, such a point could not be chosen as a terminal at all. The principle enshrined in the article was both valid in law and essential in practice.

42. In reply to the Special Rapporteur's observation on the United Kingdom Government's suggestion mentioned in paragraph 43 of document A/CN.4/97/Add.2, although it was not his own suggestion, he thought it was clear that baselines drawn across frontiers between States by an agreement between those States, in a bay or along a coastline, would, as a matter of law, be illegitimate, or at any rate not opposable to other States. A baseline must be drawn off the coast of the State itself. The point, however, could no doubt be clarified in the report.

43. Mr. SANDSTRÖM pointed out that there was in force an international convention between Sweden and

[8] I.C.J. Reports 1951, p. 116.

[9] A/CN.4/SR.316, para. 76.

Norway in which a straight baseline had been drawn between two islands, one being Swedish and the other Norwegian territory. That, however, was a special case which did not affect the essential principle.

44. An article by Sir Gerald Fitzmaurice in the *British Yearbook of International Law for 1954*[10] had convinced him of the Commission's error in inserting the reference to economic interests. It was quite correct that the finding of the International Court of Justice in the Anglo-Norwegian Fisheries Case had not invoked economic considerations, save in respect of the choice of method of drawing straight baselines. The Commission had misconceived the situation, and his proposal was designed to rectify the position.

45. Upon reflexion, he would not press the amendment in his fourth paragraph to delete the last sentence of paragraph 1 of article 5. It was clear that the non-tidal conditions in the Baltic Sea tended to conceal the importance of that provision to countries bounded by tidal waters.

46. The CHAIRMAN said it appeared to be the general opinion that article 4 should be retained as drafted.

Article 4 was adopted.

47. The CHAIRMAN said that, without prejudice to Sir Gerald Fitzmaurice's proposal, which would be voted on at the next meeting, a vote could be taken on Mr. Sandström's amendment to article 5. The principle enunciated in paragraphs 1 and 3 could be taken as a point of substance, the formulation of a precise text being left to the Drafting Committee.

48. Mr. ZOUREK questioned the desirability of transferring the reference to economic interests from the first to the third sentence. The proposal was an important one of substance, for it amounted to eliminating one of the three considerations justifying the drawing of a straight baseline, with the addition of the condition of economic interests, which could be taken into account when drawing the baselines in accordance with the two remaining criteria. The finding of the International Court of Justice could not be quoted as justifying such an interpretation.

49. Mr. SANDSTRÖM, in reply to Mr. Zourek, explained that economic interests would not apply in cases where a decision had to be taken on the admissibility of the straight baseline system, but only when, that admissibility having been accepted, the question of the place where to draw the straight baselines arose. In the article by Sir Gerald Fitzmaurice that he had referred to, there was a sketch illustrating the various methods of drawing straight baselines, and it was only at the stage of choosing the most appropriate line that economic considerations would apply. The Swedish Government had stressed the identity of the geographical and juridical concepts of internal waters and had made it clear that no economic interests were of any relevance in establishing straight baselines.

[10] "*The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law.-I* ".

50. The CHAIRMAN put to the vote paragraphs 1 and 3 of Mr. Sandström's amendment to paragraph 1 of article 5.

Paragraphs 1 and 3 were adopted by 8 votes to 2, with 3 abstentions.

51. Mr. SANDSTRÖM suggested that paragraph 2 of his amendment should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 6.30 p.m.

365th MEETING

Tuesday, 12 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

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

Article 5: Straight baselines (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 of the draft articles on the regime of the territorial sea. At the close of the previous meeting, paragraphs 1 and 3 of Mr. Sandström's amendment had been adopted.

2. Mr. KRYLOV, explaining his vote on Mr. Sandström's amendment, said that he had voted against it because he regarded it as an unacceptable modification of the 1955 draft, which was a much better text.

3. A re-reading of the relevant passages of the interesting article by Sir Gerald Fitzmaurice, to which Mr. Sand-

ström had referred at the previous meeting,[1] had convinced him that, in belittling the importance of economic factors as a criterion in the establishment of straight baselines, the author had gone farther than was warranted by the finding of the Court. In fact, he seemed to have been inspired rather by the dissenting opinion of Sir Arnold McNair[2] than by the opinion of the Court as a whole. The thesis of Mr. Sandström and Sir Gerald Fitzmaurice could not be sustained; economic factors were of equal weight with geographical considerations.

4. Mr. ZOUREK said that he had voted against Mr. Sandström's amendment because it conflicted both with the finding of the International Court of Justice in the Anglo-Norwegian Fisheries case and with the principles of international law. The Fisheries case was admittedly a special case. Apart from the specific considerations, however, to which he had referred at the previous meeting,[3] the Court had noted that the straight-baseline method had been applied " not only in the case of well defined bays, but also in cases of minor curvatures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters ".[4]

5. Mr. PAL said that he had abstained from voting on Mr. Sandström's amendment because, in the first place, he was not convinced that economic interests should be regarded as a criterion justifying the establishment of a straight baseline, and in the second place, the transfer of the relevant phrase from the first to the penultimate sentence of paragraph 1 of the article did not, in his view, improve the text.

6. The CHAIRMAN, speaking as a member of the Commission and explaining his abstention, said that his preference went to the article as drafted in 1955, which was more consistent with the proper presentation of the criteria involved. The proposals contained in paragraphs 1 and 3 of Mr. Sandström's amendment did not, however, effect any change of substance because the limitation introduced by the phrase " where necessary " in paragraph 3 ensured continuity in the situation. He was by no means opposed to Mr. Sandström's amendment, and in that connexion he would recall his own proposal at the previous session.[5]

7. Turning to Sir Gerald Fitzmaurice's proposal,[6] the subject of which had been discussed at the previous session,[7] he would vote for it because the grant of the right of innocent passage through waters which had newly become internal was in no way detrimental to the interests of the coastal State. That principle had been enunciated in the Anglo-Norwegian Fisheries Case and had been borne in mind when the Commission had drafted the article at its previous session. Even though the case was exceptional, a right of innocent passage through internal waters, created by the establishment of a straight baseline, which had been previously territorial waters or high seas, should certainly be recognized.

8. Mr. FRANÇOIS, Special Rapporteur, as a critic of Sir Gerald Fitzmaurice's viewpoint, welcomed the concessions that had been made in his proposal, which was now entirely acceptable, by reason of two important modifications. The first was that the right of passage was no longer general but restricted to cases where the waters in question had normally been used for international traffic or passage; the second was that the provision would not apply in cases where the straight baseline was already in operation, but only in the future.

9. Mr. AMADO questioned the appropriateness of the words " consisted of ".

10. Sir Gerald FITZMAURICE said that he would be quite willing to substitute " had the status of " or " had been considered "; it was merely a matter of drafting.

11. Mr. SANDSTRÖM, while supporting the proposal, would prefer the wording " had been considered ", rather than " consisted of ".

12. Mr. PAL said that the Special Rapporteur's suggestion that the provisions of the proposal would apply only to future cases of demarcation needed clarification.

13. The finding of the International Court of Justice in the Anglo-Norwegian Fisheries Case was declaratory only and did not effect any change in international law. It was incorrect to suggest that the straight-baseline system changed the nature of the waters enclosed, for they always had been internal waters. Without putting forward a formal proposal, he would suggest that the reference to change of status of the waters in question could be avoided by adopting the following text:

> Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously have normally been used for international traffic or passage, a right of innocent passage through those waters shall be recognized by the coastal State.

14. Sir Gerald FITZMAURICE said that Mr. Pal's suggestion was unacceptable. The retention of the description of the newly enclosed internal waters as areas which had previously had the status of territorial waters or high seas was essential, for the right of innocent passage would arise only if those waters had previously had such status.

15. With regard to the aspect of futurity, he assumed that the Special Rapporteur had in mind cases where the establishment of a straight baseline over a long period had already effectively given the waters in question the status of internal waters. The new situation, with application in the future, was a consequence of the decision of the International Court of Justice.

16. Mr. PAL, maintaining his viewpoint, urged that the substance of the proposal would not be affected by the deletion of the words " have been regarded as territorial waters or high seas ". The essential idea was the use of the areas in question for international traffic or passage.

17. Sir Gerald FITZMAURICE supported that, if the principle of his proposal were accepted, the precise

[1] A/CN.4/SR.364, para. 44.
[2] I.C.J. Reports 1951, p. 158.
[3] A/CN.4/SR.364, para. 48.
[4] I.C.J. Reports 1951, p. 130.
[5] A/CN.4/SR.316, para. 38.
[6] A/CN.4/SR.364, para. 40.
[7] A/CN.4/SR.316, paras. 44 to 85.

formulation of the text could be left to the drafting committee.

18. Mr. KRYLOV questioned the practical effects of the adoption of the proposal. He could not accept a situation in which a vessel entering waters newly enclosed by the establishment of a straight baseline could claim the right of innocent passage simply on the ground that such an area had previously been part of the high seas.

19. Sir Gerald FITZMAURICE explained that the Court had confined itself to declaring that it was permissible to follow the straight-baseline method in certain circumstances, with the consequence that the waters behind the straight baseline became internal waters. The Court did not consider the question of the precise effects of its finding on the status of the waters in question. Since 1951, however, it had occurred to many persons interested in the question that one effect—which had perhaps been overlooked—was that the new status of certain waters in front of the coast might authorize the withholding of a right of innocent passage where that right had previously existed. The object of his proposal was merely to preserve an existing right of innocent passage through such waters.

20. Mr. KRYLOV, maintaining his opposition to the proposal, said that it amounted to an attenuation of the finding of the Court in the Anglo-Norwegian Fisheries Case, because it would weaken the status of the newly enclosed waters. It was certainly against the spirit of the Court's decision. Moreover, he had serious doubts about the practical value of the proposed provision, which would only complicate further the business of navigation.

21. Mr. FRANÇOIS, Special Rapporteur, thought that Mr. Krylov's objections were exaggerated. The proposal merely recognized a right of innocent passage through waters that had previously been territorial waters or high seas in cases where they had been used as international traffic lanes. It provided for the continued protection of a right that had previously been enjoyed. The Court had not given a ruling on the precise point, for it had not considered it. Sir Gerald Fitzmaurice's interpretation, however, was completely in harmony with the Court's decision.

22. Mr. KRYLOV still felt that in such a complex matter it would be preferable to do nothing that might disturb the decision of the Court, particularly in view of the problematical necessity for such a provision. He could not see that British shipping, for instance, had suffered through the lack of such a provision.

23. Mr. FRANÇOIS, Special Rapporteur, pointed out that the proposal was intended to provide for future contingencies.

24. Mr. SANDSTRÖM said that, although it might not be the intention of any government to withhold the right of passage for international traffic, it was perfectly reasonable that such traffic should continue to use the same waters, even though they had become internal waters.

25. Mr. SPIROPOULOS said that the areas in question had formed part of the territorial sea, in which, consequently, a right of innocent passage had been recognized. The establishment of a straight baseline had transformed them into internal waters, but it was reasonable that the right of innocent passage should continue to be recognized. The new status of the enclosed waters was not in dispute and no sacrifice by the coastal State was involved.

26. Mr. AMADO said that the situation was that a part of the territorial sea had, by the operation of the straight-baseline system, legally become internal waters. The proposal claimed that for the purposes of lawful navigation vessels should have the right of innocent passage through such waters. He could see no difficulty in accepting Sir Gerald Fitzmaurice's amendment, because the rule would apply to internal waters only in a specific case, which, by its circumstances, was entirely justifiable.

27. Mr. PAL said that the discussion was becoming confused. The establishment of the straight-baseline system had not changed the situation, which was that in some cases the normal baseline was used and in others the straight-baseline system. In respect of the status of the areas concerned, the approval by the Court of the straight baseline had merely confirmed as legal an already existing situation. There was no doubt of the existence of a state of affairs justifying a claim for the establishment of straight baselines and the only question that arose was that of certain areas that might previously have been used for international traffic or passage. The aim should be to safeguard the right of innocent passage through such an area without any reference to change of status.

28. Mr. ZOUREK said that Mr. Pal's point was extremely pertinent. The finding of the International Court of Justice, far from inaugurating a new era in international law, had merely declared the validity of two parallel systems of establishing baselines. That finding, therefore, could not be held as establishing a new system entailing a change of status of the waters concerned. Sir Gerald Fitzmaurice's proposal, however, had the disadvantage that it would create two parallel systems of internal waters, in only one of which the right of innocent passage would be recognized. Apart from access to open ports which would of course be permissible, he could see no justification for the proposal. If, however, there were cases other than access to open ports, he would favour Mr. Pal's suggestion. He could not accept the reference to areas which had previously been considered to be territorial waters or high seas.

29. Faris Bey el-KHOURI said that there were two grounds on which Sir Gerald Fitzmaurice's proposal could be supported. First, that of previous normal use of the waters for international traffic or passage and, secondly, that the areas in question had previously had the status of territorial waters or high seas. The latter was on the whole of greater weight than the former, because no question of proof would arise. Recognition of the right of passage through such waters as an act of courtesy on the part of the coastal State might give rise to difficulties.

30. Mr. SANDSTRÖM said that the confusion appeared to lie in the fact that the right of establishing a straight baseline was an abstract right. Until a straight baseline was fixed, it did not exist in reality, and could not, therefore, enclose any waters.

31. Sir Gerald FITZMAURICE observed that he agreed very strongly with Faris Bey el-Khouri and Mr. Sandström. According to the judgment of the International Court, a State had, under certain conditions, the right to draw straight baselines. Until they were drawn, however, the coast was the baseline and the waters from the coast outwards were considered as territorial waters or might even be considered, in some very rare cases, as the high seas. It was only when the State fixed straight baselines, thereby doing what it had always had the right to do but had not so far done, that the waters between the baseline and the coast, which had previously been territorial waters, became internal waters.

32. Mr. PAL, replying to an inquiry from the CHAIRMAN, said that he had not wished to move a formal amendment but had simply made a suggestion.

33. He noted that Mr. Sandström no longer adhered to his view of the effect of the decision in the Anglo-Norwegian Fisheries Case on the question of the status of the waters between the coast and the straight baseline.

34. The CHAIRMAN put Sir Gerald Fitzmaurice's proposal [8] to the vote.

Sir Gerald Fitzmaurice's proposal was adopted by 9 votes to 1 with 2 abstentions.

Article 5 was referred to the Drafting Committee.

35. Mr. KRYLOV, explaining his vote, said that he continued to consider that the proposal would have an adverse effect on the interpretation of the Court's decision.

Article 6: Outer Limit of the Territorial Sea

36. Mr. FRANÇOIS, Special Rapporteur, said there were no comments on article 6.

Article 6 was adopted.

Article 7: Bays

37. Mr. FRANÇOIS, Special Rapporteur, outlining the comments by governments on the Commission's draft article, said the Belgian Government merely drew attention to the maximum width of ten miles for the entrance fixed by the North Seas Fisheries Convention of 1882.

38. The Brazilian Government described the definition of the term " bay " as unnecessary and complicated and said that, if a definition was desired, it would prefer that proposed by the United Kingdom Government in its reply to the request for information made by the Preparatory Committee for the 1930 Codification Conference, namely, that a bay " must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width ". The United Kingdom proposal had, however, been widely criticized as far too vague and had not been accepted either by the Codification Conference or by the International Court. It was clearly not enough to say that a bay must be " long in proportion to its width ". The Committee of Experts, for instance, had given a precise definition, which was, roughly speaking, that the width of a bay must be at least half its length.[9] He was afraid he could not recommend Brazil's suggestion to the Commission.

39. The Turkish Government suggested changing the title of the article to " Bays and Internal Seas " and adding the following paragraph:

> For the purpose of these regulations an internal sea is a well-marked sea area which may be connected to high seas by one or more entrances narrower than 12 nautical miles and the coasts of which belong to a single state. The waters within an internal sea shall be considered internal waters.

He did not feel that the suggested definition was a very happy one. The concept of an internal sea in the Turkish Government's suggestion appeared to correspond exactly to the Commission's concept of a bay.

40. The Government of the Union of South Africa, referring to paragraph 5 of the article, suggested that it stipulate that the provisions of paragraphs 1-4 and not merely those of paragraph 4 did not apply to " historic " bays. The suggestion was worthy of the Commission's attention.

41. The Israeli Government inquired, *inter alia*, what was the position of bays whose coast line was shared by more than one State. That problem was one of the many which the Commission, aware that it was making a first effort to codify the matter, had deliberately refrained from attempting to solve.

42. The Norwegian Government complained that the article was not clear and made the same suggestion as the Union of South Africa regarding paragraph 5. It also stated that none of the paragraphs reflected existing law. The Commission, particularly when establishing the twenty-five-mile limit for the closing line of bays, had of course realized that it was not reflecting existing international law, but dealing with *lex ferenda*. That was not, however, a reason for rejecting the article.

43. The United Kingdom Government did not consider that the interest of coastal States afforded any justification for the adoption of a twenty-five-mile rule. It also suggested that paragraph 2 of the article be clarified by the addition of a stipulation that islands fronting a bay could not be considered as " closing " the bay if the usual route of international traffic passed shoreward of them. The point, which was similar to that just dealt with in Sir Gerald Fitzmaurice's amendment to article 5, might, he thought, be taken up by the Commission.

44. The United States Government was in favour of maintaining the ten-mile rule.

45. Thus, several governments were opposed to the Commission's decision fixing the length of the closing line of bays at twenty-five miles. It would be recalled that in the course of a lengthy discussion the Commission

[8] A/CN.4/SR.364, para. 40.

[9] A/CN.4/61/Add.1, Annex, p. 2.

had agreed that the ten-mile rule had enjoyed wide support, being included in multilateral conventions such as the North Seas Fisheries Convention of 1882. Several members had, however, opposed future acceptance of the ten-mile rule. The existence of a close link between the length of the closing line and the breadth of the territorial sea having always—though perhaps incorrectly—been acknowledged, it was reasonable to assume that, as the trend was towards an extension of the limit of the territorial sea, the length of the closing line should be correspondingly extended. States which claimed a territorial sea of six to twelve miles in breadth, for instance, were not prepared to accept a ten-mile closing line for bays. A proposal that the length of the line should be twice the breadth of the territorial sea had been rejected by the Commission on the ground that such a rule would mean a closing line of only six miles in length for those countries accepting a three-mile limit for the territorial sea. The Commission, regarding it as essential to specify a definite length, had finally adopted a distance of twenty-five miles, which was acceptable to those States which regarded twelve miles as the maximum breadth of the territorial sea.

46. There were three possibilities open to the Commission. It could retain the article as it stood, despite the opposition of certain governments. It could reduce the length of the line, though that course would undoubtedly be opposed by several of its members. Or, it could take a decision on the lines of its decision on the breadth of the territorial sea. In other words, after recognizing the fact that several States regarded the length of the closing line of bays as linked with that of the breadth of the territorial sea, it could recommend that the length of the line should not exceed a distance to be determined by any diplomatic conference convened to fix the breadth of the territorial sea, adding that, in its view, the length of the line should be fixed between ten and twenty-five miles.

47. Mr. AMADO said that he agreed with the Brazilian observation that the definition of a bay was unnecessary and complicated. It contained much geographical technicality which it was difficult for a jurist to follow, and attempted to express in geographical terms a rule which had not yet been formulated in international practice. The twenty-five mile rule was opposed by many States and would undoubtedly give rise to much discussion. He would prefer a much simpler definition.

48. Mr. EDMONDS regretted that the Special Rapporteur had not repeated the recommendation which he had made, on very sound grounds, to the Commission's seventh session, that the ten-mile rule should be recognized as current international practice.[10] The article as it now stood had very few friends. Out of the nine governments which had commented on it, only one, the Chinese, was in favour of it, while five had declared that twenty-five miles was too great a distance. He formally proposed that the words " ten miles " be substituted for the words " twenty-five miles " throughout the article.

49. Mr. SANDSTRÖM, after reading out the comments by the Swedish Government, to which the Special Rapporteur had made no reference, said it was not clear whether the object of draft article 7 was to fix the limit of the internal waters or of the territorial sea. The point of the article would be clearer if paragraph 3, which appeared to be the main provision, were given greater prominence. He was unable to take any position at that stage on the length of the closing line. The compromise solution of twenty-five miles having failed to win general acceptance, it might be wondered whether the Commission should attempt to fix a length at all. One argument against fixing any length was the statement of the International Court, in its judgment in the Anglo-Norwegian Fisheries Case, that no such limit existed.[11] That statement had been dismissed as an *obiter dictum*. There were, however, a number of bays on the Norwegian coast and the question of straight baselines was undoubtedly bound up with that of bays.

50. Mr. ZOUREK said that there were two problems involved: the definition of a bay, and the conditions under which the waters in a bay were to be regarded as internal waters. With regard to the first problem, he thought that the definition given in article 7 should be retained by the Commission. It had been taxed with being too technical but there must be a certain element of technicality in any definition. It was for the General Assembly and any international conference that might be convened on the subject to decide whether or not the definition should be finally retained.

51. The other problem was a far more fundamental one. As he had pointed out at the previous session, the Commission was guilty of over-simplification in adopting a purely mathematical criterion.[12] The question whether the waters within a bay were internal waters of a coastal State or not depended on a variety of geographical, economic and historical factors.

52. In the North Atlantic Fisheries Case[13] in 1910, the Permanent Court of Arbitration had been called upon to settle the definition of a bay in connexion with a disputed clause in the Treaty of 1818. There was no reference at all to mathematical criteria but only specifically to the following factors: " the relation of the width of the bay to the length of penetration inland "; " the possibility and the necessity of its being defended by the State in whose territory it is indented "; " the special value which it has for the industry of the inhabitants of the shores " and " the distance which it is secluded from the highways of nations on the open sea ". If the Commission sought to reduce the question to one of mathematics, the limit would always be an arbitrary one whether it were 10, 25 or 30 miles. Such a solution furthermore would never obtain anything approaching the general acceptance of States.

53. Nor was Mr. Edmonds' proposal[14] any improvement. It was still a mathematical solution and would be

[10] A/CN.4/SR.317, paras. 45-47.

[11] I.C.J. Reports 1951, p. 141.

[12] A/CN.4/SR.318, paras. 69 and 95.

[13] American Journal of International Law, 1910, p. 982.

[14] See para. 48 above.

unacceptable to an even greater number of States. That the adoption of a closing line of twenty-five miles had been a premature move on the part of the Commission was shown by the fact that only five of the 71 maritime States had accepted it. The Commission should add other criteria to the purely mathematical one.

54. Sir Gerald FITZMAURICE, referring to the relation between articles 5 and 7, said that article 5 dealt merely with cases where the character of a particular coast justified the establishment of a general system of straight baselines. If there were any bays in the particular coastline, they would be dealt with as part of that baseline system. That fact was clear from paragraph 5 of article 7, and would be even clearer if the stipulation in that paragraph were extended to paragraphs 1-4 of article 7 and not just to paragraph 4.

55. Article 7 dealt with the totally different case of bays on a coast where there was no justification for the establishment of a straight baseline system, in a word, of bays to which article 5 simply did not apply. Consequently, if the suggestion of some governments were adopted and article 7 were eliminated as superfluous, it would no longer be possible to draw any closing line in bays on coasts for which a straight-baseline system had not been established.

56. As for the length of the closing line, he found the matter clear though admittedly controversial. The statement of the International Court on the matter in its judgment in the Anglo-Norwegian Fisheries Case [15] had, in his opinion, been rightly described as an *obiter dictum*. There had been no occasion for the Court to decide the question of bays in that dispute because the United Kingdom had already conceded, either on geographical or on historical grounds, that all the bays involved were in Norwegian waters. In any case, the Court had done no more than state that the ten-mile rule had not acquired the authority of a general rule of international law, and it would be going too far to deduce from that statement that the Court considered that there was no limit on the internal waters in bays.

57. In view of the existence of indentations, such as the Gulf of Carpentaria, which were of enormous width but had the configuration of bays, it was clear that, whether the ten-mile rule were correct or not, the Commission must set a limit to the internal waters in bays where no straight-baseline system existed. It was in fact for that reason that he had abstained from voting against the twenty-five-mile limit at the Commission's seventh session.[16] He agreed, however, with those governments which considered twenty-five miles excessive. Fifteen miles was ample. He would deal with other aspects of the article at a later stage.

58. The CHAIRMAN, speaking as a member of the Commission and recalling the views expressed by him at the Commission's seventh session,[17] said that the spirit, if not the letter of the judgment of the International Court in the Anglo-Norwegian Fisheries case ruled out the application of a mathematical criterion to the question of the internal waters of bays. He had on that occasion submitted a definition which was sufficiently wide to cover all cases.[18] Since, however, the Commission had not adopted it, he would dwell on it no further.

59. In the same proposal, he had included a paragraph based on the Harvard Draft, stipulating that in the case of bays whose coasts were shared by more than one State, the bordering States might agree upon a division of the waters within the closing line as internal waters.[18] In making that proposal he had had in mind the Gulf of Fonseca the shores of which were shared by Honduras, Nicaragua and Salvador, and which had been the subject of an award by the former Central American Court of Justice. That paragraph had also been rejected.

60. Referring to Mr. Edmonds' statement that the majority of countries were opposed to the twenty-five-mile limit, he said that, although the Commission could obviously take cognizance only of replies received from governments, it was clear from the views which governments were known to hold on the question, that the ten-mile rule was widely regarded as obsolete.

61. The Turkish Government in its comment had wished to couple the question of bays with that of internal seas. It was true that the regime of the territorial sea was one thing and that of internal seas another, but they did have certain points of contact. He was not sure that the Turkish comment was pertinent. It would give rise to certain complications, and even if there were an analogy, the matter should not be dealt with in connexion with article 7. The point might, however, be made in the comment on article 7 or at the appropriate point in the report dealing with the regime of the high seas.

62. Mr. HSU said that he did not always agree with the comments made by the Chinese Government. He himself felt that the twenty-five-mile line would be excessive, but it depended entirely on the view taken on the breadth of the territorial sea. The two questions were closely related. The ten-mile line was somewhat arbitrary; it might be interpreted as a restriction based on undue insistence on the three-mile limit for the territorial sea. Since the question of the breadth of the territorial sea had not yet been decided, the question might very well be referred to the proposed international conference; but he would not press that as a proposal.

63. Mr. FRANÇOIS, Special Rapporteur, said that it would be going too far to maintain that only one Government—the Chinese—favoured the Commission's draft. True, only that government had explicitly stated its approval, but some fifteen of the score or more governments which had sent comments had not referred to that specific point, and their silence might be construed as assent, or at least as an absence of serious objection on their part.

64. Sir Gerald FITZMAURICE proposed that the

[15] I.C.J. Reports 1951, p. 131.

[16] A/CN.4/SR.318, para. 88.

[17] *Ibid.*, paras. 90-91.

[18] A/CN.4/SR.317, para. 52.

word " fifteen " should be substituted for the word " twenty-five " in paragraphs 3 and 4 of article 7.

65. Faris Bey el-KHOURI agreed that the twenty-five-mile line was excessive and suggested that a twelve-mile line might be accepted, as that limit had been virtually accepted for the breadth of the territorial sea.

66. Mr. KRYLOV endorsed Sir Gerald Fitzmaurice's proposal as a practical one. The twenty-five-mile line had met with universal misgiving, and he himself would not be disposed to accept a ten-mile line, because it had been criticized by the International Court of Justice in the Anglo-Norwegian Fisheries Case. The Commission was entirely free to choose a completely arbitrary figure.

67. Mr. ZOUREK asked whether the Special Rapporteur or the Commission itself would be prepared to supplement the arithmetical criterion laid down in the draft of article 7 with other criteria—geographical, historic or economic.

68. Mr. FRANÇOIS, Special Rapporteur, replied that he would prefer not to make any such proposal, as it would merely complicate matters. The arithmetical method of measuring bays had been used for at least seventy years. The introduction of the other criteria suggested by Mr. Zourek would mean that each bay would become a matter of controversy.

69. Mr. SANDSTRÖM drew Mr. Zourek's attention to the geographical criteria set forth in paragraph 1 of article 7.

70. Mr. ZOUREK objected that those criteria had been used merely in the definition of bays. He had intended that such criteria should be used also for the determination of the limit of the internal waters.

71. Mr. SANDSTRÖM replied that he had at one time made an attempt to introduce the criteria advocated by Mr. Zourek and they had been incorporated to some extent in paragraph 5.

72. Mr. ZOUREK said that he had not as yet any specific proposal to submit, but would appreciate a vote on the principle that the purely arithmetical criterion should be supplemented by geographical, historical and economic considerations.

73. Mr. SANDSTRÖM proposed that the vote should be deferred until the next meeting, in order to give Mr. Zourek an opportunity to draft a specific proposal.

74. The CHAIRMAN agreed that the vote might be deferred until the next meeting pending the submission of Mr. Zourek's amendment.

Further consideration of article 7 was postponed until the next meeting.

Article 8: Ports

75. Mr. FRANÇOIS, Special Rapporteur, observed that the United Kingdom Government had again drawn attention to its comment of the previous year (A/2934, p. 44) that some qualification of article 8 might be necessary in view of the construction of piers running far out into the high seas. At the previous session, Sir Gerald Fitzmaurice[19] had stated that he would not press the objection as it dealt with somewhat exceptional cases. If he wished to do so now, a reference to the point might be made in the report.

76. Sir Gerald FITZMAURICE said that the question was not one of primary importance. It might be compared with that of artificial islands and the erection of installations on the continental shelf. It was recognized that such constructions did not generate territorial waters. Piers projecting from the land up to a certain point might reasonably be regarded as part of the land, but if they extended several miles into the high seas, their situation would be similar to that of artificial constructions in the sea, and it was arguable that they should not be regarded as part of the coast, but as erections in the high seas. Admittedly, the situation was at present exceptional, but, with the advance of science, it might not always be so. It would be undesirable to admit that countries might extend their territorial waters merely because such piers were connected with the land; at the most, they would be entitled to safety zones. He would be satisfied if a reference were made in the commentary to the fact that new situations might arise which would require reconsideration of the article, should the practice of building such erections become widespread.

It was agreed that a reference to the United Kingdom Government's comment be included in the report.

Article 8 was adopted.

Article 9: Roadsteads

77. Mr. FRANÇOIS, Special Rapporteur, said that the Brazilian Government maintained its view that roadsteads should be subject to the regime of internal waters. The Commission had decided against that concept.[20]

Article 9 was adopted without change.

Article 10: Islands

78. Mr. FRANÇOIS, Special Rapporteur, observed that the Brazilian Government still held that the position of islands would, under the Commission's draft article, be inferior to that of drying rocks and drying shoals. He himself maintained that such an opinion was erroneous, since islands were always endowed with their own territorial sea, whereas rocks and shoals did not possess one. He had elaborated that view in the addendum to his report[21] and saw no reason for reopening the discussion.

79. The Government of the Union of South Africa put forward the view that States should be permitted to take the surfline to the seaward of a drying rock or shoal, which lay within the territorial sea, as the point of departure for measuring the territorial sea, rather than the rock or shoal itself. That view could not be accepted by the Commission.

80. The question of groups of islands or archipelagos had been raised by the Philippine Government in connexion with the definition of the high seas, and by the

[19] A/CN.4/SR295, para. 71.

[20] *Ibid.*, para. 81.

[21] A/CN.4/97/Add.2, para. 74.

Yugoslav Government in connexion with article 5: Straight baselines. The Hague Codification Conference of 1930 had experienced some difficulty with regard to groups of islands, and had suggested that the line for the territorial sea should be the line linking the outermost islands of the group so that all waters within that line would be internal waters. The main question was what should be the maximum length of such lines, because the extent of waters whose status had been changed from that of high seas to that of internal waters naturally depended on that length. The Hague Conference had proposed ten miles, the same as for bays. In 1953 the Committee of Experts had limited the length of such lines to five miles. The Commission had not given much time to the question, but after a brief discussion had decided that no special clause was needed for groups of islands.[22] It must be realized what were the consequences of that decision, namely, that in an archipelago each island would have its own territorial sea, but that the Commission did not accept the idea of a stretch of closed waters embracing all the islands of an archipelago and which must be regarded as the territorial waters of the archipelago and thus also the territorial waters of a State, such as the Philippines, wholly composed of such islands.

81. The United Kingdom Government approved the omission of any clause dealing with groups of islands, as it favoured the fullest possible freedom of the high seas. The Commission should decide whether it wished to maintain its decision to omit such a clause.

82. Mr. SPIROPOULOS said that a form of law relating to archipelagos was already in force, because the Hague Conference had accepted certain principles relating thereto and they had been embodied in the literature. The question of the distance between islands was still a controversial point, but he could not accept the United Kingdom Government's suggestion. If the Commission failed to draft an appropriate clause it would leave the problem in mid-air. Some such clause should be included in the rules, either in connexion with article 10 or elsewhere. Certain restrictions had already been placed on the full freedom of the high seas, notably in connexion with bays. The rule should recognize the special conditions of groups of islands, particularly since law relating thereto was already in force. If the territorial seas of two islands were almost contiguous, a small area of the high seas might be completely enclosed; it would be illogical to have a stretch of the high seas surrounded by territorial waters.

83. Mr. SANDSTRÖM observed that in the main the general rule of straight baselines should be applied, but the question was rather different where States consisted exclusively of islands. At the present stage, however, the Commission lacked sufficient expert information on the geographical configuration of such States. It obviously could not go so far as to create a uniform territorial sea for States with enormous distances between their islands, such as Indonesia, even if a more liberal use of straight baselines might be justified in certain cases.

84. Sir Gerald FITZMAURICE said that Mr. Sandström's observation was pertinent. The real difficulty was to know what a group of islands was; the islands might be widely scattered and the total interior distance very great. A special regime might be established for cases where islands were sufficiently closely grouped to constitute both a geographical and a political unity, but a maximum distance between the islands and also between the interior lines would have to be established.

85. With regard to Mr. Spiropoulos' point about a rule of law already being in force, the position had been that no very serious proposals for a special regime for groups of islands had been advanced prior to the 1930 Hague Conference. Each island had had its own territorial waters, and, if they were situated close enough together, those waters would overlap. At the Hague Conference proposals had been made for drawing a baseline round the outer edges of the islands, and the controversy had turned on the length of the baseline. As no agreement had been reached, no clause had been embodied in a draft convention, but certain States had agreed to the drawing of such baselines, with the sole proviso that the waters within the lines would not be internal waters, but territorial sea, in order to preserve the right of passage. The law, therefore, had always remained unsettled.

86. The Commission should consider whether it wished to establish a regime for groups of islands, how it could do so, how it should define such a group, and what would be the status of the waters inside the baselines. He agreed with Mr. Spiropoulos that it would be absurd for a stretch of high seas to remain within the line, but, from a practical point of view, such waters should be regarded as territorial sea rather than internal waters. Such waters were, after all, outside, not inside, the individual islands.

87. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice that difficulties might arise if a chain of islands were given internal waters. A clause dealing with groups of islands could be applied only in cases where islands constituted a geographical unit and the distance between them was not too great. A similar problem arose in relation to straits with the territory of two different States on each side, where the breadth of each entrance was not greater than double the territorial seas, but where the strait widened out between the entrances. The waters in the wider part would not be high seas, but would be assimilated to territorial seas. He suggested that the Rapporteur should embody the ideas expressed in the discussion in a working paper.

88. Mr. ZOUREK observed that the Commission had not gone deeply into the question of groups of islands. There should, however, be a clause relating to them. The use of the straight baseline would be a practical solution only for islands close in to the coast. Where groups of islands were far from the coast and formed a geographical, economic and political unit, special provision should be made for them. It would be unfair to States composed exclusively of islands if the Commission admitted off-shore islands within the system of straight baselines, incorporating the waters between the islands and the shore in internal waters, and omitted to draft

[22] A/CN.4/SR.319, para. 56.

a similar clause for archipelagic States, for if there were no such clause, such States would never have any internal waters.

89. Mr. FRANÇOIS, Special Rapporteur, replying to Mr. Spiropoulos, said that he had already drafted an article on groups of islands[23] in his third report on the regime of the territorial sea. The Commission had, however, been unable to adopt an article based on that draft for, like the Hague Conference of 1930, it had failed to overcome the difficulties, which had since been aggravated. He rather doubted whether the Commission would have time at that late stage to deal with the matter in detail. It should preferably be left to the proposed diplomatic conference, especially since the question was closely related to that of the breadth of the territorial sea. He would therefore, if the Commission so agreed, include in his report a passage to the effect that the Commission had recognized the need to deal with the question, but had lacked time and the requisite assistance of experts, and had therefore decided to leave the decision to a diplomatic conference.

90. Mr. PAL accepted that proposal. Normal cases of islands were covered by the provisions already made, but if the distance between them was far greater than twice the breadth of the territorial sea—and even that breadth had not yet been decided—and if the configuration of the archipelago was not known, the Commission could hardly discuss the matter to any purpose.

91. The CHAIRMAN, speaking as a member of the Commission, observed that the Commission would undoubtedly accept the Special Rapporteur's proposed passage for his report, as it reflected the facts. He suggested, however, that he should add an additional passage from the comment accepted at the seventh session, reading: " Moreover, article 5 may be applicable to groups of islands situated off the coasts, while the general rules will normally apply to other islands forming a group " (A/2934, p. 18). In other words, archipelagos would be governed by analogy by the same general principle as that laid down in article 5.

92. Mr. SANDSTRÖM suggested that reference be also made in the report to the difficulties arising from the great variety of situations with regard to groups of islands.

It was agreed that the Special Rapporteur should include in his report a passage along the lines suggested by himself, the Chairman and Mr. Sandström.

Article 10 was adopted.

Article 11: Drying rocks and drying shoals

93. The CHAIRMAN pointed out that article 11 had already been disposed of at the previous meeting in connexion with articles 4 and 5.

Article 11 was adopted.

The meeting rose at 1.10 p.m.

[23] A/CN.4/77.

366th MEETING

Wednesday, 13 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2693, A/2934, A/CN.4/97/Add.2, A/CN.99 and Add.1-3) (*continued*)

Article 7: Bays (resumed from the previous meeting)

1. The CHAIRMAN, inviting the Commission to resume its consideration of article 7 of the draft articles on the regime of the territorial sea, drew attention to the amendments submitted by Mr. Sandström and Mr. Zourek.

Mr. Sandström's amendment was as follows:

1. The waters of a bay shall be considered as internal waters if:

(*a*) By reason of the depth of penetration of the bay, or by its configuration generally, its waters are closely linked to the land domain;

(*b*) The line drawn between the points marking the entrance of the bay at low water does not exceed *x* miles;

(*c*) The area of the bay is as large as or larger than that of the semi-circle drawn on this line, and

(*d*) The coasts belong to a single State.

2. [Paragraph 4 of the 1955 text (A/2934), substituting *x* miles for twenty-five miles.]

3. [Paragraph 2 of the 1955 text.]

4. The line drawn across the entrance of the bay shall serve as the base-line for delimitation of the territorial sea.

5. [Paragraph 5 of the 1955 text.]

2. Mr. Zourek's amendment was as follows:

In paragraph 3 replace the clause beginning " if the line

drawn " and continuing to the end of the paragraph by the following:

if they are linked to the land domain by reason of the configuration of the bay, the width of its entrance, its economic value to the people of the State or by reason of the distance separating the bay from international shipping lanes on the high seas.

3. In addition, Mr. Edmonds,[1] Faris Bey el-Khouri[2] and Sir Gerald Fitzmaurice[3] had proposed figures of 10, 12 and 15 miles respectively for the closing line of the entrance of a bay.

4. Mr. SANDSTRÖM said that his amendment was largely a drafting amendment and could be examined by the Drafting Committee. The only innovation was the proposal in paragraph 4 that the line drawn across the entrance of a bay should serve as the baseline for delimitation of the territorial sea, which was the same provision as in paragraph 1 of article 13.

5. Mr. PAL said that discussion of the article would be facilitated if it were realized that there were no amendments to paragraph 2 of the draft article or to paragraph 4, except to the figure " twenty-five ". In paragraph 3, only Mr. Zourek's proposal introduced a fresh qualification, that of the economic value of the bay. Paragraph 1 would require consideration, particularly in view of Mr. Sandström's proposal.

6. Sir Gerald FITZMAURICE said that Mr. Sandström's ingenious proposal, which was acceptable, would have the same practical effect as the draft article. The only minor criticism that he would make was that its opening phrase seemed to be tautologous in that " waters of the bay " made the assumption that there was a bay. Unless, however, the waters of the area in question were in fact closely linked to the land domain, they did not constitute a bay at all. The whole purpose of the definition in the draft article was to stress that relationship.

7. He had also a slight criticism to make of the wording of paragraph 4, which referred to the " line drawn across the entrance of the bay ". If the bay were more than the x miles broad, then the line would not be drawn across the entrance, but at the point where the width did not exceed the x miles. The phrase " across the entrance of the bay " therefore called for modification.

8. The same criticism of tautology could be levelled at Mr. Zourek's amendment, and far more cogently than in the case of Mr. Sandström's amendment. The statement that the waters should be considered internal waters " if they are linked to the land domain by reason of the configuration of the bay " was begging the whole question. If the waters were not linked to the land domain the indentation would not be a bay at all.

9. Referring to the other criteria, he said that his views on economic criteria were well known to the Commission. The criteria were so vague that, were they adopted, it would be impossible to determine whether a particular indentation was a bay or not. He was convinced that the only way to enable countries to settle such questions was to specify a closing line of a definite distance.

10. Mr. FRANÇOIS, Special Rapporteur, referring to the four criteria contained in paragraph 1 of Mr. Sandström's amendment, said that the last three of them were already contained in the Commission's draft article 7. It was difficult to imagine that any indentation to which the last three criteria applied could nevertheless not be a bay. The additional criterion that " the waters of a bay shall be considered as internal waters if by reason of the depth of penetration of the bay, or by its configuration generally, the waters are closely linked to the land domain" was in effect the very basis of the definition of a bay and should not therefore be treated as on the same footing as the other three. It might, however, be included in the commentary.

11. Mr. SANDSTRÖM explained that he had avoided giving any definition of a bay because he regarded it as a geographical concept. Bays might, however, exist which did not meet the first requirement in paragraph 1 of his amendment. In any case, as he had already pointed out, he left his text entirely to the discretion of the Drafting Committee.

12. Mr. ZOUREK, recalling his remarks at the previous meeting,[4] said that the whole purpose of his amendment was to avoid the adoption of a purely mathematical criterion. The criteria it contained were based on those adopted by the Permanent Court of Arbitration in 1910 in settling the dispute between the United States of America and Great Britain over the North-Atlantic coast fisheries.[5] They were admittedly less precise than a fixed distance. So precise a criterion as a fixed distance, however, would never be accepted by the majority of States, because of the extreme variety of cases to which it would have to be applied. His amendment would involve the deletion of paragraph 4 of the existing draft article.

13. Mr. KRYLOV drew attention to the fact that both amendments referred to the need for the waters to be linked to the land domain by reason of the configuration of the bay. He suggested that the Commission refer them to the Drafting Committee and retain the draft article pending the Drafting Committee's report.

14. The CHAIRMAN pointed out that Mr. Zourek's amendment, despite certain similarities to that of Mr. Sandström, involved a substantial change in the text of the draft article and would therefore require a decision of the Commission. Mr. Sandström's amendment could, however, be referred to the Drafting Committee without a decision.

15. Mr. PAL pointed out that a decision would be required on the parts of Mr. Sandström's amendment where he proposed substituting an unspecified number of miles for the words " twenty-five miles ".

16. The CHAIRMAN put Mr. Zourek's amendment to the vote.

[1] A/CN.4/SR.365, para. 48.

[2] *Ibid.*, para. 65.

[3] *Ibid.*, para. 64.

[4] A/CN.4/SR.365, paras. 51-53.

[5] American Journal of International Law, 1910, pages 982-983.

Mr. Zourek's amendment was rejected by 8 votes to 1 with 4 abstentions.

17. The CHAIRMAN, explaining his abstention, said that although, as he had pointed out at the Commission's seventh session,[6] he was opposed to a numerical criterion for determining whether the waters of a bay were internal waters, at the same time he did not consider that the criteria provided by Mr. Zourek would permit a proper determination of the limits of the internal waters.

18. Mr. PAL said that he had abstained because the Commission had already rejected similar proposals in which the concept of economic interest was put forward as a criterion. Such a concept was far too vague to serve as a basis for a decision by an arbitral tribunal or the International Court.

19. The CHAIRMAN put to the vote that part of Mr. Sandström's amendment which called for an unspecified length of the closing line.

Mr. Sandström's amendment was rejected by 6 votes to 4, with 3 abstentions.

20. Mr. SCELLE said that he had voted against the amendment for the same reason for which he had previously opposed the Commission's decision not to prescribe a specific breadth for the territorial sea.[7]

21. The CHAIRMAN put to the vote Mr. Edmonds' amendment that the length of the closing line be changed to 10 miles.

Mr. Edmonds' proposal was rejected by 8 votes to 3, with 2 abstentions.

22. The CHAIRMAN put to the vote Faris Bey el-Khouri's proposal that the length of the closing line be changed to 12 miles.

Faris Bey el-Khouri's proposal was rejected by 7 votes to 5, with 1 abstention.

23. The CHAIRMAN put to the vote Sir Gerald Fitzmaurice's proposal that the length of the closing line be changed to 15 miles.

Sir Gerald Fitzmaurice's proposal was adopted by 7 votes to 5.

It was *agreed* that the portions of Mr. Sandström's amendment unaffected by the decision on the length of the closing line should be taken into consideration by the Drafting Committee with a view to possible drafting changes in the article.

Article 12: Delimitation of the territorial sea in straits, and Article 14: Delimitation of the territorial sea of two States, the coasts of which are opposite each other

24. Mr. FRANÇOIS, Special Rapporteur, suggested that articles 12 and 14 be considered together, as several governments had commented that both dealt with the same points and might well be combined. He had accordingly drafted a composite article[8] which might, if the Commission agreed in principle on its substance, be referred to the Drafting Committee.

25. The Turkish Government had suggested that in article 12, paragraph 4, the words " except where the connexion passes through an internal sea " should be added after the words " straits which join two parts of the high seas ". The first sentence of paragraph 4 would then read:

> Paragraph 1 and the first sentence of paragraph 3 of this article shall be applicable to straits which join two parts of the high seas, except where the connexion passes through an internal sea, and which have only one coastal State in cases in which the breadth of the straits is greater than twice the breadth of that State's territorial sea.

26. He had originally stated[9] that the exact purport of that addition escaped him, as he had thought that when States were separated by an internal sea, there could be no question of a territorial sea, because no territorial waters existed in an internal sea, but on reflection he had concluded that that might be precisely the tenor of the Turkish Government's comment. There was, however, no necessity to make an exception for such cases, because when waters were an internal sea in the strict sense of the term, there could be no question of a territorial sea, so that article 12 would not apply at all; on the other hand, when waters were not an internal sea in the strict sense of the term, or were to some extent a landlocked sea, the regime of internal waters would not be applicable, and article 12 would have to apply. There was therefore no ground for making the addition requested by the Turkish Government. He would, however, include some discussion of internal waters in his report and the Commission might consider it when it came to discuss the report.

27. The Norwegian Government had drawn attention to the fact that the articles provided no solution for the case of two States which had territorial seas of different breadth. That was true, but the Commission had been unable to solve that problem, and was not now required to do so, because it was hoped that a uniform limit would be established for the territorial sea. There was a system governing disputes in similar cases in international private law, but it was not the present task of the Commission to find a solution in international public law for disputes arising in such cases.

28. The United Kingdom Government had proposed a new text to replace article 14, paragraph 1. The main differences from the existing text were the introduction of the phrase " is usually determined " and the omission of the phrase " in the absence of agreement between those States ". Sir Gerald Fitzmaurice had already agreed[10] that the word " usually " was unnecessary, since it was covered by the phrase " unless another boundary line is justified by special circumstances ", as was the phrase " in the absence of agreement between those States ".

29. The Yugoslav Government had proposed the deletion of both the phrase " in the absence of agreement

[6] A/CN.4/SR.318, para. 91.

[7] A/CN.4/SR.363, para. 109.

[8] A/CN.4/97/Add.2, para. 88.

[9] A/CN.4/97/Add.2, para. 81.

[10] A/CN.4/SR.360, para. 28.

between those States " and the phrase " unless another boundary line is justified by special circumstances ". He did not believe that the Commission was prepared to delete the latter phrase, because it attached considerable weight to it and its deletion would make the article too rigid.

30. He therefore concluded that the wording of the articles should be retained, subject to the amendment proposed by the United Kingdom Government, and that his own proposal for combining articles 12 and 14 should be referred to the Drafting Committee.

31. Mr. Krylov questioned the use of the term " baseline " in paragraph 1 of the Special Rapporteur's draft. The term " straight baseline " had been used hitherto. It was probably merely a drafting point.

32. Mr. FRANÇOIS, Special Rapporteur, explained that he had been trying to find a term to cover both the normal tide-line system and the straight-baseline system. The term might be explained in the commentary.

33. Mr. PAL suggested that, in view of the fact that the Commission had not been able to take a decision on the breadth of the territorial sea, it might be preferable to adopt the phrase used by the United Kingdom in its amendment to article 14, paragraph 1—" the principle of the median line "—rather than the phrase " the median line " in the Commission's draft. Difficulties might arise in applying the median line itself. If a strait was eight miles broad, and one coastal State claimed a territorial sea six miles in breadth and the other three miles in breadth, the former would lose two miles of territorial sea and the latter gain one mile, where the median line ran at four miles.

34. Mr. FRANÇOIS, Special Rapporteur, said that all members agreed in principle with Mr. Pal's point, but it was primarily a matter of drafting. The case might perhaps be covered by the phrase " unless another boundary line is justified by special circumstances ". The point might be left to the Drafting Committee.

35. Mr. SANDSTRÖM said that he was not certain that all members agreed in principle with Mr. Pal's point. It was open to question whether the median line could be applied when the waters of a strait between the coasts of two States were not wide enough to give to both the territorial sea which they usually claimed.

36. Mr. SPIROPOULOS thought that another case to be taken into consideration was that of a strait ten miles in breadth between the coasts of a State which claimed a three-mile limit and a State which claimed a twelve-mile limit. It might be asked whether the latter would receive only five miles of its twelve miles and the former would obtain two miles more than it usually claimed.

37. Mr. FRANÇOIS, Special Rapporteur, admitted that the question was insoluble when two States claimed different breadths for their territorial seas. There might be a solution where those claims were recognized by international law, or, in other words, were regarded as historic rights, but there seemed to be no solution where the breadth of the territorial sea was disputed. The same situation would arise with regard to many other articles and could not be solved until the question of the breadth of the territorial sea had been decided.

38. Sir Gerald FITZMAURICE observed that the Special Rapporteur's point was very pertinent. The United Kingdom Government, in a long and detailed comment on the breadth of the territorial sea submitted in 1955 (A/2934, pp. 41-43), had expressed the view that one of the most important matters to be settled was that of a uniform breadth for the territorial sea. At the present session some members had expressed views, and had reflected views expressed outside the Commission, that the breadth should not be uniform throughout the world, but that the regime might differ from region to region, or even from country to country. The point made by the Special Rapporteur illustrated the practical difficulties that resulted from such a doctrine.

39. The United Kingdom Government had made a somewhat similar proposal (A/CN.4/99/Add.1) in connexion with article 7 on the continental shelf. That proposal should be broadly applicable in the present context, although it would not cover all special cases.

40. Mr. SANDSTRÖM observed that a case in point was the Sound, between Sweden and Denmark. Sweden applied the four-mile limit for its territorial sea and Denmark the three-mile limit, but the two countries had concluded an agreement to apply the median line.

41. Mr. KRYLOV said that the Special Rapporteur was perfectly correct; the only possible solution was to conclude specific agreements. The case mentioned by Mr. Spiropoulos could not be solved in international law, although many somewhat similar cases were dealt with in civil law. The Commission should be prudent and refrain from going too far; it could not possibly decide all cases by means of the draft articles.

42. Mr. ZOUREK observed that paragraph 3 of the draft proposed by the Special Rapporteur provided, in effect, that when a State held the coasts on both sides of a strait, the waters could be deemed to be its territorial sea. Many straits, however, especially in States formed of groups of islands, were regarded as internal waters when they were not required for international navigation. The Special Rapporteur's draft excluded that possibility.

43. Sir Gerald FITZMAURICE said that there might be some justification for regarding as territorial waters an internal sea connected with the high seas by straits at each end of it, but there could be no justification for regarding such waters as internal waters if the sea were more than a certain breadth. He could see some moral justification for regarding such waters as territorial sea rather than high seas, but to regard them as internal waters would lead to an impossible situation. It would mean that there would be a right of passage from the high seas through the first strait, no right of passage through the waters into which it led, and then again a right of passage through the second strait leading out into the high seas.

44. Mr. SANDSTRÖM pointed out that the question of passage was often regulated by treaty.

45. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice. The question had been discussed at the

1930 Hague Conference. It would be contrary to all the fundamental rules to regard a very broad sea lying between two straits as internal waters; at most, it might be regarded as a territorial sea.

46. Mr. SCELLE observed that no absolute definition could be established to cover special cases. In the case raised by Sir Gerald Fitzmaurice the waters would be part of the high seas and could not possibly be internal waters. Such cases almost always resulted from political circumstances following a political dispute. The Commission should not enter into such details.

The combined draft for articles 12 and 14 prepared by the Special Rapporteur (A/CN.4/97/Add.2, para. 88) was adopted, subject to consideration by the Drafting Committee.

Article 13: Delimitation of the territorial sea at the mouth of a river

47. Mr. FRANÇOIS, Special Rapporteur, drew attention to a proposal by the Indian Government for an addition to article 13 (A/CN.4/99/Add.3), reading as follows:

> Provided that if there is a port situated at or near the mouth of a river or on the estuary into which a river flows, the territorial sea shall be measured from such outermost limits as may be notified by the Government or the port authority having jurisdiction over the port, in the interest of pilotage and safe navigation to and from the port.

The Commission must decide whether a State should have such extensive discretionary powers to fix the limits of its territorial sea.

48. Mr. SANDSTRÖM asked how the Indian Government's proposal differed from the provisions of article 8.

49. Mr. FRANÇOIS, Special Rapporteur, replied that it differed a great deal since article 8 dealt with permanent harbour works which formed an integral part of the harbour system. The Indian Government's proposal would mean the extension of the territorial sea to any breadth which the coastal State considered necessary in the interest of pilotage and safe navigation to and from the port. It might consider that the outermost limit required for those purposes might be as much as, for instance, four miles, and only beyond the four-mile limit would the territorial sea begin.

50. Mr. PAL said that he would not formally move the Indian Government's proposal, for which he himself was in no way responsible. So far as he understood it, that proposal dealt with the relative position of rivers and the sea, whereas article 8 dealt with the position of ports. If the Indian Government's proposal was not accepted, the territorial sea would be measured from the outermost permanent harbour works which formed an integral part of the harbour system. The Indian Government's proposal differed from article 8 in that it would measure the territorial sea from the outermost limits notified by the Government. Undoubtedly, the provisions of article 8 must have been taken into account when the proposal had been made, since it could not have been intended to confer completely discretionary powers. It might have been intended to cover special difficulties encountered with regard to pilotage on rivers in India.

Article 13 was adopted without change.

Article 15: Delimitation of the territorial sea of two adjacent States

51. Mr. FRANÇOIS, Special Rapporteur, said that the Norwegian Government had asked whether articles 14 and 15 might not be combined. He did not think that that would be possible because their subjects were quite different. Both, it was true, dealt with the median line, but in article 14 it was the median line between two coasts opposite each other, whereas in article 15 it was the delimitation of adjacent waters by application of the principle of equidistance from the nearest points on the respective baselines. The method was essentially different; to merge the two articles would create confusion.

52. The United Kingdom Government had agreed to the text.

53. The Yugoslav Government had made the same proposal[11] as in regard to article 14. The Commission had not accepted the latter proposal.

54. He therefore suggested that the text of article 15 be adopted as it stood.

55. Mr. ZOUREK proposed that paragraph 1 of the article should be re-drafted in the same way as article 7 relating to the continental shelf, subject to the approval of the Drafting Committee.[12] The article should stipulate, first, the principle that the delimitation of the boundary should be determined by agreement between the parties concerned, and, secondly, that only if negotiations broke down should the principle incorporated in article 15 be applied.

56. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Zourek, but suggested that his amendment should be considered by the Drafting Committee before the Commission finally adopted it.

Subject to re-drafting by the Drafting Committee, article 15 with Mr. Zourek's amendment was adopted.

Article 16: Meaning of the right of innocent passage

57. Mr. FRANÇOIS, Sepcial Rapporteur, drew attention to the Government of India's proposal to add the words " except in times of war or emergency declared by the coastal State " (A/CN.4/97/Add.2, para. 96). He would point out, however, that a distinction should be drawn between a state of war and a state of emergency. With regard to the former, all the rules concerning passage would apply only in time of peace and the Government of India's point could be adequately met by a statement to that effect in the comment. The proposal with regard to a state of emergency was a different matter entirely, and the Commission would have to decide whether to approve the far-reaching decision of the admissibility of an exception for a state of emergency unilaterally declared by the State in question.

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[11] See para. 29 above.

[12] A/CN.4/SR.360, para. 30.

58. The Commission would be hardly likely to accept the contention of the Government of Israel that paragraph 3 of the draft rendered the effect of paragraph 1 completely nugatory. Paragraph 3 merely restricted the right of innocent passage to vessels proceeding on their lawful occasions; the stipulation that passage was innocent if " the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State..." should be maintained. The Government of Israel had raised numerous other objections of detail which, however, did not give rise to any specific proposals.

59. He was not clear as to the purpose of the United Kingdom Government's proposal for the insertion in paragraph 3, after the words " coastal State ", of the words " or for the purpose of avoiding import or export controls or customs duties of the coastal State ". He had the impression that the point was already covered by the text as it stood.

60. The Yugoslav amendment (A/CN.4/97/Add.2, para. 103), which was in the nature of a drafting change, might be left for consideration by the Drafting Committee. There was general agreement that the phrase " public order " was not satisfactory. Subject to the re-wording of paragraph 3, therefore, and to a decision on the question raised by the Government of India, the draft article could be adopted.

61. Mr. KRYLOV said the article should be retained as drafted. The Government of India's proposal could be adequately met by an explicit statement in the comment that the rules concerning passage would be applicable only in time of peace. He recalled that in the Montreux Convention of 1936,[13] Turkey had gained its point by the insertion of an article based on a state of emergency. In the light of article 33 of the Charter of the United Nations, however, any such reference were better omitted, since it might be interpreted as a misconception of the Charter. In any case, a state of emergency was extremely difficult to define.

62. Mr. SANDSTRÖM, concurring, adduced the further argument that the question was already settled by the provisions of article 18.

63. Mr. PAL pointed out that the proposal of the Government of India had already been considered by the Commission at its seventh session (A/2934, p. 30); he was not disposed to raise it again.

64. Sir Gerald FITZMAURICE understood that the United Kingdom proposal (A/CN.4/97/Add.2, para. 101) had been inspired by the consideration that a vessel entering the territorial sea for the purpose of smuggling or with the intent to avoid the import or export controls of the coastal State could not be regarded as being on innocent passage. From that angle, the case hardly seemed to be covered. Paragraph 3 of article 16 referred to " acts prejudicial to the security of the coastal State ", but it was doubtful whether an infringement of customs regulations would fall under the heading of an act prejudicial to security. Paragraph 1 of article 18 also referred to security, with the addition of " such other of its interests as it is authorized to protect under the present rules ". A rule authorizing the protection of that specific interest then had to be sought, and it was not clear where it could be found. The specific provisions (*a*)-(*e*) of article 19 did not apply, although the case might be regarded as being covered by the general phrase at the beginning of that article that "Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted by the coastal State etc.". The whole process seemed rather circumambulatory. The case was an important one and the customs authorities in the United Kingdom doubted whether the article as drafted really covered it.

65. Mr. ZOUREK, while endorsing the principle behind the United Kingdom proposal, said that the point was surely already covered by the existing provisions in paragraph 3 of article 16 and the general stipulation at the beginning of article 19. He could not conceive that the " laws and regulations enacted by the coastal State " did not embrace customs regulations. If, however, the text was considered insufficiently explicit, a specific stipulation with regard to customs control could be added to article 19.

66. Mr. PAL, disagreeing, said that in a matter of such importance no room should be left for any ambiguity. Even the detailed provisions of article 19 were inadequate, and article 16 merely referred to the security aspect. The analogy of the article on the contiguous zone, which had specifically referred to the exercise by the coastal State of the control necessary to prevent and punish the infringement, within the territorial sea, of its customs, fiscal or sanitary regulations, was a useful guide and the United Kingdom proposal, which he would support, would bring article 16 into line with it.

67. Mr. SANDSTRÖM said that, since the existing draft did not meet the point raised, he would accept the proposal of the United Kingdom Government.

68. Sir Gerald FITZMAURICE said that, in view of the support given by Mr. Pal and Mr. Sandström, he would formally propose the addition in paragraph 3, after the words " coastal State ", of the words " or for the purpose of avoiding import or export controls or customs duties of the coastal State ".

69. Mr. ZOUREK, while fully supporting the principle inspiring the proposal, reiterated his opinion that the opening phrase of article 19, which was of general application, adequately covered the case in question.

70. Mr. SPIROPOULOS said that Mr. Zourek's point would be valid if it were not for the phrase continuing the article, which read: " in conformity with these rules and other rules of international law ". It was highly doubtful whether the existing rules of international law did cover the case, and in view of that uncertainty it would be advisable to make the text quite clear by accepting the proposal, either in the form of an article or as an explanation in the comment.

[13] League of Nations Treaty Series, Vol. CLXXIII, 1936-37, No. 4015—Convention regarding the Regime of the Straits. Signed at Montreux, 20 July 1936, Article 6.

71. Mr. SANDSTRÖM pointed out the difference in scope between the provisions of articles 16 and 19. The former recognized the right of innocent passage, whereas the latter laid stress on the obligations of vessels exercising that right. The distinction led to different consequences in that under article 16, in certain circumstances, a vessel could be prohibited from exercising that right. Under article 19, the action of the local authorities would be limited to measures of control over ships which were already exercising the right of innocent passage.

72. Mr. ZOUREK disagreed and urged that, in addition to the single case it was proposed to add to paragraph 3 of article 16, there were many other cases that would also remove the qualification of innocence in respect of the right of passage. For instance, sub-paragraph (*d*) of article 19 referred to rights of fishing; if a vessel entered the territorial sea of a coastal State in order to fish, would that be regarded as innocent passage? Or to take the other cases of acts prejudicial to the security or infringing other regulations of the coastal State, it was obvious that under article 19 they constituted offences. If desired, the article could be completed, although in view of the words " in particular " that was not necessary. A strictly logical approach would demand either the specification of all conceivable cases or none. There was no justification for specifying in article 16 just a single case.

73. Sir Gerald FITZMAURICE said that the situation that Mr. Zourek deprecated did in fact exist, because paragraph 3 of article 16, far from specifying all conceivable cases, referred only to acts prejudicial to the security of the coastal State as removing from the passage the qualification of innocence; in other words, even on the existing basis none of the cases under article 19 made the passage non-innocent. The mere addition of another case to paragraph 3 would in no way alter the situation in that respect.

74. Mr. Sandström had rightly pointed out that the distinction between article 16 and 19 was that in the former, irrespective of any act of the vessel in the territorial sea, passage could be refused on the grounds that it was not innocent. Under the latter article, a right of passage existed and could not be withheld, although penalties could be imposed for any infringement of the coastal State's regulations during that passage.

75. Mr. ZOUREK said that he could not accept Sir Gerald Fitzmaurice's contention that paragraph 3 of article 16 limited non-innocence of passage to cases of the commission of an act prejudicial to the security of the coastal State. The following words, " or contrary to the present rules, or to other rules of international law ", added two further conditions, making three in all. Moreover, the case was adequately covered by the obligation in article 19 to comply with the laws and regulations of the coastal State. If, however, the Commission decided than an additional specification must be inserted, it should be added to article 19 and not to article 16.

76. Mr. HSU said that there was no doubt about the soundness of the motive behind the United Kingdom proposal. The question arose, however, whether article 16 was the appropriate place to insert such a provision. The case in question was incidental to trade, and it might therefore be argued that in such a context it was a misnomer to withhold the classification of innocence from the passage. Trade in itself was an innocent occupation.

77. Mr. SANDSTRÖM, stressing the essential differences between the provisions of articles 16 and 19, said that paragraph 3 of article 16 covered the case of the whole of the passage through the territorial sea being rendered non-innocent by the commission of certain acts, whereas article 19 referred to isolated incidents during passage.

78. Mr. PAL said that the discussion showed the desirability of amending paragraph 3. Since other States were not bound to recognize the customs regulations of a coastal State, an express reference to the case quoted by the United Kingdom was required.

79. Mr. ZOUREK was not opposed to the principle of the proposal; he merely maintained that the case was covered by the phrase " contrary to the present rules ".

80. Sir Gerald FITZMAURICE explained that the United Kingdom proposal was aimed at the activities of so-called " hovering " vessels, which waited just outside the territorial limits for an opportunity to proceed inside in order to engage in smuggling. Many countries suffering from such activities had enacted legislation to put a stop to that practice.

81. Mr. HSU said that in view of Sir Gerald Fitzmaurice's explanation, he would accept his proposal.

82. Mr. SANDSTRÖM proposed that the point be met by an explicit reference to the case in the comment to the article.

83. Mr. ZOUREK, reiterating his endorsement to the principle of the proposal, said that a reference in paragraph 3 of article 16 to the provisions of article 19, thereby linking them together, would cover the case, which was only one among many possibilities. Mr. Sandström's proposal, however, was acceptable.

84. Sir Gerald FITZMAURICE said he could accept Mr. Sandström's proposal, provided that the reference was made in specific relation to article 16.

Article 16 was adopted, subject to reference to Sir Gerald Fitzmaurice's amendment being made in the comment to that article.

Article 17: Duties of the coastal State

85. Mr. FRANÇOIS, Special Rapporteur, said that the Yugoslav Government wished articles 17 and 19 to be transposed so that the interests of the coastal State would be referred to before those of navigation. It also suggested replacement of the words " principle of the freedom of communication " in paragraph 1 of the article by the words " innocent passage ".

86. He was not in favour of acting on the first suggestion, especially as it was linked with the claim that the interests of the coastal State should have precedence over those of navigation. The Commission had carefully considered the arrangement of the articles in the draft and the order it had adopted was probably the best under the circum-

stances. The second suggestion involved a relatively unimportant drafting change and might well be acted upon. The term " innocent passage " was certainly more precise than the words used in the article.

It was agreed to substitute the words " innocent passage " for the words " principle of the freedom of communication " in paragraph 1 of article 17.

Article 17, as thus amended, was adopted.

Article 18: Rights of protection of the coastal State

87. Mr. FRANÇOIS, Special Rapporteur, said that the Turkish Government doubted the advisability of formulating any rules on passage of vessels through straits. The Turkish Government's comment was clearly inspired by its concern to preserve the status of the straits of the Bosphorus and the Dardanelles as fixed by international convention. It was going rather far, however, to suggest that no general rules be enunciated for the large number of straits in the world not covered by international agreements. It should be sufficient if the Turkish Government were given the assurance that the Commission's article was not intended to affect straits whose status was governed by conventions.

88. The Turkish Government also suggested that paragraph 4 begin with the words " In peace time " and that a clause be inserted expressly reserving the rights of the coastal State in time of war, or when it considered itself under the menace of war, or when it was acting in conformity with its rights and obligations as a Member of the United Nations. The first and second suggestions were already covered by the decision of the Commission that all its rules applied to time of peace. As to the question of the menace of war, he understood it to be the Commission's view that such a concept was too vague to serve as a justification for the suspension of the right of passage. Some reference to the question might, however, be made in the comment on the article. The last suggestion dealt with a question to which Mr. Salamanca had frequently drawn attention. The Commission might consider including a clause reserving the rights of the coastal State when acting in conformity with its rights and obligations as a Member of the United Nations.

89. The Government of Israel claimed that, regardless of their position as territorial sea, straits in the geographical sense which constituted the only access to a harbour belonging to another State could under no circumstances fall under the regime of the territorial sea. It appeared to have in mind the Gulf of Aqaba, at the head of which Israel had a port to which the only access was through the territorial seas of other coastal States, the width of the gulf being never more than twice that of the territorial sea. The case was exceptional—possibly unique. He wondered whether Faris Bey el-Khouri would give his views on whether the Commission should insert a stipulation on the lines suggested by Israel, either in article 18 or in the commentary on it.

90. The Government of Norway suggested that the words " and other rules of international law " be added to the words " under the present rules " at the end of paragraph 1. It would be more consistent with the text of other articles adopted by the Commission if such an addendum were made.

91. The United Kingdom Government claimed that paragraph 1 of the article covered much the same ground as paragraph 3 of article 16. He could not agree with that claim and was anxious to retain paragraph 1. Paragraph 3 of article 16 merely defined innocent passage in general. Paragraph 1 of article 18, on the other hand, dealt with a special case in which the coastal State was granted an exceptional right which did not emerge at all from the wording of article 16.

92. The Yugoslav Government proposed the following text for paragraph 1:

> 1. A coastal State may take the necessary steps in its territorial sea to protect itself against any endangering of its security and public order, security of navigation, customs, sanitary and other interests.

The Commission did not favour references to " public order ",[14] and he could not recommend the amendment.

93. Faris Bey el-KHOURI said that the case of the Gulf of Aqaba was exceptional. Though the Commission should study the suggestion of the Israel Government he did not consider that it should formulate a general rule on the subject. To forbid under any circumstances the suspension of the innocent passage of foreign vessels through straits such as those described by the Israel Government would be unfair to the coastal States concerned. A port was not a natural feature existing from time immemorial, and if a State saw fit to establish a port at a point to which the only access was through the territorial waters of other States, it must accept the consequences. It was always open to the State in question to establish a port elsewhere or to conclude agreements with the other coastal States on the question of access to the port.

94. Sir Gerald FITZMAURICE said that it was difficult to see from the text what exactly the Israel Government had in mind. Vessels would in any case enjoy the right of innocent passage through a gulf consisting entirely of the territorial waters of coastal States to a port belonging to a third State. He wondered whether the situation envisaged by the Israel Government was not already covered by article 18.

95. He could not agree with Faris Bey el-Khouri that a State establishing a port in such a situation must accept the consequences. Under both municipal and international law, a person or State setting up a building on a river had certain rights *vis-à-vis* the persons or States controlling the flow of that river upstream. A State had a perfect right to establish a port on a gulf such as that envisaged and shipping should have normal access to it.

96. Mr. FRANÇOIS, Special Rapporteur, pointed out that paragraph 4 of article 18 related to straits between two parts of the high seas, and so did not apply to the Gulf of Aqaba which, though open to the high seas at one end, merely gave access to a port at the other.

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[14] See para. 60 above.

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

367th MEETING

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

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

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

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

Article 19: Duties of foreign vessels during their passage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 19, as thus amended, was adopted.

Article 20: Charges to be levied upon foreign vessels

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

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

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

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

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

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

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

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

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

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

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

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

On that understanding, article 20 was adopted.

Article 21: Arrest on board a foreign vessel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 23: Government vessels operated for commercial purposes and

Article 24: Government vessels operated for non-commercial purposes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 25: Passage of warships

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

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

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

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

The meeting rose at 1.10 p.m.

368th MEETING

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

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

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

Article 25: Passage of warships (continued)

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

2. Mr. KRYLOV favoured the retention of the article as drafted, although it might be thought that paragraph 2 was slightly tautologous in its repetition of the provision of paragraph 4 of article 18.

3. With regard to the substance of the article, he would invoke the authority of Gidel, who had written: " Le passage des bâtiments de guerre étrangers, dans la mer territoriale, n'est pas un droit, mais une tolérance."[1] That principle had been taken up by the Belgian Government (A/CN.4/99, page 12), which upheld the view that the right of passage of warships through the territorial sea was merely a concession contingent on the consent of the coastal State. The American jurist Elihu Root, in the North Atlantic Fisheries Arbitration, had made the same point, " Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and re-pass, because they do not threaten."[2] Moreover, both the Danish and Netherlands Governments held that, although authorization was not required, previous notification through diplomatic channels was in accordance with international usage. The absence of any comment from the United States Government seemed to imply acceptance of the draft article. Only the United Kingdom opposed both previous authorization and notification.

4. In view of the changed situation brought about by the provisions of the Charter of the United Nations —a highly relevant consideration—the 1955 draft was an accurate reflexion of contemporary conditions and there was no reason to modify it in any way.

5. Mr. FRANÇOIS, Special Rapporteur, felt that Mr. Krylov had not stated the Netherlands' point of view correctly, for in its reply it had urged the restoration of the 1954 text, under which neither previous authorization nor notification was required. The reason was that, in the opinion of the Netherlands Government and the Netherlands Navy, in practice neither was required.

6. The exclusion of the requirement of previous authorization or notification had been found unacceptable by some governments, and as a result the draft had been modified at the previous session. The 1955 draft was opposed by only two States, whose criticism might be met by a slight drafting amendment to paragraph 1. He would simply change the order of the two sentences it contained, and insert at the beginning of the new second sentence the word " Nevertheless,". That amendment would have the advantage of providing that, so long as the coastal State did not prohibit the right of innocent passage, the existing situation would continue.

7. Sir Gerald FITZMAURICE said that he would go still farther than the Special Rapporteur and propose reverting to the 1954 text. His views on the matter were well known, and he need only refer to his remarks at the previous session.[3] His criticism of the draft article was that it neither accurately enunciated international law nor reflected international practice. In a set or articles in which the Commission was attempting to codify existing law, it should not introduce an innovation which was in conflict with usage. Hitherto, a clear distinction had been drawn between the visit by a foreign warship to the port of a coastal State and passage through some part of its territorial sea. International practice was that in the former case notification was always given, whereas in the latter, when it was a question of mere passage, that formality was not required. The view that previous notification was required was based on an erroneous conception of the function of warships in time of peace and of the reasons for the desired recognition of the right of innocent passage. In peacetime, warships had the right to proceed on their lawful occasion, just as had any other vessels, and passage through the territorial sea was due to the fact that such a course was the only one available, or that it lay along a normal shipping lane, or that, on account of weather or other special conditions, it was the most practicable highway. Why then assume some sinister motive calling for previous authorization or notification? In practice, the coastal State would gain nothing by such a provision, which would merely constitute an impediment to navigation.

8. The comment by the United Kingdom Government (A/CN.4/99/Add.1, page 70) stressed that there was no question of disputing the right of the coastal State to regulate the passage of warships through the territorial sea. It listed four considerations that should govern the treatment of warships by the Commission, and the fourth of those, referring to the tendency of some countries to claim large extensions of the territorial sea, was of particular importance. Even if it could be conceded that, on the basis of the three-mile limit, the passage of foreign warships through its territorial sea might cause some apprehension to the coastal State, with the extensions now claimed there could be none.

9. Again, articles 16 to 19 were applicable to all vessels, and in respect of warships did provide adequate safeguards against abuse, including the right to suspend passage under certain conditions. The innovation introduced in 1955 would have the regrettable consequence of rendering the draft unacceptable to those countries whose warships had been in the habit of proceeding freely on their lawful occasions about the world. Paragraph 2 of the 1954 draft provided ample safeguards and the 1954 draft was the text that should be adopted.

10. Mr. SCELLE, fully endorsing Sir Gerald Fitzmaurice's remarks, said that it was surprising and regrettable that at its previous session the Commission should have jettisoned the liberal text that it had adopted in 1954, for its decision was in accordance neither with customary law nor with the requirements of the situation.

11. He could not support Mr. Krylov's interpretation of Gidel's position in the matter. His own understanding of Gidel's position was that right of innocent passage was not a concession by the coastal State, but an absolute necessity of navigation. French legal doctrine had tended to stress the fusion of the territorial sea with the conti-

[1] *Le droit international public de la mer*, vol. III, page 284.

[2] *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague, 1910*, World Peace Foundation, 1912, p. 99.

[3] A/CN.4/SR.306, paras. 89 and 90, A/CN.4/SR.307, paras. 16 to 21, A/CN.4/SR.308, paras. 27 and 30.

guous zone and the high seas, maintaining that passage through territorial waters was an essential requirement for the utilization of the high seas. Moreover, under certain circumstances it might be undertaken as a result of some unforeseeable maritime contingency, in which case notification could obviously not be expected.

12. Mr. KRYLOV said that, in the context of the article, Sir Gerald Fitzmaurice's reference to the navigational aspect of the passage of a warship through the territorial sea seemed to be irrelevant. Navigation was a function of merchant vessels, but not of warships. With the possible exception of cadet training ships, the latter did not navigate ocean waters; they proceeded from one place to another under government orders, which was a different matter.

13. With regard to the Special Rapporteur's reply to his (Mr. Krylov's) previous comment, he regretted his misunderstanding of the Netherlands position. The Special Rapporteur's proposal was therefore perhaps acceptable.

14. In reply to Mr. Scelle, he had the strong impression that he had quoted Gidel accurately, but he had referred to him only as representing French doctrine on that subject.

15. Faris Bey el-KHOURI, drawing attention to one point that had not been mentioned by Sir Gerald Fitzmaurice—with whose remarks he was in general agreement—said that the extension of the limit of the territorial sea from three to twelve miles would result in most of the maritime highways of the world falling within territorial waters. That was a consideration that must be borne in mind, for it was essential that the article should not prove an impediment to navigation, although it was true that the movements of warships were not in the same category as those of merchant vessels.

16. Mr. ZOUREK pointed out that the Special Rapporteur, in introducing the article at the previous meeting,[4] had referred only to the comments by governments communicated that year. Account should also be taken, however, of the replies from governments in 1955, some of which, in particular that of the Swedish Government (A/2934, p. 39) were critical of the 1954 draft.

17. The reason for the provision by international law of special stipulations with regard to the innocent passage of warships through the territorial sea of a coastal State was, as the Special Rapporteur had correctly pointed out, based on their dangerous character[5] The mere presence in territorial waters of a foreign warship constituted a threat to the coastal State and might well be a disturbance to the tranquillity of mind of its nationals. A warship was, after all, a combatant unit of the armed forces of a State. International law prohibited the free entry of foreign land forces into the territory of a State, and the reasons for following that analogy in respect of the passage of warships through the territorial sea—which also constituted national territory—were cogent.

18. International practice in the matter was far from uniform, as was shown by the replies from governments to the questionnaire circulated by the Preparatory Committee of the 1930 Conference for the Codification of International Law[6] some States requiring previous notification, others not. The practice of the passage through the territorial sea of foreign warships was not founded on international law, but on *comitas gentium*. As Mr. Krylov had correctly pointed out, passage of warships through the territorial sea was generally allowed as a matter of courtesy; but there was no right, it was only a concession, or act of comity, which might be withheld without any infringement of the provisions of international law. The correctness of that view was borne out by the records of the 1930 Conference for the Codification of International Law, which showed that it had been endorsed by both the United States and the United Kingdom representatives.[7] That view was also held by many other authorities. Mr. Krylov had already quoted Gidel's opinion, to which he would add only that of Oppenheim: "But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognized";[8] and that of the Harvard Law School Research in International Law which stated the same thesis.[9] There was therefore a considerable volume of evidence that the practice of the passage of warships through the territorial sea was based not on any right under international law, but on the comity of nations.

19. Mr. Krylov had also drawn attention to the provisions of the Charter of the United Nations, which had the effect that warships could be operated only for defensive purposes. Any departure from that principle would be in conflict with the Charter. The presence in the territorial sea of the warship of a foreign State without previous notification could hardly be interpreted as being for purposes of defence. At the previous session, Mr. Scelle too had made the point that the adoption of the United Nations Charter had materially altered the situation,[10] a point with which he was in full agreement.

20. The 1955 draft, therefore, was entirely in accordance with the provisions of international law, and a study of the text, in particular the use of the word "may" in the first sentence and of "Normally" in the second sentence of the first paragraph, showed that it was a compromise solution which took into account the interests of both the coastal State and the foreign State.

21. Mr. SANDSTRÖM clarified the Swedish Government's view by quoting the comment to which Mr. Zourek had referred. It stated that, according to the Commission's draft, the right of passage of foreign warships through the territorial sea of a coastal State appeared

[4] A/CN.4/SR.367, para. 105.

[5] *Ibid.* para. 90.

[6] League of Nations Publications: C.74.M.39.1929.V, pp. 65-70.

[7] League of Nations Publications: C.351(*b*).M.145(*b*).1930.V, pp. 59 and 63.

[8] International Law (7th edition), vol. I, p. 448.

[9] Harvard Law School Research in International Law, *Territorial Waters*, 1929, p. 295.

[10] A/CN.4/SR.306, para. 91.

to rest on a somewhat precarious basis and that consequently it might be preferable to make no provision for the right of passage of warships in a future convention (A/2934, p. 39).

22. The feelings of small States could not be disregarded, for some, such as Denmark and Norway, had undergone distressing experiences during the Second World War as a result of the passage of foreign warships through their territorial sea. It might be objected that those incidents had taken place during a world war and were therefore abnormal, but that did not allay the apprehension felt in small countries. Mr. Zourek's point was therefore of importance and, in view of the uncertainty with regard to the precise provisions of international law, it would be more in accordance with contemporary thought and the United Nations Charter to retain the text of the 1955 draft.

23. Mr. SCELLE said that if, as it appeared, he had misinterpreted the view of Professor Gidel, he must point out that his colleague had failed to take account of the essential unity of the sea. The territorial sea, the contiguous zone, and the high seas, though different from the legal standpoint, were, from the practical standpoint of navigation, all parts of a single element, the sea. And navigation was still navigation, whether the ship were a merchant ship or a warship. Policemen had the same rights of movement on the highway as ordinary citizens—fortunately—for otherwise the only persons who would be able to move about freely would be brigands. In the same way, warships, the policemen of the seas, had the same normal rights of passage as commercial shipping. Mr. Zourek's conception of the purely defensive role of warships would severely restrict their movement. Warships could not perform their task if perpetually anchored in their home roadstead. If they were not permitted to pass through territorial waters, they would have no *droit d'escale* and so would be unable to circulate freely on the high seas.

24. Mr. Zourek had also referred to the concept of comity in connexion with the permission for warships to pass through the territorial sea. But international comity, though it might at one time have served as a substitute for international law, could not serve as a basis for any rule of international law.

25. The Commission appeared to be forgetting that chapter VII of the United Nations Charter had profoundly modified international law. Though no agreements had been concluded, as provided for in article 43 in that chapter, regarding the armed forces to be made available to the Security Council by the Members of the United Nations, it was inconceivable that Members, were there a threat of war, would not take measures to support the action of the Security Council. That being so, there must be freedom of movement for warships to travel to parts of the world where aggression, which the Commission had described as the principal international crime, was threatened. However, a power would have to be completely mad before it would commit aggression at a time when all nations wished for peace and were, implicitly at least, bound to preserve it. There was therefore no reason to restrict the right of passage of warships because of the danger of sudden invasion, as in the case, cited by Mr. Sandström, of Denmark and Norway during the recent World War.

26. In short, he did not think that the text adopted by the Commission at its sixth session was in any way outmoded. On the contrary, it was a step forward and should be made a rule of international law.

27. Mr. LIANG, Secretary to the Commission, after recalling that for many peoples the idea of foreign warships was closely associated with that of a display of force, said that according to the laws and regulations examined by the Secretariat, many countries subjected the passage of warships through the territorial sea to previous authorization or notification. It was quite understandable that States which felt that they had reason to be suspicious of foreign warships should enact such provisions. While previous authorization was not required in every case, notification appeared to be quite generally practised. Indeed, since warships constituted a far greater threat to the safety of traffic than did commercial shipping, it might be regarded as a necessary precaution.

28. The requirement of authorization or notification was, however, subject to two qualifications which were not open to dispute. The first was the right of warships of a State to enter another State's waters during a storm or other emergency, and the second the absolute right of innocent passage through straits normally used for international navigation between two parts of the high seas. In other cases, however, previous notification appeared to be called for on commonsense grounds and by general practice.

29. Referring to Mr. Scelle's statement, he said that when an international police force came into being in pursuance of Article 43 of the Charter, no notification or authorization would be necessary with respect to warships belonging to that force. The Commission's draft, however, envisaged other situations which were more normal and had nothing to do with the application of enforcement measures by the United Nations.

30. Mr. ZOUREK observed that *droit d'escale* was quite different from right of innocent passage. In any case, the modern warship normally carried enough fuel to make it generally unnecessary for it to exercise its *droit d'escale*. There was, incidentally, no rule of international law that warships of a State must be admitted to the ports of other States, though, of course, they might be admitted in case of distress.

31. Much had been made of the fact that it was merely " innocent passage " that was involved. But a coastal State could hardly know whether the passage of a warship was innocent unless it had at least been notified of the warship's arrival. And the experience of some countries in time of crisis or war was not calculated to allay their fears in that respect.

32. Referring to Mr. Scelle's and the Secretary's remarks on an international police force, he pointed out that, under Article 43 of the United Nations Charter, the placing of armed forces, assistance and facilities, including rights of passage, at the disposal of the Security

Council, was not automatic, but conditional on the conclusion of a special agreement or agreements.

33. Mr. AMADO observed that the countries of Latin America had known what it was to experience a display of force by foreign warships. He could not understand the objections to the requirement of previous notification. If an armed foreigner entered a State's territory, the police had a perfect right to inquire his intentions. Why, therefore, must a State tolerate the presence of powerful naval units in its territorial waters and not even have the right to know the reason for their presence? He preferred the text adopted by the Commission at its seventh session.

34. Mr. SPIROPOULOS said that he had no strong feelings either for or against the principle of subjecting the right of passage of warships to previous authorization or notification. He was merely interested in enabling the Commission to reach a solution. The provisions of the Charter cited by Mr. Scelle did not have any real bearing on the problem. All questions of international law were affected in some degree by the Charter, and he could not see that the problem under discussion was affected any more than another. The 1930 Codification Conference, regarding the passage of foreign warships through a territorial sea as a by no means extraordinary and, indeed, rather rare occurrence, had approached the question in a much calmer fashion than the Commission and had not been at all concerned about the possibility of a display of force. And quite rightly, since, in modern times, there was no need to enter the territorial sea of a State in order to make a display of force.

35. As a possible compromise solution, he would propose as an amendment the deletion of the first sentence in paragraph 1, merely retaining the words " Normally, the coastal State shall grant innocent passage to warships through the territorial sea subject to the observance of the provisions of articles 18 and 19." Such a solution would leave a State the right to require previous authorization or notification in circumstances which were not normal. It would also reflect existing practice and would be much on the lines of paragraph 1 of article 12 in the text of the Codification Conference at The Hague, which ran as follows: " As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification." [11]

36. Faris Bey el-KHOURI thought that Mr. Spiropoulos' amendment offered a satisfactory solution. It established the principle that coastal States should allow innocent passage to warships subject to certain conditions but, at the same time, did not deprive those States of the right to make regulations. Regulations of that kind would in any case be of no value against States acting in bad faith. The invasion of Norway and Denmark during the Second World War could not have been prevented by regulations.

37. Sir Gerald FITZMAURICE agreed with Mr. Spiropoulos in noting a tendency to introduce ideological and sociological considerations which were not really germane to the subject. Much had been made of the threat to the security of the coastal State inherent in the passage of warships through its territorial sea. Under modern conditions such considerations were totally unrealistic. Warships could bombard a coast with the utmost accuracy from a distance of 40 miles or more and aircraft carriers could operate from a distance of 200 or 250 miles or much more. There was no need whatever for warships wishing to commit hostile acts to enter the territorial sea, and if they did wish to, they certainly would not ask previous authorization.

38. The discussion appeared to have moved away from the real problem, which was that of granting innocent passage through the territorial sea—in other words, a matter of navigation. And, despite Mr. Krylov's claims,[12] the navigational needs and rights of a warship travelling normally from one point to another were identical with those of a commercial vessel.

39. Mr. Zourek, in a very interesting statement, had really only proved points upon which all were already agreed. It was admitted that there had always been certain reservations regarding the right of innocent passage of warships. The fact remained that the practice of States, on which international law was ultimately founded, normally admitted the passage of warships through the territorial sea, without authorization or notification. Indeed he was prepared to wager that the admiralties of most States with warships, though notifying other States from time to time, did not regard themselves as bound to do so in cases of ordinary passage of warships, without stopping, through the territorial sea. He therefore considered that the Commission would be taking the wrong course in subjecting the passage of warships, for the first time, to such requirements. He would not, however, press his proposal to restore the text adopted by the Commission at its sixth session and would accept Mr. Spiropoulos' amendment, which left the question open.

40. Mr. KRYLOV said the wisest course would be to retain the text adopted at the Commission's seventh session or, failing that, to adopt the Special Rapporteur's proposal which did not involve a change of much consequence. He was quite unable to accept Mr. Spiropoulos' amendment since it only half settled the question.

41. Mr. EDMONDS, comparing the texts adopted by the Commission at its sixth and seventh sessions respectively, pointed out that in the latter the right of innocent passage of warships was qualified only to the extent that it was subject to previous authorization or notification. The amendment proposed by Mr. Spiropoulos would, he thought, leave the question even more in doubt and imply a much more restricted right than that enunciated in the text adopted by the Commission at its sixth session. It was, furthermore, not clear what meaning was to be attached to the word " normally " in Mr. Spiropoulos' text. For the sake of clarity, the Commission should

[11] League of Nations Publications: C.351.M.145,1930.V, p. 130.

[12] See para. 11, above.

either return to the text adopted at its sixth session or approve that adopted at its seventh session.

42. The CHAIRMAN declared the discussion closed and invited the Commission to vote first on Mr. Spiropoulos' amendment[13] to delete the first sentence of paragraph 1.

Mr. Spiropoulos' amendment was rejected by 9 votes to 3, with 2 abstentions.

43. Sir Gerald FITZMAURICE said that, Mr. Spiropoulos' amendment having been rejected, he wished to resubmit his own proposal[14] that the Commission revert to the text adopted at its sixth session.

Sir Gerald Fitzmaurice's proposal was rejected by 7 votes to 3, with 4 abstentions.

44. At the request of Mr. Krylov, the CHAIRMAN put to the vote the Special Rapporteur's amendment[15] that the position of the two sentences in paragraph 1 of article 25 as adopted by the Commission at its seventh session be transposed.

The Special Rapporteur's amendment was rejected by 4 votes to 3, with 6 abstentions.

Article 25 was adopted without change.

Article 26: Non-observance of the regulations.

There were no comments on the article.

Article 26 was adopted without change.

45. The CHAIRMAN *declared* that the Commission had completed its consideration of the draft articles on the regime of the territorial sea.

The law of treaties (item 3 of the agenda) (A/CN.4/101)

46. The CHAIRMAN invited the Commission to take up item 3 of its agenda, the law of treaties, and called on Sir Gerald Fitzmaurice, Special Rapporteur, to introduce his report (A/CN.4/101).

47. Sir Gerald FITZMAURICE, Special Rapporteur, said he would not go into the articles embodied in his report as that would involve too detailed a discussion. He wished to have the Commission's guidance on some of the points on which his draft had been based, so that he might be able to base his future work on the general feeling expressed, or perhaps amend some of what he had already done. The questions on which he would be grateful for an expression of views on the part of members of the Commission were as follows:

(i) Did members of the Commission agree that in general a codification of the law of treaties should not take the form of a convention, but of a code *stricto sensu* —i.e., of a set of rules and principles stated in the abstract, and not in the language of obligation?

(ii) Did members agree that the articles on the drawing-up and conclusion of treaties (with which the present report was mainly concerned) had not previously been formulated in sufficient detail and required expansion? The answer to that question would be without prejudice to the further question of what degree of expansion was desirable, a question which might be left open for the present.

(iii) Did members favour the idea that, although a code on the law of treaties must begin with the topic of the *conclusion* of treaties, it should nevertheless, as a matter of presentation, give an early place to certain absolutely fundamental principles of treaty law, such as those set out in articles 4-9 of the present text, even though, as a matter of pure logic, those articles should probably figure in later parts of the code.

(iv) Did members favour a continuation of the method of attempting to draft each article of the code in such language as to cover all kinds of "treaties" by one and the same form of words—i.e., not only formal treaties and conventions, but also such things as exchanges of notes, agreed memoranda, etc.—and not only general multilateral instruments, but also bilateral ones? Or would it be better to split up the subject more, and devote special sections to particular classes of instruments? A combination of those methods might also be envisaged.

(v) At its third session, the Commission had decided[16] to leave aside the question whether the code should cover treaties made by and with international organizations. It had decided that the code should be drafted in the first place so as to cover States only. The question whether the articles so drafted could be applied to international organizations as they stood, or would require modification, could be decided later. Sir Hersch Lauterpacht in his reports[17] had definitely included international organizations. He himself had mentioned the matter in his report in the commentary on articles 1 (3) and 2 (1) in paragraphs 2 and 3 on page 44. He felt it would be desirable to take a final decision as to whether international organizations should be covered, and if so in what form.

48. To take those questions in order and a little more fully, in connexion with the first one, he explained that he was perfectly well aware that more than one method might be employed. The Commission's draft on the law of the high seas was an example of a combination of the methods used in conventions and in codes, as the language adopted had been to some extent the conventional language in which States undertook obligations. That method might not be wholly appropriate in dealing with the law of treaties. There would inevitably be passages where conventional language would be used, but the subject lent itself to looser treatment, because a certain amount of introductory or explanatory matter was very often required. If the Commission departed from conventional language, it would be able to introduce some general language, which was often extremely useful for explaining in an article itself the precise reasons for the form proposed, without the need for reference to a commentary.

49. As regards his second question, he was conscious

[13] See para. 35, above.

[14] See para. 7, above.

[15] See para. 6, above.

[16] A/CN.4/L.55.

[17] A/CN.4/63 and A/CN.4/87.

that he might have expanded the articles more than was strictly necessary and that the Commission might find on examination that they could be abbreviated or telescoped. If, however, the basis for his proposals was accepted, the articles would be fuller than those drafted by Professor Brierly[18] or by Sir Hersch Lauterpacht.[19] He felt some diffidence in departing from the previous reports, but his impression had been that, while as a matter of law the topic of the conclusion of treaties had been very adequately and effectively set out, the articles were not adequate when related to daily practice, and many points had not been covered.

50. In the law of treaties there was a distinction, although it was often considerably blurred, between matters strictly of law and matters which might be regarded as merely protocol and not really matters of law in the sense that they could not be dispensed with. Care should be taken not to overstep the line which separated the law of treaties and daily practice with regard to treaties. Nevertheless, there was a case for introducing into a code on the law of treaties matters which were not strictly law, but very considerably affected practice.

51. His third question did not raise a point of the first importance. He had to some extent departed from logic by beginning with the topic of the drawing-up and conclusion of treaties and going on in articles 4 to 9 to introduce very general and absolutely fundamental principles of treaty law which went beyond that topic. It was perfectly true that articles 4 to 9 should have been placed later, in connexion with the validity of treaties and the position of third parties. As a matter of presentation, however, it had seemed more advisable that a code on the law of treaties should start by enumerating a few really fundamental principles of treaty law, and he had therefore begun by defining substantially what a treaty was, for the purpose of a code, had continued with articles enumerating the fundamental principles of treaty law, and had then gone on to the topic of the drawing up and conclusion of treaties. There were other questions of arrangement which would have to be decided in due course, but they were less important.

52. His fourth question raised a point of some difficulty, of which anyone drafting a code of treaty law immediately became conscious. The system adopted by Professor Brierly and Sir Hersch Lauterpacht had been to draft the articles in language which would cover every kind of treaty. He had followed that method, but had realized that in fact there were great differences between the different types of treaty, for example between a general multilateral treaty—with the whole process of drawing up, signature, ratification and accession—and bilateral treaties in the form of exchanges of notes or agreed memoranda.

53. Both forms of international agreements were basically governed by the ordinary law of obligation, but there were very great differences with regard to drawing up and concluding the various kinds of treaties and the methods of bringing them into force. It was not impossible, of course, to draft articles applicable to all kinds of treaties, but there were great difficulties in the way, and the drafter must often be conscious that since there were certain aspects relating only to one kind of treaty, language designed to cover all kinds of treaties might sometimes be inappropriate. There was, for example, the whole question of ratification, which did not arise with exchanges of notes. He had therefore wondered whether it might not be better to split up the subject and include sections on particular types of instrument. It might be best to include an article to the effect that, unless otherwise stated, the provisions of the code would apply to all types of treaty, and then to draft articles in which rules were stated applicable to only a particular type of treaty.

54. The question of treaties made by and with international organizations had been discussed at previous sessions and the results had been summarized in a working paper on the law of treaties prepared by the Secretariat.[20] In that paper the texts of articles prepared by Sir Hersch Lauterpacht and the provisional decisions and tentative texts adopted by the Commission had been placed side by side.

55. In the comment to article 1 of Sir Hersch Lauterpacht's text (essential requirements of a treaty) it was stated that a majority of the Commission had been in favour of including in its study agreements to which international organizations were parties and it had been generally agreed that while the treaty-making power of certain organizations was clear, the determination of the other organizations which possessed the capacity for making treaties would need further consideration.[21] At its third session[22] the Commission had decided to adopt the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside for the moment the question of the capacity of international organizations to make treaties; that it should draft the articles with reference to States only; and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification.

56. On that basis, the articles might have been expected to relate only to States, but Sir Hersch Lauterpacht in his second report[23] had definitely included international organizations, and he himself also thought that they should be included. It would be impossible to ignore in a modern code of treaty law the fact that many international organizations existed and most of them had a treaty-making capacity. Such capacity had been recognized to the United Nations by the advisory opinion of the International Court of Justice in the case of Reparation for Injuries suffered in the service of the United Nations.[24] The language in which that judgment had been couched was clearly applicable to many other international orga-

[18] A/CN.4/23 and A/CN.4/43.

[19] A/CN.4/63 and A/CN.4/87.

[20] A/CN.4/L.55.

[21] A/1316, paras. 161, 162 and A/CN.4/SR.50, 51 and 52.

[22] A/CN.4/SR.98, p. 3.

[23] A/CN.4/87.

[24] I.C.J. Reports 1949, p. 174.

nizations with treaty-making powers similar to those of the United Nations.

57. If it was agreed that such international organizations should be covered by the code, the question arose how that code should be drafted in accordance with the decision [25] taken by the Commission at its third session. Language might be used consistent with the enunciation of the principles for treaties between States, but a paragraph might be included stating that they applied, *mutatis mutandis*, to treaties made by and with international organizations, unless anything to the contrary was stated. He anticipated that it would be desirable to include a section providing for a number of exceptions. If that were agreed, he might continue as he had begun, drafting the articles as applicable to States unless the contrary was stated, and conclude with a section in which the exceptions were set forth. There would thus be three classes of treaties: those between States, those between international organizations, and those between States and international organizations. He would welcome any comments from members of the Commission on his questions.

58. Mr. AMADO said that he had been gratified to see that the Special Rapporteur had gone straight to the heart of the matter instead of writing yet another book on the law of treaties. At the outset, he had rightly drawn a distinction between treaties proper—the *actes solennels*, as Mr. Scelle called them—and the minor forms of treaty-making such as exchanges of notes, often executed by individual Ministers with the approval of the Head of State, which did not require ratification. Incidentally, he had been amused at the very English definition of ratification in article 13, paragraph (viii), as the act whereby a signatory State ratified its signature. In his own view, ratification was a procedure by which a State agreed to be bound by the treaty. He entirely agreed that a separate section of the code should be devoted to the minor forms of treaty-making.

59. Much more thought would have to be given to the question whether there should be a separate formulation for treaties made by and with international organizations, which obviously could not be treated on the same footing as treaties between States.

60. He also entirely agreed that a code would be preferable to a convention for a codification of the law of treaties and that it should include enunciations of fundamental principles, provided that it was drafted in such precise terms as to obviate difficulties of interpretation and to maintain international law as a consistent whole. He also agreed with the Special Rapporteur's second and third questions, but, at that stage, could go no farther on the fourth and fifth questions than to congratulate him on their skilful drafting.

61. Mr. SCELLE said that he had not had time to consider the Special Rapporteur's questions in detail, but in general thought the suggestions a very good method of enabling the Commission to study the report methodically.

62. He entirely agreed with the substance of the first question, but would require explanations on the second. There would hardly be time to discuss questions of method in detail, especially the question whether treaties made by and with international organizations could be assimilated to bilateral or multilateral treaties. Professor Philip Jessup was to deliver a lecture shortly at the Academy of International Law on the question of how international law might be drawn up by international organizations. That question would open up entirely new problems.

63. The practice of international organizations was parliamentary rather than diplomatic, and took place in circumstances quite different from those which governed relations between States. According to Kelsen's theories, a whole series of rules of law would issue from that difference. The law of treaties was the law of an already organized international society rather than the law of a society of States. The method of dealing with treaties made by and with international organizations would depend very greatly on whether they were regarded as societies of nations or as universal international societies and from that difference would issue great differences in the rules of international law. When States entered international organizations, they abandoned a considerable amount of their general competence. The treaties made by them could not be regarded in the same light as treaties between States, because they did not serve the total interests of individual States, but the interests of individuals or corporations, which lay outside the interests of States.

64. The rules of law issuing from treaties and the rules of law issuing from international custom and the judgments of international courts must be considered separately. The question could not be solved *a priori*, and the solution to be suggested by the Special Rapporteur would undoubtedly appeal to the Commission's imagination.

65. A profound change was occurring in the nature of international law, for it was evolving towards a single standard of law based on universality. One of the reasons for its present fluid state was that it no longer governed solely the relations between States, but was becoming something more like municipal law, despite the existence of very large States and very small States, almost like the mediaeval city States. International law was in fact becoming what had been called the parliamentary law of States. That stage, however, was being preceded by a whole complex of entirely new situations. The Universal Postal Convention, for example, although a treaty, was in a way a municipal law of the whole international community and, as an international construction, could not strictly be regarded as a treaty; being universal, it was something more.

66. The matter might be discussed more fully when the Special Rapporteur's proposals were before the Commission, but the basic distinction to be made was between the law of an organized society, which might almost be called oecumenical, and an anarchic society composed of antagonistic groups of States.

67. Mr. SPIROPOULOS congratulated the Special Rapporteur on his report. The questions that he had

[25] A/CN.4/SR.98, p. 3.

asked the Commission required an answer so that he would be able to continue his work.

68. The question whether a codification of the law of treaties should take the form of a convention or of a code was a thorny one. In all cases up to the present the Commission had presented texts in conventional form and had always recommended to the General Assembly what action to take, whether to take note, to accept the text, or, as in the case of the law of the sea, to convene an international conference. In the case of the law of treaties, the Commission had hitherto had a convention in view, as the rules has been drafted in that form. Sir Gerald Fitzmaurice had quite rightly asked the question, since the way in which he drafted the articles would depend on the Commission's decision. The idea of a code was not unacceptable, as a code would not require approval, but might be regarded as a scientific work for States and those concerned with international law to use in interpreting treaties. As the conventions drafted by the Commission were very rarely accepted, the idea of a code of treaty law was to be welcomed.

69. With regard to the second question, he agreed that the Commission might well go further than it had, and that detailed articles might be useful. The Special Rapporteur's report [26] reminded him of an excellent work by Bittner,[27] which went into great detail on the law of treaties and had thus proved extremely useful. The detail introduced by the Special Rapporteur, particularly the definitions in article 13, would provide a very valuable practical guide to the framing and conclusion of treaties. There was not always complete agreement on the terms defined in that article.

70. It was very hard to decide whether the absolutely fundamental principles of treaty law should be set out at the beginning of the code. That might perhaps be useful, but, if it was subsequently found unnecessary, the general principles might be included in the appropriate place.

71. With regard to the fourth question, he did not think that a combination of the methods suggested would be wise at the outset. As Mr. Amado had observed, there was a radical difference between treaties proper and exchanges of notes. The two topics were better separated, at least in the early stages of the work, and the Commission might subsequently decide whether they could be combined.

72. The Commission had already decided for the time being not to deal with treaties made by and with international organizations. Some attention should undoubtedly be given to the topic, but the matter of main importance was that of treaties between States, which should be dealt with first. The position of treaties by international organizations was not yet wholly clear, and so should be examined separately. It should not, of course, be discarded altogether, since the purpose was to draft a complete code covering all existing institutions.

The meeting rose at 1.05 p.m.

[26] A/CN.4/101.

[27] L. Bittner: *Die Lehre von den Völkerrechtlichen Vertragsurkunden*, 1924.

369th MEETING

Monday, 18 June 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

The law of treaties (item 3 of the agenda) (A/CN.4/101) (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of the Special Rapporteur's report on the Law of Treaties (A/CN.4/101) in the light of the questions he (the Special Rapporteur) had put to the Commission at the previous meeting.[1]

2. Mr. KRYLOV said that he would not so much reply to the Special Rapporteur's questions as express his general feelings about the points raised in them.

3. He entirely agreed both that the codification of the law of treaties should take the form not of a convention, but of a code, which could better express the conclusions reached, and that the code should be presented in the form of a study of the successive stages in treaty-making.

4. He also agreed that a statement of certain fundamental principles of treaty law, such as those set out in articles 4-9, should precede the remainder. He had, however, some doubts with regard to the emphasis laid on executive acts in article 9 and the undue distinction drawn between the rules of international and of constitutional law. Acts of the cabinet or of the Head of State would always have to be consistent with constitutional law.

5. He agreed with the proposal that the code should be drafted in language such as to cover all kinds of treaties, including exchanges of notes and agreed memoranda.

6. With regard to the fifth question, he believed that Sir Hersch Lauterpacht had acted wisely in deciding to depart from the Commission's decision at its third session and in including, not only treaties between States, but also treaties made by and with international organizations.[2] The United Nations had already reached that point, as might be seen from the fact that it included such treaties in the United Nations Treaty Series. He, himself, in compiling the six volumes of the treaty series of the

[1] A/CN.4/SR.368, para. 47.

[2] A/CN.4/L.55.

Union of Soviet Republics had even included *communiqués*, which were not treaties in the strict sense, but lay somewhere between treaties and declarations, as they were usually couched in very abstract terms. He had, of course, placed them in a separate section of the series. The inclusion of every possible relevant international document was necessary in order to give a full and accurate picture of the contemporary situation with regard to international instruments.

7. His main misgiving with regard to the Special Rapporteur's report was the undue detail. The Special Rapporteur had drafted forty-two articles, whereas the Harvard Draft Convention had only thirty-six, the Havana Draft only twenty, and Sir Hersch Lauterpacht's draft only eighteen. The Special Rapporteur's five articles dealing with the absolutely fundamental principles of treaty law were necessary and extremely well drafted, but thirty more articles dealing merely with the conclusion of treaties was too many. Indeed, the Special Rapporteur's second question suggested that he had not yet decided how many there would be. True, he was drafting a code, not a convention, and domestic codes often contained a vast number of articles; for example, the French Civil Code had some 2,200. But what the Special Rapporteur had in mind was an international code.

8. One example of unnecessary detail was to be found in article 10—definition of validity. No doubt such detail useful in a textbook for law students, but chanceries and diplomats would not appreciate the subtleties of the distinction between formal validity, essential validity and temporal validity, as they were far more interested in the political aspects. He was aware that English jurisprudence was fond of definitions, but to continental jurists such complex definitions seemed too cumbersome.

9. The Special Rapporteur had brought up an intricate question in dealing with reservations. Reservations had caused many differences of opinion, and the International Court of Justice had taken up a position which differed considerably from that adopted by the International Law Commission. The Commission's view had been somewhat rigid, as it had been dealing with reservations in the abstract, whereas the Court had had to deal with them in practice. The United Nations Secretariat had studied the questions of reservations and had followed the practice of the League of Nations, whereas many legal experts and many representatives to the United Nations defended the practice of the Pan-American Union, which was more liberal and tended towards universality. The question, of course, applied only to multilateral treaties; reservations to bilateral treaties were too rare to matter.

10. The Special Rapporteur's report showed a great advance on that of Sir Hersch Lauterpacht, who, in his insistence on such matters as the capacity of the parties and of their agents,[3] had simply been repeating matters with which all jurists had been fully familiar ever since the Peace of Campoformio. The Special Rapporteur should, therefore, concentrate on the five main principles, but not go into great detail. He should try to follow the example of Leo Tolstoi and condense his articles as much as possible.

11. Mr. PAL was somewhat reluctant to answer the questions asked by the Special Rapporteur, because it seemed undesirable to impose a programme on him. There might be a danger of the programme superseding the Rapporteur's personal methods.

12. He entirely agreed with the suggestion in the Special Rapporteur's first question. Although a treaty by its very nature appeared to be the creature of the will of the parties, the very fact that a product of such will could be regarded as having binding force on the parties independently of any continuing support from that will meant that its binding force must be recognized as being based on something higher than the mere will of the agreeing parties—i.e., on some higher principle, whose formal source of strength was accepted as founded, in the last resort, on a precept imposed from outside. Even if the view was inescapable that such principles themselves had once been created by the will of the people, they continued in force independently of the will of the subject of the law which they sustained. The form proposed by the Special Rapporteur would have the particular merit of bringing out the play of some such higher principle.

13. He agreed with the Special Rapporteur that the law on the subject should be formulated in more detail in the articles rather than in the comments. Footnotes, interpretations and reinterpretations very often had the effect of diluting the intended force of the law. True, no formulation of law could do full justice to the complexities of motive which often came into play. Comments might therefore become unavoidable. When formulating rules, however, it was always preferable to try to visualize the entire field to be covered and to make the rule as precise as it could be made if the whole field was to be covered, without, of course, sacrificing the requisite elasticity. He therefore agreed with the Special Rapporteur's second suggestion.

14. He also believed that the formulation of fundamental principles of treaty law was essential and would not detract from the presentation, if placed early in the draft. The consideration of those principles at an early stage would be of great help to the Commission in its discussion of the remainder of the code.

15. The method proposed of drafting the articles in such language as to cover all kinds of treaties by one and the same form of words would be acceptable, provided the treaties to be covered were clearly defined.

16. With regard to treaties made by and with international organizations, the view taken by the Commission at its third session might well be maintained.

17. In considering the way in which the Commission's work on the subject should be presented for acceptance by Member States, article 23 of the Commission's Statute would be relevant. Sub-paragraphs 1 (*b*) and 1 (*c*) would give the only possible methods—namely, to take note of or adopt the report by resolution, or to recommend the draft to Members with a view to the conclusion of a convention. The latter might require adoption by a majority vote, but the Commission's findings might not

[3] A/CN.4/63, Section I.

be acceptable to all States in the form proposed. Unanimity would, however, be desirable.

18. Although detailed comment on the articles would not be proper at that stage, he wondered whether article 8—Classification of treaties—was appropriately placed among fundamental principles; it might be better placed in part I, section A. He would reserve any further criticism of detail until the Commission came to consider the articles separately.

19. Mr. SALAMANCA observed that all members of the Commission appeared to agree that the methods proposed by the Special Rapporteur would enhance the prestige of the Commission's work, inasmuch as it would show a general harmony of views among representatives of the different legal systems. The Special Rapporteur had drafted his first three questions extremely well and should be given a certain amount of latitude as to the best way of presenting his material for discussion.

20. The use of language such as to cover all kinds of treaties by one and the same form of words might give rise to difficulties. To establish general rules for all kinds of diplomatic instruments would be very difficult. For example, the so-called Monroe Doctrine had been given a fresh interpretation by each succeeding United States Secretary of State; its scope was uncertain and it did not in any case have the validity of a treaty.

21. He was not sure whether the rules for bilateral treaties could be extended to other treaties. One of the main problems in connexion with bilateral treaties that had arisen in recent years was their excessive number; many chanceries no longer knew precisely what their obligations were.

22. The Commission would have to reconsider its decision [4] at its third session to leave aside treaties made by and with international organizations, although Sir Hersch Lauterpacht had later included them in his report.[5] It was a moot point whether multilateral treaties made by and with international organizations should be included. Some of those organizations had their own specific characteristics and might be placed under appropriate rules. When the articles came to be discussed in detail, the Latin American members would undoubtedly bear in mind the Havana Draft Convention.

23. Mr. HSU said that the Special Rapporteur's first and second questions really concerned a matter of style on which he should exercise his personal taste. The particular point at issue would probably dictate whether an article should be concise or detailed. He himself preferred precise and concise drafting, but the text might perhaps be made rather fuller in its draft form, since it was always easier to cut down a text than to expand it. The only decision required was whether treaties made by and with international organizations should be included. Sir Hersch Lauterpacht had rightly included them, despite the Commission's previous adverse decision. Since international organizations existed as entities and had treaty-making capacity, provision should be made for them, even though there was not as yet very much upon which to base rules of customary law. Such rules might, however, be developed on the basis of the principles governing the relations between States. The Special Rapporteur had rightly pointed out that entities that did not possess treaty-making capacity should be excluded.[6]

24. Mr. FRANÇOIS did not entirely agree with Mr. Krylov that the report was too detailed. Mr. Krylov had argued that articles should always be as concise as possible; but he himself wondered whether that principle should be applied to the present report and whether the articles should be limited to a statement of general principles. The experience of the Institut de droit international was a case in point. In 1955 and 1956 its rapporteurs dealing with the interpretation of treaties had begun by proposing that fairly detailed rules should be adopted. Only one or two general principles, which met universal acceptance, had, however, been adopted and those principles were so general that they were of no real value. Misgivings had been expressed that if the Institut continued along such lines, its prestige would suffer, since its work would make little contribution to the development of international law. The Commission's real duty was to codify international law, not to lay down principles of international law which had already been accepted. For codification considerable detail was required, and if the Commission failed to go into detail, it would not be fulfilling the task given it.

25. There was almost unanimous acceptance of the matters raised by the Special Rapporteur in his first, second and third questions. In his fourth question, the Special Rapporteur had asked whether the articles should cover only treaties or also exchanges of notes and agreed memoranda. He himself was strongly in favour of considering forms of arrangements other than treaties in the strict sense, since they took the same form as treaties, except that they did not need to be ratified. Those other forms had been adopted mainly in order to avoid the need for parliamentary approval.

26. A case in point was embodied in the Netherlands Constitution. Until 1920, only treaties dealing with certain matters had required parliamentary approval. A democratic trend had set in in that year and the government had proposed that all conventions, regardless of their form, should be submitted to the States-General. The States-General had rejected the proposal because they had feared that they would be overburdened with minor details if called upon to approve all such arrangements. The bill had therefore been amended so that only treaties *stricto sensu* had to be submitted to the States-General for approval and others would merely be communicated to them. The result had been that whenever the Government had not wished to submit an arrangement to the States-General, that arrangement had been concluded in the form of a protocol or an exchange of notes. When the Constitution had been revised in 1952, it had been generally recognized that that situation was intolerable. Under the new Constitution all arrangements had

[4] A/CN.4/SR.85, para. 10.

[5] A/CN.4/87.

[6] A/CN.4/101, p. 44, para. 3.

to be submitted to the States-General. Fresh difficulties had arisen, which would undoubtedly also plague the Special Rapporteur. Owing to the number of arrangements in writing intended to have binding force, but which could not be regarded as treaties, such as the acceptance of a diplomatic agent or the request by aw arship to enter a port and the reply thereto, it was evident that some distinction had to be made; but so far it had proved impossible to discover a definition which would exclude such instruments, and in practice each particular case had been dealt with on its merits. It was to be hoped that the Special Rapporteur would be able to find some way to delimit those arrangements which should be assimilated to treaties.

27. He had some doubts about the inclusion in the proposed code of treaties made by and with international organizations, not because he did not think that the question was not a very important one, but because the question of their treaty-making capacity was only at the beginning of its development. International organizations such as the United Nations, supra-national bodies such as the European Coal and Steel Community, and specialized agencies such as the United Nations Educational, Scientific and Cultural Organization had in fact concluded treaties, and it seemed very probable that that development would still continue.

28. There was too, the question of the arrangements concluded with governments by great international trading corporations. They were hardly contracts in civil law, but must be considered as something intermediate between a contract and a convention. It was becoming almost impossible to continue to regard such large corporations as private institutions. Indeed it had been recognized that they had a right to appear, at least before arbitral tribunals, as *personae stantes in judicio,* even if they were not yet entitled to appear before the International Court of Justice. If they wished to appear before that Court, at least from the formal point of view, the State was the party to the suit, but there had already been several cases in which States in effect had considered that that was a mere formality and that the large corporation, not the State, was *dominus litis.* The Permanent Court of Arbitration had already drawn the necessary conclusions from that development and had recognized that disputes between States and such corporations might be heard before it. That was a new form of international institution, although it could not yet be said to be on quite the same footing as a State, and its new status would undoubtedly be reflected in legislation also. It might therefore be inopportune for the Commission to consider at that stage whether international organizations should be covered by the code from the outset. It would be more advisable to confine the code to relations between States and, when it had been completed, to consider whether the rules might be extended to international organizations. Provisionally the code should deal with relations between States only, and therefore the question of whether it should cover treaties made by and with international organizations should be left aside for the moment.

29. Faris Bey el-KHOURI agreed with the Special Rapporteur that, in general, codification should take the form, not of a convention, but of a code. Draft articles dealing with the law of treaties should fall into two sections, the first dealing with procedural matters and the second—of greater importance—with the topic of validity; i.e., it should be a study of the conditions necessary for ensuring the validity of treaties and, in particular, the avoidance of any defects that might give rise to subsequent difficulties of interpretation. In order to facilitate the task of the International Court of Justice, which was the competent court of appeal in such matters, the Commission's draft should be based on fundamental considerations. Unless that were done, the Court might well be obliged to declare void a treaty concluded along the lines recommended by the Commission.

30. Further, on the analogy with contracts between individuals in private law, which must be concluded between majors, inter-State treaties should be concluded between equal and independent States and not between such a State and, for instance, a Protectorate. History contained numerous examples of treaties concluded between powerful States and weaker States which were in practical subjection to them. There was also the case of agreements between two States for the division of the territory of a third State into zones of influence, which they would share, without the State concerned being aware of the matter. That, too, should be covered; it should be a basic principle that rights under treaties should be confined to the parties.

31. Again, in some countries it was the practice that treaties must be ratified by Parliament. There was also, however, the possible case of a ruler enjoying power *de facto* but not *de jure* concluding a treaty which, on his fall from power, might be denounced. In view of the changed world situation all those points must be borne in mind. The world looked to the Commission to safeguard the rights of mankind, in particular of subject peoples and under-developed countries. There should be no question of any possible imposition of treaties by one State on another.

32. He was opposed to the application of the proposed code to international organizations if only for the reason that, whereas the validity of treaties could be decided by the International Court of Justice, no such provisions existed in respect of agreements to which international organizations were parties; no judicial court existed for such a purpose.

33. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's first proposal that a codification of the law of treaties should take the form of a code *stricto sensu* was fully justifiable. In preparing such a code, the Commission would be called upon to establish and define certain general principles regulating the law of treaties in a manner analogous to the General Part of any international treaty.

34. Two points in particular called for attention. The first was the question of the validity of treaties, in particular of multilateral treaties in respect of third parties. Under the League of Nations, the binding force of certain instruments of an administrative nature had been recognized in respect of non-parties, and, theoretically at least, article 2 of the United Nations Charter had recog-

nized a similar extension of the binding force of the principles contained in the Charter.

35. The second point was the desirability of including the counterpart of paragraph (7) of article 5 of the draft, the principle of *rebus sic stantibus*. There would almost certainly be opposition from countries which regarded such a question as taboo. Nevertheless, in view of the provisions of Article 14 of the Charter, the enunciation of such a principle would be fully in harmony with the trend of contemporary opinion.

36. With regard to the scope of the code, the question was linked with the problem that arose in respect of State responsibility—namely, the type of instrument to which the code would apply, bearing in mind the evolution of juridical concepts. For that reason it would be essential to select a method that would keep the whole picture in focus.

37. With regard to treaties between States, he supported Mr. François's opinion that the draft code should apply not only to formal treaties and conventions but also to other written instruments [7] in so far as they expressed the will of the States concerned. The latter category, of course, formed a very much larger group than the former.

38. The question of the application of the code to international organizations would have to be considered in due course. In respect of treaty-making, international organizations constituted an ill-defined category. There were not many examples of international agreements concluded by such organizations, but he had in mind the 1947 Geneva draft charter for the International Trade Organization to which entities not having the status of States had been signatories without the intervention of the metropolitan power; the General Agreement on Tariffs and Trade (GATT) was a similar instrument. Such agreements would be regarded as valid, subject to the recognition of the authority to sign of the entities concerned. Such variations of the classical form of international treaty must certainly be borne in mind.

39. There still remained, however, the case mentioned by Mr. François of entities that were neither States nor international organizations as commonly understood. To the best of his belief, under the League of Nations, a European railway company had signed an agreement with a number of States which contained a provision to the effect that registration of the agreement should take place at the Secretariat of the League of Nations. If his recollection was correct, that implied that, although one of the parties concluding an agreement was a private legal person, the agreement was registered by the League of Nations as an international convention.

40. Mr. EDMONDS, giving his first impression of the report on the law of treaties, said that he was in entire agreement with the Special Rapporteur's suggestion that the draft should take the form of a code rather than a convention. His (the Special Rapporteur's) analysis of the question represented an advance on the approach of his predecessors.

41. The third question raised by the Special Rapporteur was merely a matter of arrangement. He would favour giving an early place to fundamental principles of treaty law in respect of conclusion.

42. Mr. François' interesting comments on the development of the situation in the Netherlands indicated that it was the reverse of that in the United States, where for political reasons the Senate had adopted the firm policy that every agreement that was in any way binding upon the United States should be submitted to that body for approval. Admittedly, a strict interpretation of that doctrine would lead to an impossible situation.

43. So far as was possible, the Commission's draft should be applicable to whatever form an obligation might take; that was better than attempting to distinguish between the different kinds of treaty. He was in favour of a thorough study of a comparatively restricted field. The subject itself was a very large one, and it would be inadvisable to consider at the outset agreements made by and with international organizations. To cover adequately the subject of agreements between States would be a considerable enough task; if, subsequently, it were possible to extend the study to other bodies, that would be all to the good.

44. Mr. SANDSTRÖM said that the Special Rapporteur's choice of the code form was undoubtedly wise. Despite the fact that certain questions could be appropriately dealt with in a convention, generally speaking, the subject lent itself better to code form.

45. Agreement on that question to a great extent provided the answer to the Special Rapporteur's second question with regard to the detailed treatment of the draft articles. A much more important issue was that of the degree of expansion: on that, he was inclined to share Mr. François' view that the draft should not be confined to general principles.

46. While accepting the idea that a code on the law of treaties should take as its starting point the topic of conclusion, he doubted the wisdom of inserting basic principles at the beginning, especially those dealt with in articles 4-7. Those aspects would in any case be touched upon subsequently when considering the effects of treaties, and would be better dealt with at that stage. The natural place for article 8—Classification of Treaties, and article 9—The Exercise of the Treaty-making Power, was certainly at the beginning of the code.

47. The Special Rapporteur's fourth question could be resolved more easily when the draft had been studied as a whole and the treatment to be given to the different types of instrument could be better appreciated.

48. As to the fifth question, he would endorse Mr. François' viewpoint. The evolution of agreements made by and with international organizations was so uncertain that it would be wise to assess more positively the trend of events before attempting to make a definite pronouncement. It would certainly be premature to include such agreements in a general law of treaties. A final decision as to whether international organizations should be covered should, however, be taken later.

49. Mr. ZOUREK said that it was a pleasure to see in the report on the laws of treaties such a promising

[7] See para. 26 above.

approach to a subject that hitherto the Commission, through no fault of its own, had been obliged very largely to neglect. He was hopeful that that approach would provide a satisfactory solution to the different problems.

50. With regard to the first question raised by the Special Rapporteur, the Commission could choose between a re-statement of the practice of States, irrespective of the General Assembly's approval of its conclusions, and codification of the law of treaties in the form of draft articles. The latter course would be more in accordance with the Commission's terms of reference; moreover, the question of approval by the General Assembly was of importance in view of the desirability of subsequent approval in the form of an international convention. Otherwise, the practical value of the code would be diminished. However, even approval by the General Assembly without the conclusions of an international convention would represent progress.

51. On a point of terminology, he would prefer the more flexible title " rules " rather than " code " which, with its implication of obligation, seemed to promise more than the Commission could guarantee. There were, moreover, precedents in international practice for the use of the word " rules ".

52. With regard to the second question, he would suggest that the draft might be shortened by transferring definitions or discussion of certain points of principle to the comment. That, however, was a question of final presentation.

53. The third question called for a positive answer, for the solution of the problem of the fundamental principles of treaty law would at least affect to some extent the whole aspect of the validity of treaties. The articles dealing with those principles could be usefully completed by a provision referring to the voiding of treaties in cases of acts the commission of which entailed conflict with the fundamental principles of international law, as was contained in the draft reports of Sir Hersch Lauterpacht.[8] Admittedly the validity of treaties would be dealt with in a subsequent report; it would, nevertheless, be valuable to include in the articles dealing with fundamental principles an expression of the will of the parties concerned, and the use of violence or threats of violence against a State as a basis for voiding a treaty should certainly be retained.

54. With regard to the fourth question, he would favour a combination of the methods of covering all kinds of treaties by one and the same form of words and devoting special sections to certain particular classes of instruments. The first method alone raised too many difficulties, whereas restriction to the second would lead to duplication. There would be an advantage in grouping in one part provisions of general scope and in separate subdivisions rules in respect of the different types of treaty.

55. Mr. François had referred to the difficulty of restricting the scope of the title " treaties"; it was admittedly a difficult task, but one that must be tackled. He recalled that after the Second World War some international agreements were expressed in the form of *communiqués* rather than formulated with all the paraphernalia of a solemn convention. That was the type of case that Mr. Krylov had in mind.[9] *Communiqués*, although usually descriptive or declaratory, might also contain certain elements of international agreement.

56. Oral agreements should probably be disregarded for the time being. The problem was a delicate one and difficulties had arisen in the past and would probably occur in future. The case he had in mind was the precise juridical value of an oral agreement made on some subject of minor importance by, say, an ambassador and a Foreign Minister.

57. With regard to the fifth question, the issue was not only one of principle, but also one of scope. In that respect, the Commission's attention should be concentrated first on treaties between States. The question of treaties made by and with international organizations could be considered later when the whole subject came to be examined more fully.

58. Reference had been made during the discussion to treaties concluded between States and large commercial or industrial undertakings. Whatever might be the size of the interests involved, such agreements did not fall within the domain of public international law. There were many possibilities that could be covered by such agreements, such as the delivery of arms to a State, the construction of fortifications or the renting of a free zone in a port; but such agreements could not be taken out of their proper field of international private law. Reference to such problems could conveniently be made in the comment.

59. The subject, as defined by the Special Rapporteur, was a vast one and raised a number of highly controversial issues. One such issue, already referred to by Mr. Krylov, was that of constitutional limitations on the exercise of the treaty-making power.[10] According to the Special Rapporteur, treaty-making was, on the international plane, an executive act.[11] Whatever legislative processes had to be gone through to make such an act effective on the domestic plane, on the international plane the act was authentic. In other words, a treaty, even though irregularly concluded from the constitutional standpoint, would be valid internationally. Such a theory, though enjoying the support of a number of distinguished workers, was, in his opinion, out of tune with the needs of present-day international life and had never been the accepted opinion on the matter. A treaty concluded in violation of constitutional requirements should be regarded as internationally invalid. The distinction drawn in the report between constitutional and international law which, in that matter, went back to constitutional law, was, as Mr. Krylov had said, too rigid.

60. The question of reservations to multilateral treaties was another controversial point. It had to be borne in mind that treaties were frequently based on drafts pre-

[8] A/CN.4/63, A/CN.4/87.

[9] See para. 6, above.

[10] See para. 4 above.

[11] A/CN.4/101, article 9, page 18.

pared and adopted by assemblies on the principle of the majority will and not, as in the past, on that of unanimity. Thus the States in a minority had no other choice but to enter reservations. A solution to that difficult problem might be found on the lines of the advisory opinion given by the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[12] The practice of the Organization of American States in that respect was to be preferred to the former practice of the League of Nations.

61. A further question, already mentioned by the Chairman, was that of the doctrine of *rebus sic stantibus*, without which it was impossible to account for the fact that certain treaties which had never been denounced or annulled were, none the less, no longer regarded as valid by the parties to them. The very abuse which had been made of the doctrine was a further reason for regulating the conditions under which it might be applied.

62. Mr. SPIROPOULOS said that, while adhering to the views he had expressed at the previous meeting,[13] he wished to raise a question relating to the Commission's method of work. He fully agreed that the work on the Law of Treaties should take the form of a code, that was, something more on the lines of a domestic code and going into greater detail than a draft convention. A code of that kind need not be accepted by States in so many words. Under article 23 of its Statute, the Commission might recommend that the General Assembly merely take note of the code or even take no action at all, the document having already been published.

63. The preparation of a code was, however, something entirely new for the Commission, which had hitherto been concerned with the preparation of draft conventions. Like Mr. Krylov, therefore, he thought it dangerous to enter too far into theoretical questions and attempt to define in too great detail. Though the Special Rapporteur could undoubtedly produce a masterly treatise on treaties, it would be another thing to obtain the approval of all fifteen members of the Commission for every detail in that work. Was it really wise, or necessary, for instance, to go into a detailed definition of a State, to raise the question of subjects of international law or to go into detail regarding validity, full powers, participation and accession? He wondered in fact whether a definition such as that of validity was even given in the law governing contracts in domestic civil codes. Such codes did not generally seek to define everything. They assumed a certain amount of knowledge and left a great deal to case law. He accordingly felt it inadvisable for the Commission to go farther than the average domestic code and plunge into the general theory of law. Detailed matters of definition could, if necessary, be dealt with in the commentary on the articles.

64. Mr. LIANG, Secretary to the Commission, said that the drafting of a code such as that suggested by the Special Rapporteur would mark a turning-point in the work of the Commission, which had hitherto been largely concerned with the preparation of draft conventions for submission to the Assembly. The question was not so much one of form, since the Commission, though bound under article 20 of its Statute to prepare its drafts in the form of articles, was perfectly free to entitle a set of articles " code ". The question was the action to be taken with regard to the code. The division of the work of the Commission into two sections, codification and development, which the Secretariat was, he believed, the first to recommend in 1947, now showed itself to be justified. One of the considerations prompting that division had been that there was no point in submitting draft conventions to governments on subjects which were of no immediate interest to them. Very few governments, for instance, would be interested in signing or ratifying a convention on the theory and procedure of treaty-making. Presumably the Special Rapporteur was thinking on those lines, for, without explicitly saying so, he appeared anxious to avoid submitting a text in the form of a convention for adoption by States and thought it would be more useful to produce a code or set of rules which could be consulted by States and contribute to the development of international law.

65. On the question whether the code should enter into details, he found the views of Mr. Krylov and Mr. Spiropoulos difficult to accept. If the code was not to be submitted for ultimate adoption in the form of a draft convention, Mr. Spiropoulos' objections to entering into detail would appear to be unjustified. Judging from the material in existence on the subject, a code would be of practically no use unless it went into detail. Bittner's work,[14] for example, which was frequently consulted by governments, was highly detailed. The twenty articles of the Havana Convention of 1928, on the other hand, were so general that, from his own experience, they would not stand up to close analysis. That was perhaps why States had had no difficulty in adopting them and had found little use for them since. The Harvard Draft Convention of 1935 was useful, not so much for the actual articles as for the wealth of material that it contained. The text produced by the Institut de droit international, which had condensed the whole question into three articles, failed to cover the whole field of treaty-making—a field so wide that it might be said to include not one, but a number of subjects. The interpretation of treaties, for example, might well be as vast a problem as the responsibility of States, and the operation and termination of treaties were also very extensive subjects. If the Commission's object was the progressive development of the question, there would be no objection to taking each part separately and in detail.

66. The question whether the code should also cover treaty-making by international organizations was one in which the Secretariat was naturally very interested. He fully agreed with Mr. Zourek that the principle could not be open to question. International organizations were a part of international life and should be covered by the code. The only question was how to include them. He was not much in favour of the formula adopted by the previous Special Rapporteur of referring to " States,

[12] I.C.J. Reports 1951, pp. 15-69.

[13] A/CN.4/SR.368, paras. 67-72.

[14] L. Bittner, *Die Lehre von den Völkerrechtlichen Vertragsurkunden.*

including international organizations" or "States, including organizations of States". The two entities could not be dealt with as if they were exactly the same thing. It would prove extremely difficult to draft and discuss articles with the twofold application to States and international organizations in mind, and the results of such a procedure might be rather unfortunate. Perhaps the best course would be to draft the articles with reference to treaties between States and then see what changes were required in order to apply them to treaties to which international organizations were parties. A special section might even be set aside for international organizations.

67. Mr. SPIROPOULOS explained that he was in full agreement with the idea of drafting a detailed code. He had merely questioned the advisability, from the standpoint of the Commission's work, of including certain detailed and theoretical definitions.

The meeting rose at 6.25 p.m.

370th MEETING

Tuesday, 19 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

The law of treaties (item 3 of the agenda) (A/CN.4/101) (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to reply to the observations by members on his questions [1] and proposals.

2. Sir Gerald FITZMAURICE, Special Rapporteur, said that the Commission appeared to be generally agreed that codification of the law of treaties should not take the form of a convention. His own views on the matter coincided with those of the Secretariat.

3. As regards his second question he was again in general agreement with the Secretariat. While sympathizing with those who had expressed a preference for something precise and short, he thought that, if the Commission was to do more than draft a few very general articles, there was really no alternative but to go into some detail, since significance was bound to be attached to whatever was omitted. He was, however, conscious of the fact that the set of articles was perhaps too long and that there were ways in which it might be condensed.

4. The desirability of including definitions was a point on which he had thought of requesting the views of members of the Commission. He regarded it as a matter of expediency rather than of principle. Some terms which occurred frequently would need to be defined in order to avoid wearisome repetition of certain qualifications in the articles. Other definitions, however, might prove on further examination to be unnecessary. In one sense, he agreed with those who held that the term "State" did not require definition. However, the view put forward by Faris Bey el-Khouri [2] that semi-sovereign and protected entities had no treaty-making capacity rather suggested that it did. He was afraid that he could not agree with that view. In the interests of semi-sovereign entities it was most desirable that they should be free to enter into treaty relations with other countries. And to make that possible, the doctrine that such entities could repudiate past agreements on changing their status must be rejected; otherwise States would be reluctant to conclude treaties with them.

5. The definitions of ratification and accession might be omitted, but in that case certain ideas they contained must be brought into the articles in some other form. The definition of accession had been included to make clear a fact that was not always realized—namely, that it was a course open only to States not signatories to a treaty. Similarly, the definition of ratification had been included to make clear that it was a process gone through only when a treaty had previously been signed. It was not the treaty that was ratified, but the signature.

6. His third question was largely a matter of presentation, on which no final decision need be taken until the work was much more advanced. He was inclined, after hearing the discussion, to omit the articles in question and leave the fundamental principles of treaty law to be elaborated later; otherwise, as some speakers had pointed out, the Commission would certainly be asked why it had not included other principles regarded as equally fundamental.

7. It appeared to be generally agreed that the code should cover every kind of genuine treaty instrument and international agreement, including exchanges of notes and agreed memoranda. Indeed, it would be a great mistake to omit what were now the most frequent forms of agreement, particularly in bilateral negotiations. The only problem was that the language of the articles might be somewhat strained in the endeavour to make them apply to such diverse forms of agreement. It was, in fact, for that reason that he had envisaged devoting a special section to particular classes of instrument. The two approaches might, however, be combined. Since, as

[1] A/CN.4/SR.368, para. 47.

[2] A/CN.4/SR.369, para. 30.

Mr. François had pointed out,[3] much of the law of treaties, especially that relating to validity, applied to all instruments irrespectively, some articles could cover all forms of instrument. In other cases, such as the methods of concluding and terminating treaties, separate articles might be required for certain types of instrument. He proposed to examine the question further.

8. The problem of the concept of a treaty in the municipal law of States had been raised by Mr. François,[4] in particular with reference to the situation in the Netherlands. There might, admittedly, be countries where even the issue of a *communiqué* containing a bare reference to the fact that agreement had been reached with another State was subject to prior approval of the legislature. He did not think, however, that the Commission need worry much about such cases. He had sought to provide for them by a saving clause in article 2, paragraph 4, which made it clear that the code did not in any way affect the status of an instrument in relation to the constitutional requirements of particular States regarding the treaty-making Power. The code left countries entirely free to define a treaty in whatever manner they wished for the purposes of their own law.

9. In describing treaty-making as an executive act on the international plane, he had realized that he was touching on a highly controversial question. The Commission should, however, hesitate before accepting, without great qualification, the theory that a country could not validly become party to a treaty if its constitutional requirements were not complied with in the process of becoming a party. The doctrine that failure to comply with constitutional requirements necessarily and invariably invalidated a country's ratification of a treaty was a dangerous one. Were it adopted, no State could ever be sure that a treaty had been finally ratified by another State, since it would have no means of ascertaining whether every constitutional requirement had been fulfilled. And governments would be able to withdraw from inconvenient treaty obligations whenever it suited them, by alleging some irregularity in the process of ratification.

10. He took a similar view of the difficult problem of reservations to treaties and would be most reluctant to accept the system established by the International Court in its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[5] Such a system, though working satisfactorily in a few cases, would, in general, be extremely difficult to apply. Mr. Zourek had contended that, in view of the current practice of adopting conventions by majority vote, the States in a minority must be allowed to enter reservations.[6] Such reservations must, however, figure in the convention if the minority States were not to be placed in the privileged position of being able to reintroduce for their own benefit points on which they had been overruled. States thus overruled were, after all, free to refuse to sign the convention. The system which he advocated appeared to be regarded by some members as extremely rigid. In point of fact it departed very appreciably from what was known as the traditional system and allowed considerable latitude. For instance, though the general doctrine that reservations should be permitted in the circumstances described by Mr. Zourek could not be accepted, some reservations not affecting the substance might be permissible.

11. Reference had also been made to the doctrine of *rebus sic stantibus*,[7] which was particularly relevant to the revision and termination of treaties. The brief allusion to the doctrine in his report would need elaboration. The question was one of those on which the Commission might, he thought, make a proposal *de lege ferenda*, all the more so as the question of revision of treaties was to some extent not covered by existing law. The doctrine of *rebus sic stantibus* was, however, justly regarded with suspicion and the Commission would be ill-advised to accept the claim that a country could free itself of its treaty obligations merely by alleging changed circumstances. If, on the other hand, circumstances had changed so fundamentally that the whole basis of the treaty had been destroyed, the doctrine might be reasonably invoked. In any case, the problem would not require consideration for some time.

12. On the question whether the code should cover treaties made by and with international organizations, the general feeling of the Commission appeared to be that it should. That international organizations possessed of international personality had treaty-making capacity was beyond question. Agreements such as those between the United Nations and most of its Members on privileges and immunities were undoubtedly international instruments and should be covered by the code. But, as Mr. François had pointed out,[8] the question was relatively young. He accordingly proposed to draft the code with reference to States only, but bearing constantly in mind the question of its application to international organizations. The Commission could then judge whether the various articles might be adapted to apply to international organizations, or whether a special section would be required.

13. Agreements between governments and individuals or non-political bodies, on the other hand, could not be covered by the code, despite the resemblance they bore in a few cases to international agreements. Their diversity was such that to attempt to deal with them would lead to endless confusion. He was convinced that the Commission should confine its conception of a treaty to an agreement made between entities possessed of international personality. Not that he wished thereby to imply that individuals and private companies had no international rights under their agreements with States. It was merely that the rights arose in a different way and could not be regarded as founded on a treaty.

14. The CHAIRMAN said that the statement by the Special Rapporteur admirably reflected the views of the Commission.

[3] A/CN.4/SR. 369, para. 25.

[4] *Ibid.*, para. 26.

[5] I.C.J. Reports, 1951, pp. 15-69.

[6] A/CN.4/SR.369, para. 60.

[7] A/CN.4/SR.369, para. 35.

[8] *Ibid.*, para. 27.

The Chairman declared the discussion on the law of treaties closed.

State responsibility (item 6 of the agenda) (A/CN.496) (*continued*)

15. The CHAIRMAN, after inviting the Commission to consider the question of State responsibility and drawing attention to the report entitled " International Responsibility " (A/CN.4/96) prepared by himself as Special Rapporteur for the topic, asked the Secretary to outline the history of the item.

16. Mr. LIANG, Secretary to the Commission, recalled that at its sixth session the Commission, in pursuance of General Assembly resolution 799 (VIII), had decided to undertake the study of state responsibility at the earliest opportunity.[9] As part of the preparatory work for that study, the Harvard Law School Research Centre had kindly agreed, at the suggestion of the Secretariat, to revise the draft Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners, which had been prepared by Professor Borchard with the assistance of an advisory committee and published in 1929 by the Harvard Research. The task of revision had been entrusted to Professor Katz and Professor Sohn, working in collaboration with an advisory committee. He thought the Commission would agree that, just as the original draft had been of great assistance to the Codification Conference at The Hague in 1930 and to the learned world in general, a revised version might also be of great service both to the Commission and to the public. While the negotiations had been conducted with the consent of the Special Rapporteur, their present Chairman, Mr. García-Amador, the Secretariat was solely responsible for the arrangements. It was not, however, in any way responsible for the revised text itself, which, when completed in March 1957, would be published by the Harvard Law School. At the Secretariat's suggestion, Professor Katz and Professor Sohn had been invited by the Chairman to be present at the Commission's debates on the item.

17. The CHAIRMAN remarked that a revision of the Harvard draft convention, and more particularly of the commentary on it, would undoubtedly be of great assistance to the Commission.

18. If there were no comments, he would assume that the Commission had no objection to the arrangements made with the Harvard Law School or to the presence of two members of its staff during the Commission's discussion of the item. He wished to thank the Harvard Law School and the Legal Department of the Pan-American Union for the valuable assistance that they had afforded him in the preparation of his report.

19. Speaking as Special Rapporteur, he introduced his report on international responsibility (A/CN.4/96). At the outset he had asked himself whether international responsibility might be codified in the same way as any other topic in international law, since, necessarily, traditional principles of international law had been affected by recent practice and doctrine. Both theoretically and practically, international responsibility had undergone a profound transformation, and the traditional concept in international law must be re-examined in the light of the new trends. He had examined each fundamental aspect in that light.

20. The first question he had tackled had been the appreciation of the impact of historical and doctrinal development on the legal concept of responsibility itself. When that concept had been studied fifteen or twenty years previously, the idea had prevailed that international responsibility had been nothing more than the duty to make reparation for injuries occasioned by the breach or non-performance of an international obligation; in other words, the concept of responsibility had corresponded to that of liability under municipal law. Today, however, international responsibility covered both civil liability, in the strict sense of the term, and criminal responsibility, according to the nature of the obligation, the breach or non-performance of which gave rise to the responsibility.

21. It was true that General Assembly resolution 799 (VIII), in compliance with which the study had been undertaken, appeared to limit the scope of the inquiry to civil liability. His report, accordingly, omitted matters outside that field and matters already studied by the Commission. It had, however, to be recognized that criminal responsibility had been clearly defined in modern international jurisprudence, and when civil liability was examined, some cases might be found in which there was a basic element of criminal responsibility which had not hitherto been recognized. Whereas in previous studies attention had been concentrated on the duty to make reparation, in contemporary jurisprudence it was recognized that wrongful acts might be a matter of criminal responsibility from the point of view of international law. A decision would have to be taken on the action required in such circumstances. Although the concept of criminal responsibility had not been wholly absent from traditional international law, it had been found that some forms of reparation bordered on the characteristics of criminal responsibility, and that fact had been recognized even by such leading exponents of the traditional doctrine as Anzilotti. That matter too must be taken into consideration. That idea had been incorporated in basis for discussion No. 1—Legal content and function of international responsibility (A/CN.4/96, chapter X, p. 127). The Commission would not have to study criminal responsibility as such, but would have to bear in mind cases in which the responsibility for a punishable act implied punishment and also the reparation of the injury.

22. In considering basis for discussion No. II—The active subjects of international responsibility—it should be borne in mind that even if General Assembly resolution 799 (VIII) was interpreted strictly, it would be found, when an exclusive responsibility of States was studied, that in the modern concept of international responsibility accepted by the Commission some part of the responsibility for committing certain illegal acts might not be imputable to States exclusively. Two

[9] *Official Records of the General Assembly, Ninth session, Supplement No. 9* (A/2693), para. 74.

matters were involved: the duty to make reparation, and criminal responsibility. The latter was not imputable to States, but to individuals within the existing concept. Thus, even within a restricted interpretation of General Assembly resolution 799 (VIII), the Commission could not avoid the consideration of criminal responsibility if it wished fully to comply with the General Assembly resolution.

23. He had not included that topic in the bases for discussion, since it was mainly a theoretical concept, but he would point out that the concept that the individual was an active subject of international responsibility existed in some cases, as laid down by the rulings of the Court provided for by the Treaty of 18 April 1951 constituting the European Coal and Steel Community.[10] In such cases, if the individual was unable to recover damages from an official or employee, the Court might assess an equitable indemnity against the Community. That view had also been endorsed by both the 1951 and 1953 Committees on International Criminal Jurisdiction, when the French, Belgian and other delegations had proposed that the Court might hear cases involving civil liability suits against persons who had committed crimes against international law. The proposal had been made by obviously responsible delegations. It had not been accepted, because it had been deemed outside the scope of the Committee's terms of reference, but the idea itself had not been rejected in substance, and if the Commission wished its conclusions to square with international practice, it could not fail to contemplate the principle that individuals might be active subjects of international responsibility.

24. There were also many precedents for the international responsibility of international organizations, a concept which had been accepted since the time of the League of Nations. The idea embodied in paragraph 3 of basis for discussion No. II had been universally accepted, although objections had been raised in some cases.

25. In basis for discussion No. III he had raised the question of the passive subjects of international responsibility, or, in other words, the situation of the titular claimant of an injured interest or right. The traditional theory and practice had been established by, and had issued from, the same basic concepts as the concept of imputability. The basic idea had been that only the State was imputable, since international law prevailed solely between States and conferred interests and rights upon them. It had not, therefore, been conceived that when there was a breach or non-performance of an international obligation which resulted in injury, there could be any other titular claimant of the injured interest or right than the State.

26. In contemporary international law, in which full recognition had been given to the existence of other subjects of international responsibility, traditional theory and practice must be reconsidered in order to adapt them to the new state of affairs. Accordingly, he had listed as passive subjects of international responsibility foreign private individuals, States and international organizations. Undoubtedly, a foreign individual, as an individual, would be a passive subject of international responsibility only at a given moment — namely, when the circumstances set out in sub-paragraph 2 (*b*) were not present. Under that sub-paragraph, the State as a legal entity might be the direct object of the injury, but, as a State, it might also be affected as the State of the nationality of the foreign private individual who had been injured in person or property. The foreign individual might be the passive subject directly affected, but, in some circumstances, the injury might occur in such a way as to indicate a general state of danger—i.e., a number of occurrences gave grounds for assuming that the State concerned had a general interest in protecting the interests or rights of its nationals. That doctrine had been accepted in various arbitral awards, but was no longer the classic doctrine accepted by the International Court of Justice. The Court, imbued as it was with traditional practice and theory, had always identified the interest of foreign private individuals with that of the State of which they were nationals, and had refused to accept the idea that a foreign individual might be the titular claimant of an interest.

27. The same situation prevailed in the case of international organizations. He had reproduced almost literally the Court's advisory opinion in the case of Reparation for Injuries suffered in the service of the United Nations[11] in order to define the responsibilities which such organizations might incur.

28. The problem set out in paragraph 3 referred to that deriving from the capacity to bring an international claim for damages sustained. Logically, in international practice an individual would always have such a capacity when his own interest was injured, but that idea might not be acceptable in practice at the present stage of international law; it would therefore be better simply to state the principle so that it might apply in some circumstances and not in others. The guiding principle was that in cases of responsibility for damage to the person or property of aliens, " general interest " of the alien's State in the damage should receive special consideration. In other words, in cases in which not only the material interest of the alien was injured, but also the interest of the State of which he was a national, the State of his nationality might invoke " general interest " for circumstances in which the injury occurred. The case was an extremely complex one, and he had no fixed opinion, owing to the difficulties of reconciling all the new ideas of State responsibility with the capacity to bring an international claim.

29. In basis for discussion No. IV—Responsibility in respect of violations of the fundamental rights of man—he had tried to find a solution to perhaps one of the most important practical problems in international law with regard to international responsibility. In traditional international law there had always been a clash between the so-called " international standard of justice " and the principle of the equality of nationals and aliens. The

[10] *American Journal of International Law* (1952), Suppl. Vol. 46, p. 120.

[11] I.C.J. Reports 1949, p. 174.

former had been widely accepted and had been supported by various decisions of arbitral tribunals and commissions. An attempt had been made to establish the principle that aliens might enjoy and merit special respect from the State in which they resided or where they carried on their activities. The latter principle prevailed where there were certain fundamental human rights which constituted the rights guaranteed in all civilized countries. Especially in Latin America, the former came into conflict with the principle, embodied in all Latin American constitutions, and in many special laws, that nationals and aliens enjoyed equality of treatment. It had been stated that aliens should not have the right, nor expect, to receive preferential treatment over nationals. The problem had always related to the idea of drawing a distinction between nationals and aliens who, in some cases, might receive more rights and, in others, be placed on the same footing, as nationals under local law.

30. The " international standard of justice " had been the principle of the international recognition of individual rights, but it should be noted that those rights were accorded to the individual alien in his capacity as a national of another State. That rule had been established at a time when international law had not recognized any rights to individuals in any capacity other than that of alien, so long as that status was maintained. The same situation had obtained when the principle of equal treatment of aliens and nationals had prevailed.

31. A number of learned writers had dealt with the situation with regard to the international recognition of the rights of man as it had been recently defined by the United Nations Charter, and, in particular, by the Declaration signed at Bogotá in March 1948 and the Universal Declaration of Human Rights signed at Paris in December 1948. Those international instruments had given rise to an entirely new situation in which the same human rights as previously had been recognized, but the distinction between nationals and aliens had been wholly eliminated. The two traditional concepts had been fused together, and both had lost their individual justification. When the existence of a minimum of fundamental human rights was internationally recognized, the question whether an individual was a national of a State or an alien or a stateless person had ceased to matter, because the factor of nationality no longer came into consideration.

32. The declarations of rights which he had cited referred to a number of rights with which the Commission was not concerned and which were not essentially fundamental human rights. That difficulty might, however, be easily overcome if the Commission, when it came to prepare its first draft establishing the specific obligations forming international responsibility, stated precisely what were the essential and fundamental human rights that were actually germane to its purpose, and based its draft on actual practice—in particular, on cases of denials of justice.

33. The problem in basis for discussion No. V—Exoneration from responsibility; extenuating and aggravating circumstances—was rather more complicated. It was difficult to state precisely in every case what were the causes of exoneration from international responsibility, especially what were some of the extenuating and aggravating circumstances, and equally difficult to say whether they had been recognized or not in international law and practice, in particular cases of self-defence and *force majeure*. Some cases had been recognized as genuine causes for exoneration, but others merely as extenuating circumstances. The Commission might in any case establish a range of gradations, but that would give rise to serious difficulties. For the purposes of his report, he had simply drawn attention to the difficulties and confined himself to recognizing the general principle that such gradation might exist and be valid.

34. He had formulated sub-paragraph 2 (*a*)—Failure to resort to local remedies—in the simplest way; and that might give rise to difficulties of interpretation, especially with regard to the term " exhausted ". Some authorities construed " exhaustion " as the time at which all means of local redress had been tried and found inadequate. Others adhered to the opinion of the Permanent Court of International Justice that it was not necessary to resort to municipal courts if those courts had no jurisdiction to award relief, and that it was not necessary again to resort to those courts if the result must be a repetition of a decision already given.[12] The latter view was dangerous, as it permitted the party to prejudge the effectiveness of local remedies; but it was applied in practice. It had also been held that the resort to local remedies must be sufficient to guarantee effective reparation. That view would be dangerous if accepted without reservations, as it involved a matter of judgment.

35. The renunciation of diplomatic protection by the State had been a practice common towards the end of the nineteenth century and beginning of the twentieth century, although it had been deprecated by jurists. Thus the Institut de droit international at its Neuchâtel session (1900) had adopted a resolution recommending States to abstain from inserting in treaties " reciprocal non-liability clauses ".[13] The practice had almost died out. The criticism had rightly been made that, if the rights of an individual were concerned, it was not conceivable that the State should renounce protection of those rights when they were not the rights of the State itself. That was consistent with contemporary notions of international law. The State was now capable of renouncing nothing more than its own rights, but not the rights of its nationals which belonged to them, not as nationals, but as individuals. That point would have to be taken into consideration, because there would always be rights and interests reserved to the State itself as a collective and political entity, and there would always be cases of injuries to the interests of foreigners where a " general interest " of the State was also involved. A State might renounce diplomatic protection only when the material and moral damage was done to an interest of its own and not an interest of one of its nationals in his capacity as a private person.

36. In the case of renunciation of diplomatic protection

[12] Permanent Court of International Justice, Series A/B (Judgments, Orders and Advisory Opinions), No. 76, p. 18. *Panevezys - Saldutiskis Railway* case.

[13] *Annuaire de l'Institut de droit international*, Vol. 18, p. 253.

by foreign private individuals, the "Calvo clause" might be relied on in so far as it did not refer to rights which, by their nature, were not capable of being renounced, or to questions in which the private person was not the only interested party. In other words, the principle of renunciation of diplomatic protection by an individual was accepted, but with two restrictions or conditions — namely, that the rights were not those which by their very nature no human being might be permitted to renounce even if he wished to do so, for his economic interests or under pressure, and secondly, that the Calvo clause could not be extended to those rights where the private person was not the only interested party. That might occur when a foreign private party went to a country and signed a contract in which he renounced diplomatic protection covering all matters in it, and one of the matters involved in its execution was a "general interest" of the State of his nationality. In that case, the Calvo clause would not be valid, since it dealt only with the exclusive right of a private person which might be renounced, but did not apply with regard to an interest which was not solely the interest of that private person. That was logical enough, and, indeed, was based on the same logic as the case where a State renounced the diplomatic protection of foreign private persons when the State's interest alone was not involved, but also that of a foreign private person. He had found that method of formulating the principle most appropriate, together with the exceptions, to which he had attributed the same fundamental value.

37. Basis for discussion No. VI—Character, function and measure of reparation—was linked to basis of discussion No I—Legal content and function of international responsibility. But it also raised other questions in connexion with which traditional doctrine and practice might require substantial reconsideration in accordance with the latest developments in international law.

38. Paragraph 1 established two forms of reparation in the strict sense—restitution and pecuniary damages where restitution was not possible or would not be adequate. The principle had been generally recognized and applied in practice.

39. The difficulties arose in the punitive function of reparation measures referred to in paragraph 2, for the problem of penal damages was highly controversial. On the one hand, there was a refusal to admit that international practice recognized the penal character of reparations, and on the other, many authorities, whether in respect of judicial, diplomatic or arbitral practice, stated that, however they might be styled, reparations were in fact imposed with a punitive purpose, a striking case in point being that of the *I'm Alone*. That theory had been criticized on the grounds that the State or community should not be punished for an act committed by one of its officials, which led to an attempt to distinguish between restitution *stricto sensu*—i.e., damages—and reparation in its punitive aspect, the basis being the question whether the sanction should fall on the individual as an organ of the State or as a private person. In the traditional view, the action of the State was restricted to an acknowledgment of the act committed and, on occasion, punishment of the offender. The problem was one of presentation. In traditional practice, the acceptance of State responsibility led to a distinction being drawn between the civil responsibility assumed by the State and the penal responsibility borne by the individual, of which the latter must bear the direct consequences. That was the natural result of the recognition of State responsibility and the punishment of the offender, whether an official or a private individual.

40. In the determination of the extent of reparation, particularly of pecuniary damages, practice and international jurisprudence were not always based on the sole logical criterion, which was the character of the obligation concerned—i.e., the gravity of the wrongful act and the extent of the damage caused. Unfortunately, political considerations had come to play an important role, and the victim State considered that reparation should correspond not only to the material damage inflicted, but to the moral prejudice caused to the "honour and dignity of the State". Frequently, that view was expressed categorically, as in the case of the *I'm Alone*, when a pecuniary reparation was imposed, apart from the damages proper, for the wrong inflicted upon the State. That procedure was hardly consistent with contemporary trends in international law.

41. In another case, the Permanent Court of International Justice had found that "The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage" (A/CN4/96, p. 110). That was certainly an artificial distinction alien to modern ideas, for it amounted to raising the State to the status of a kind of superman, and the individual, even in the case of a wrongful act leading to his death, was diminished to the level of a mere accessory. The criterion was always the damage suffered by the State.

42. The inconsistency was seen also in the Janes case in Mexico, where, after the assassination of an alien, the court did not base reparation on the original wrongful act of the offender, but imposed a fine on the State for the non-observance of its duty (A/CN.4/96, p. 111). The sanction was not visited upon the individual wrongdoer, because it was held that he had no international personality. That procedure was both artificial and unjustifiable, for it was not based on the simple, logical assumption that reparation should be determined by reference to the gravity of the offence or the extent of the damage caused. Those reflections led to paragraph 3, which referred to the determination of the character and measure of reparation. In practice, the determining authority was the State which, since it had abrogated the claims of the individual, acted arbitrarily in assessing the amount of reparation.

43. Further inconsistencies in traditional procedure were found in basis for discussion No. VII—International claims and modes of settlement. Paragraph 1 referred to the new character of an international claim resulting from the transfer of the claim from the individual level to the State level, with its accompanying political aspects,

and to the difficulties thereby entailed. Those difficulties arising out of the traditional doctrine were stressed in the comment to article 18 of the Harvard Research draft, which he had quoted on page 118 of his report. It was an unfortunate fact that the questions of national prestige involved in disputes between States tended quite to lose sight of the interests of the individual concerned. Diplomatic history was rich in such examples, and it behoved the Commission to seek a solution of that problem of the continuity of claim.

44. No difficulties should arise in respect of paragraphs 2 and 3, for they were based on the principles of the United Nations Charter. Paragraph 2 referred to arbitration, unless the parties agreed to some other more appropriate mode of settlement, while paragraph 3, which was also directly inspired by the provisions of the Charter, excluded the direct exercise of diplomatic protection through a threat, or actual use, of force.

45. With regard to the plan of work, he proposed that, as in dealing with other topics, the Commission should proceed by stages. The first aspect of the whole topic of international responsibility should be the " responsibility of States for damage caused to the person or property of aliens ". That item was one of the greatest interest, and its choice was also in full accordance with the terms of General Assembly resolution 799 (VIII). Moreover, there was ample documentation dealing with cases involving State responsibility. The subject of international responsibility in respect of international organizations was not yet ripe for consideration.

46. Mr. AMADO said that the task before the Commission was the codification of the existing rules of international law in respect of international responsibility. All national doctrines recognized that codification could fill in the gaps and re-state the recognized law in a more precise form. To some extent that simplified the task. However, the works of the many distinguished authors who had ranged over that vast subject were illuminated by expressions of noble aspirations with regard to the rights of mankind, which, it must be admitted, did not facilitate the task that lay before the Commission.

47. His first public contact with the problem had been at Montevideo in 1933, at the Seventh International Conference of American States, where the traditional concepts of international law had reigned supreme — and in passing he would note the frequent and apposite use of the term " traditional " by the Special Rapporteur, who had even quoted Professor Anzilotti, one of those who had most developed the theory of risk according to which the responsibility of a State existed *per se*. That Conference marked the inauguration, under the aegis of the late President Roosevelt and Mr. Cordell Hull, of the new orientation of United States policy. It had been followed by other conferences, for which there had been rich material provided by the Institute of International Law, the Harvard Law School Research and the documents of the former Permanent Court of International Justice at The Hague. In those days, responsibility was regarded as an inter-State matter. It was held that reparation made by a State was the maximum sanction that could be imposed, and any idea that went farther than *restitutio in integrum* was completely excluded. Reparation always took the form of pecuniary damages. Since then, however, other elements, such as the many diverse aspects of human rights, had intervened and the Commission would have to study the extent to which those new factors affected its task of a precise codification of the topic of international responsibility.

48. Mr. HSU, while appreciating the awareness of the Special Rapporteur of the new concepts of international responsibility, felt that he (the Special Rapporteur) had nevertheless somewhat narrowed the field in his proposed plan of work. He agreed that the Commission should adopt a gradual approach to the subject, but did that not imply that the subject should receive the more specific title, " Responsibility of States for damage caused to the person or property of aliens ", which would be more appropriate to the restricted field envisaged?

49. Faris Bey el-KHOURI, while acknowledging the comprehensive approach to a very difficult subject made by the Special Rapporteur, drew attention to one aspect of international responsibility that should not be overlooked. It was illustrated by the claims submitted to the Federal Republic of Germany by the State of Israel in respect of damage inflicted upon those of its nationals who had been victims of Nazi ill-treatment during the war. Those acts had ben condemned by world opinion, and sanctions had been imposed at the Nuremburg trials. Two questions arose, however. Was there any place in the codification of state responsibility for claims made by co-religionists based on ill-treatment inflicted on religious grounds; and, secondly was a newly founded State justified in claiming on behalf of its nationals reparation for wrongful acts committed before its creation? The Commission should not overlook those considerations.

50. Sir Gerald FITZMAURICE congratulated the Special Rapporteur on his systematic and scholarly approach to a subject of great importance. The report would undoubtedly rank as a most valuable contribution to the knowledge and understanding of the subject.

51. The Special Rapporteur had raised the question of the fitness of the subject for codification. In one sense, the topic was eminently fit, for the problem of responsibility was one that arose frequently in inter-State relations; there was also, as the Special Rapporteur had himself pointed out, in the findings of the International Court of Justice, claims tribunals and similar bodies a great volume of case law on the subject. The Commission must not be blind to the fact, however, that—as the Hague Codification Conference in 1930 had discovered—the whole subject was one of extreme complexity. There where two major difficulties. In the first place, there was insufficient agreement on fundamentals; it might be said that there were two opposing schools of thought. In that respect, the report had made a valuable attempt to reconcile certain basic differences of opinion. Secondly, even if agreement on fundamental principles could be reached, the amount of detail involved was so great as inevitably to cause further differences.

52. The Commission should not be deterred by those difficulties, for the need for codification was outstanding. To a large extent, international intercourse depended for its smooth flow on clearly formulated rules; in particular, with regard to the treatment of aliens in the broadest sense of the term—i.e., with regard not only to their persons, but also to their property, commercial interests and the like. In the contemporary world, it was of great importance to promote an international approach to such topics as the supply of capital for the development of under-developed countries. Past experience had unfortunately acted as a deterrent against assuming the risks of such capital investment, and many of the difficulties had arisen from the lack of certainty of the rules governing the position of aliens and their interests. A code on that topic that would reconcile the different points of view and find general acceptance would be of real benefit.

The meeting rose at 12.55 p.m.

371st MEETING

Wednesday, 20 June 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

State responsibility (item 6 of the agenda) (A/CN.4/96) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of item 6 of its agenda—State responsibility. If any members wished to make any general observations on the report on International Responsibility (A/CN.4/96) they would, of course, be free to do so. It would, however, facilitate consideration of the topic if the bases for discussion were subsequently taken separately.

2. Mr. EDMONDS said that the report was a most thoughtful study which would provide an admirable basis for a thorough discussion of the topic; for the moment, he would confine himself to a brief general comment. As an American poet had observed, " New occasions bring new duties ", and the closer association of the peoples of the world that had been promoted by the remarkable advance of science during the present century had led to a changed world situation in which a new light had been thrown on international duties and responsibilities. While agreeing with Sir Gerald Fitzmaurice that the subject certainly lent itself to codification,[1] he had to admit that a cursory reading of the draft indicated a range that went far beyond the rules hitherto internationally recognized in that field. It might be that the Commission, by a bold pronouncement, should take a definite step forward. His own approach, however, would be much more cautious, for it must not be overlooked that the Commission would be adopting a code which must be generally acceptable at the present time and not a set of rules full of fair promise only for the future. Without suggesting that the Special Rapporteur had in any way been too forward-looking, he felt that circumspection was required in stating existing law and in formulating rules for adoption by States.

3. Sir Gerald FITZMAURICE, while reserving his position with regard to particular articles, said he would add one or two comments to the remarks that he had made at the previous meeting. He had been struck by the very point made by Mr. Edmonds, and could only endorse the wise recommendation of the Special Rapporteur in the final paragraph of his report (A/CN.4/96, page 31), that the Commission should adopt a gradual approach to the question of codification. As drafted, the report covered the whole field of international responsibility which, although impinging at certain points on the position of the individual, was almost co-terminous with international law. The topic of paramount importance in the Commission's programme was the responsibility of States.

4. The question then arose whether an attempt should be made to cover the whole field of State responsibility, which again was almost coterminous with international law. The primary consideration was not the general responsibility of all international obligations, but, in particular, the responsibility of States for damage caused to the person or property of aliens. To urge such a limitation was in no sense to detract from the value of the report, which would be of considerable use, if only in the demarcation of the field of study and in opening up a wider view of a most important subject.

5. Mr. KRYLOV said that he was glad to share the opinion of a previous and highly distinguished Special Rapporteur, Mr. Guerrero, in whose work the history of the subject could be studied in detail.[2] In approaching the problem of state responsibility, the question naturally arose what progress had been made in the study of the subject during the quarter of a century that had elapsed since the publication of Guerrero's work. During that time the topic of international responsibility had attracted three new elements.

[1] A/CN.4/SR.370, para. 51.

[2] G. Guerrero: *La Responsabilité internationale des Etats*, Académie diplomatique internationale, 1928.

6. The first was the concept that the rights and guarantees afforded to aliens by the State should not be less than the fundamental rights of man as recognized and defined in contemporary international instruments.

7. The second was a borderline question that was by no means clear and called for further study, namely, that of a " general interest " that involved the State in the injury caused to the personal property of its nationals. That new element was illustrated by the claim of Israel against the Federal Republic of Germany submitted in respect of Nazi ill-treatment of European Jewry during the Second World War. It was claimed that such a case came within the scope of " general interest ". Personally, he doubted whether such concern on the part of the State of Israel would arouse much enthusiasm in the breast of a Jew who was a French national. The question, nevertheless, was a material one that should not be overlooked.

8. As to the third element, the Special Rapporteur, following a familiar academic practice, had kept his most telling point to the end; it was to be found in paragraph 3 of basis for discussion No. VII and amounted to a prohibition of the direct exercise of diplomatic protection through a threat, or the actual use, of force or any other form of intervention in the domestic or external affairs of the respondent State. The situation, therefore, was that State responsibility must be based on the fundamental principles of international law and on the rule he had just quoted. That point linked the approach of the Special Rapporteur with that of Guerrero, who had given prominence to the idea of non-intervention in the exercise of diplomatic protection, and in that connexion, he would refer once again to the wise precept, quoted by Grotius: *suum cuique*. He would reserve his right to comment on the other bases for discussion later.

9. Mr. SPIROPOULOS congratulated the Special Rapporteur on his report, which was of outstanding interest. It could not be compared with that on " Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners ", drawn up in 1927 by the Sub-Committee set up by the Committee of Experts on the Progressive Codification of International Law, under the League of Nations (Guerrero Report) (A/CN.4/96, Annex 1), for it embodied many new ideas which, for the first time in such a document, were formulated as principles. The Special Rapporteur had confined himself to putting forward certain bases for discussion summarizing general concepts and ideas which would subsequently be submitted to the Commission in a definitive text. That was a departure from the method adopted by Sir Gerald Fitzmaurice, who, in his report on the law of treaties (A/CN.4/101), had submitted his draft in final form.

10. As regards the bases for discussion, the first, which enunciated general principles, did not call for particular attention. In bases Nos. II and III, the correct approach had been adopted in drawing a distinction between the active and passive subjects of international responsibility. In basis No. II, it was pointed out that individuals could be active subjects in so far as any act or omission considered as punishable under international law could give rise to criminal responsibility. A study of that question had already been undertaken by the Commission at its second and sixth sessions, when it had prepared a draft code of offences against the peace and security of mankind. Moreover, as the Special Rapporteur had rightly pointed out, criminal responsibility was involved only in certain circumstances.

11. The most important question was that of the passive subjects of international responsibility, dealt with in basis No. III, which in fact constituted the core of the report. The fundamental ideas expressed therein were quite new, for, as Mr. Amado has said,[3] traditional doctrine maintained that only a State could be the passive subject of international responsibility. The Special Rapporteur considered that foreign private individuals could also be so regarded, provided the injury affected their person or property, and, having enunciated that principle, he adduced the basic and completely new concept according to which, as he (Mr. Spiropoulos) understood it, a person who had violated international law would be regarded as the passive subject of international responsibility. In its codification of the topic, the Commission should keep abreast of new ideas or, at the very least, give them mature consideration. Disregarding for the time being the question of international organizations, and despite his own doubts about the possibility of adopting such an innovation, the idea of formulating it in a report was excellent.

12. According to that concept, States might become passive subjects of international responsibility where a " general interest " was involved. He was not sure that he fully grasped the meaning of that concept, to which Mr. Krylov had also drawn attention.[4] A State would always have an interest in its own nationals. The Special Rapporteur, however, had restricted that interest to certain cases in which it had an interest in the injury caused to the person or property of its nationals. In that context, " special " rather than " general " might be a better word to use. In any case, the idea that, in principle, the passive subjects of international responsibility were private individuals, but that States could also qualify for that status in cases of " general (or special) interest " was a new concept. From the traditional point of view, that idea would be acceptable, although many authors, such as Krabbe, Legouis, Politis and others would dissent, regarding foreign private individuals as the only passive subjects of international responsibility. The Commission might well establish such a principle. What was of greater importance was the question of the practical results to which it would lead, and in that respect many difficulties would certainly be met with.

13. Paragraph 3 expressed the idea that the real owner of the injured interest or right should be recognized as having the capacity to bring an international claim for the damage sustained. What would be the practical consequence of such a rule? Capacity belonged to the private individual concerned, but in paragraph 2 it had

[3] A/CN.4/SR.370, para. 47.

[4] See para. 7, above.

been urged that in cases of " general interest " a State could be the passive subject of international responsibility. The extent of the application of the principle did not emerge clearly. Did the Special Rapporteur mean, for instance, that a foreign private individual having suffered damage could bring a case before an international tribunal such as the International Court of Justice? If so, the practical result would not be an innovation, because it would always be the State which would have the capacity to bring an international claim for the damage sustained. In the absence of a precise text, therefore, it was difficult to form an opinion on the practical consequences of the application of the principle.

14. With regard to basis for discussion No. IV, the Commission would have to decide later its attitude towards the principle of responsibility in respect of violations of the fundamental rights of man. The second sentence of paragraph 1 contained the important provision, amounting to a minimum guarantee of protection —emphasized by the phrase " in any case "—that the rights and guarantees afforded to aliens by the State should not be less than " the fundamental rights of man " recognized and defined in contemporary international instruments. In other words, those fundamental rights were taken as a criterion of violation of the provisions of international law. That was a new and most important concept, to which the Special Rapporteur had rightly drawn particular attention. In view of both the Universal Declaration of Human Rights and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome in 1950, the question could be put whether the principles embodied in those two documents really constituted a standard criterion for deciding whether the rights of an alien had been violated. Traditional doctrine had adopted a different criterion, that of the " international standard ", the validity of which, particularly since the Chorzow Factory case, [5] had been generally recognized. It might well be that a new international standard could be set up in order to determine the responsibilities of a State towards aliens in its territory.

15. With regard to sub-paragraph 2 (*b*) of basis for discussion No. V, dealing with renunciation of diplomatic protection as an exonerating circumstance, he wondered whether the manner of presenting the question was in accordance with international law. The text referred to " rights, which, by their nature, are not capable of being renounced ". Though personally unaware of any right that could not be renounced, he recognized that some jurists held that there were certain rights which a State could not waive in any circumstances. The text went on to refer to " questions in which the private person is not the only interested party ". If the implication was that in questions in which a private person was not the only interested party the State could not renounce diplomatic protection, the rule was not in accordance with traditional practice. He might quote, for instance, the Ambatielos case between Greece and the United Kingdom, which originated in 1923, but was not settled until 1956, Greece having refrained for years from bringing it before an international tribunal because it did not wish to disturb its friendly relations with the United Kingdom. Admittedly in that case the claim had been left in abeyance rather than abandoned, but there were cases in which States, being obliged to consider the general interest as well as that of the individual, had entirely abandoned the claims of their nationals. The text was therefore an extremely interesting innovation in that it laid down the clear rule that States could not abandon the claims of private persons.

16. The statement in paragraph 1 of basis for discussion No. VII that the international claim should not be considered as a new claim distinct from that brought before the local authorities was another departure of great importance. It was, however, contrary to traditional practice. He wondered, moreover, what the practical implications of such a principle would be. Assuming for the moment that an award had been made in favour of Greece in the Ambatielos case, then, under the new principle, Mr. Ambatielos, a private person having capacity to bring an international claim as a passive subject of international responsibility, would have been entitled to take measures of execution. But according to existing international law that was not possible. When an international tribunal made an award to a State in respect of a claim involving a private person, it was the State that enjoyed all the rights deriving from that award and not the private person.

17. As for the rule enunciated in paragraph 3 of basis for discussion No. VII, it dealt with what, in European diplomatic relations at least, was a very exceptional case. While regarding it as a rule which must be acceptable to all, he felt that the " intervention " would need to be clearly defined. Mere provocatory language did not constitute intervention. The term must be understood as denoting real intrusion in the domestic or external affairs of a State.

18. Mr. SALAMANCA congratulated the Special Rapporteur on the immense intellectual effort which he had made to cover every possible aspect of so vast and complex a problem; he had not hesitated to define his position very clearly and if he (Mr. Salamanca) differed from him, it was mainly on the matter of the emphasis placed on the role of the individual as a subject of international law.

19. Although not necessarily inclined towards conservative solutions, he thought it difficult, and perhaps even rash, to attempt to draw a clear-cut distinction between traditional and modern international law. Disputes regarding international responsibility, even when individual nationals were involved, were still disputes between States. The presence of private persons in such disputes was permitted by States only when it suited them. The view of the Institut de droit international quoted by the Special Rapporteur [6] in support of his thesis was, he thought, to be interpreted in that sense. Cases in which private persons were involved, either as active or passive subjects, were exceptionel and did not consti-

[5] *Publications of the Permanent Court of International Justice*, Series A, No. 9, 1927.

[6] A/CN.4/96, p. 66.

tute clear international practice. What might be called the traditional trend emerging from disputes between States alone was far more uniform. Since, however, some jurists saw a definite trend in disputes between States involving private persons, the question might be studied further, but should not be viewed as a contribution to the development of international law. The relationship between the State and the individual in international law was worthy of further study. It was noteworthy that, whereas in domestic law the sphere of action of the individual was being steadily restricted, the States in which the individual had least rights being regarded by some authorities as the most modern, in international law the opposite trend prevailed.

20. Referring to basis for discussion No. IV, he agreed that the draft covenants on human rights in process of elaboration by the United Nations laid down uniform criteria for the interpretation of human rights. But from the very outset it had been claimed that some of their provisions ran counter to those of Article 2, 7 of the Charter. The problem, in any case, was not one of recognition, since most States already recognized those rights in their domestic law. It was rather one of implementation, and on that point the Commission was bound to encounter all kinds of procedural and legal difficulties similar to those encountered when the question of an international criminal jurisdiction was discussed.

21. In considering the question of diplomatic protection, dealt with in basis for discussion No. V, the Commission, or at least its Latin-American members, might bear in mind President Roosevelt's declaration of non-intervention made in 1938 and the American Treaty on Pacific Settlement (Pact of Bogotá). The Mutual Security Agreements concluded by the United States of America with a number of States, both within and outside Latin America, were worthy of study in that connexion too. The detailed provisions included in some of those agreements for the compensation of United States investors in the event of expropriation established a kind of *a priori* diplomatic protection involving the total elimination of the private person as a subject of international responsibility. In view of the increasing number of such mutual security agreements and their comparative uniformity, it was quite possible that a solution to many problems of international responsibility might be found in the device of *a priori* diplomatic protection.

22. The question of diplomatic protection also had a bearing on basis for discussion No. VII. In the matter of international investment, as the debates in the Economic and Social Council showed, there were two conflicting trends: one based on fear of expropriation and the other on fear of exploitation. A reconciliation of those two trends might make a progressive contribution towards the solution of many problems of international responsibility. A purely practical measure that might do much to solve the problem was the establishment of international insurance companies to cover the risk of expropriation and refuse to insure any State which violated its contractual obligations. In the theoretical field, however, the wider adoption of the device of *a priori* diplomatic protection might completely transform the concept of state responsibility in the field of international investment. With the question of damage and prejudice and the punitive function of reparation measures, he would deal at a later stage.

23. So far as the Commission's plan of work was concerned, it clearly had to comply with the terms of General Assembly resolution 799 (VIII). Attempts by the Commission to solve all the problems raised by a particular subject had often given rise to conflicting reactions in the General Assembly. Since States were slow to accept the Commission's conclusions, he thought it wiser to concentrate at first on civil responsibility in a restricted sense, without prejudice to the possibility of dealing with the subject of international responsibility more fully at a later stage.

24. Mr. PAL expressed his sincere admiration for the report, which had opened up a vast field of knowledge. He wished first to be quite clear as to the exact subject under discussion. He could not understand why previous speakers had referred to " individual responsibility ". The misunderstanding had perhaps arisen through the Special Rapporteur's adoption of the rather wide term " International responsibility ". General Assembly resolution 799 (VIII), however, referred explicitly to " State responsibility ", that was, the responsibility of States to States and not the responsibility of States to individuals. Though the Commission might have occasion to take account of the actions of private persons it would only do so in so far as they gave rise to a case of State responsibility. The question of individual responsibility did not enter into the subject.

25. The same problem arose in connexion with basis for discussion No. III, where it was stated that foreign private individuals might be passive subjects of international responsibility. To accept that thesis would broaden the subject immensely. The Commission would have to consider the cases of millions of refugees and expellees who had suffered prejudice and loss of property through State action, in Korea, Indo-China, or through the partition of the Indian sub-continent, for example. He could not accept such an interpretation. The question was one of the responsibility of a State to a State, irrespective of the nature of the action that gave rise to that responsibility. A State might acquire a right *vis-à-vis* another State through an individual, but the individual could not himself acquire such a right *vis-à-vis* a foreign State.

26. The background material in the Special Rapporteur's report had confirmed his impression that the principles of international law governing state responsibility to be codified had been those governing the relations between State and State, with the individual entering into the picture merely as an agent giving rise to such responsibility. Under General Assembly resolution 799 (VIII), the reason for such codification had been declared to be the desirability of the maintenance and development of peaceful relations between States, and it was thus obvious that individuals could not in that context be regarded as subjects of international law, since they could not enforce their rights as against States. Even if basis for discussion No. III were really as wide as Mr. Spiropoulos had claimed it to be, the

Commission should avoid too broad an interpretation and keep in view the ultimate responsibility of State to State.

27. The problem of State responsibility had been under study since at least 1925. Annex No. 2 to the Special Rapporteur's report showed that bases for discussion had been drawn up as long ago as 1929 in the hope that they would secure approval by all States. Several States had given an assurance of their approval, but by no means all States had accepted the bases. That in itself was a warning against unduly broadening the subject.

28. Mr. Spiropoulos had expressed the belief in connexion with basis for discussion No. V (Exoneration from responsibility; extenuating and aggravating circumstances) that he could not conceive of a person or entity as incapable of renouncing diplomatic protection.[7] That was going too far, since it was conceivable that a right might be held by an agent on behalf of another party and that agent might not be empowered to renounce that right. There was apt to be confusion between the State and the depositary of the power of the State; the State possessed a right and the depositary exercised it.

29. Nor could he share Mr. Spiropoulos' misgivings with regard to basis for discussion No. VII (International claims and modes of settlement), in particular with regard to the use of the term " a new claim " in paragraph 1. In his understanding, one of the basic principles was that whenever a question of responsibility for the interest of a State arose, the injured individual would first resort to local remedies, and, only if they proved inadequate would he seek another jurisdiction. After local remedies had been exhausted, the State would intervene but would not lay a fresh claim by resorting to local remedies. The claim would, in fact, be the claim originally brought by the individual, and the State would be resorting to jurisdiction under international law other than that provided for local remedies.

30. The bases for discussion drafted by the Special Rapporteur covered the entire field of state responsibility and should not be extended by the Commission, even though the language in which they were couched made that possible.

31. Mr. SCELLE said that, on the Special Rapporteur's valuable report, he would only repeat a few personal observations on the lines of those he had made on his predecessor's report. Responsibility was a general aspect of international order, which, like every kind of juridical order, both national and international, must be a combination of the debits and credits that existed between members of the same society. There had been an appreciable evolution in the conception of the international society. Formerly, international law had dealt solely, or almost solely, with relations between States and the subject of international law had been primarily the State. Increasingly, however, the individual was tending to become the principal subject of international law. The responsibility of individual to individual was becoming much greater than that of State to State, since the State was tending merely to assert the responsibility of individual to individual, provided that responsibility issued from the juridical order of the State concerned.

32. The exhaustion of local remedies had originally derived from a simple act of courtesy between rulers. The relation now lay between individuals when the State was capable of asserting such responsibility. Responsibilities issuing from acts of rulers and their agents had now become the exception. Whenever the collectivity of States was not directly involved, the primary responsibility was that of individual to individual, or in other words the responsibility of individuals as subjects of law. That was the great new development. The exhaustion of local remedies was certainly needed, but those remedies were something definitely available. It even occurred sometimes that the responsibilities were criminal responsibilities, and there an extraordinary principle emerged, which would not even have been conceivable until quite recently, namely, that the responsibility was not linked with the exhaustion of local remedies nor with nationality.

33. That principle had issued from relations between the State of Israel and the State of the Federal Republic of Germany, which had agreed to recognize that there was a responsibility which was not derived from an act of a State *vis-à-vis* its subjects, but from a quite different act. From the sole fact that a State had recognized that it had incurred a responsibility which did not exist in the rules of international law now in force, a claim for responsibility *vis-à-vis* another State had emerged. It had been somewhat as if a State, which had not concerned itself with the interests of its nationals, had been asked by the international community to show that another State, at a different stage in its legislation and policy, had made itself responsible and must indemnify another State which had taken upon itself to succour violations of a general right, a human right, or in other words a right essential to all individuals. That was something quite new, so much so that many international jurists might claim that it was exceptional, but it had been an appurtenance to the recognition of human rights. That overturned the whole foundation on which international law had hitherto rested. It was, in fact, a development towards the abolition of law as between States and the substitution of a total interrelation between individuals. The judiciary and the State would apply that new form of law. The State would no longer be asked to enforce a substitute for international law, but to perform the essential function of applying the consequences of responsibility, as between individuals or as between the individual and the State; in other words, of distinguishing between subjective and objective responsibility. That responsibility, whether civil or criminal, would function within the State in the same way as in international society with respect to relations between the individual and agents of the State. That was an astonishingly rapid development towards the transformation of international law into something like municipal law. A striking example was the way in which the principle that " The King can do no wrong " had

[7] See para. 15, above.

disappeared in favour of the principle of the responsibility of the State towards the individual and its general responsibility to the international community.

34. Most qualified jurists considered that the relation of State to State expressed in diplomatic protection was on the way to eclipse and to its substitution by new rules of law. In any case, diplomatic protection had been an innovation in the relation of the rights of the individual to those of the State, and was increasingly becoming a legal fiction.

35. The Commission would be unwise to draft its codification of the rules of State responsibility in the form of a convention. It should draw up a new code to be submitted to the General Assembly. A convention would be unlikely to be accepted by the General Assembly.

36. Mr. ZOUREK observed that the question of whether individuals might be subjects of international law was the key to the Special Rapporteur's draft and had aroused acute differences of opinion. He himself could not accept such a concept. Abolition of the inter-State character of international law would mean the end of international law. Several historical examples had been adduced in which individuals had been endowed with capacity to appear before international tribunals. None, however, offered sufficient grounds for regarding the individual as a subject of international law—i.e., as endowed with the capacity to create rules of international law. It was, of course, always possible for States to endow individuals with capacity for access to international tribunals by means of international conventions, but, in doing so, they did not intend to confer on individuals the characteristics of a subject of international law. The capacity to establish rules of international law belonged only to States, and, to an infinitely less degree and in virtue of and within the limits of special arrangements, to international organizations, but certainly not to individuals.

37. A special argument often advanced had been the international protection of human rights; it had been contended that that undoubtedly conferred on the individual the characteristics of a subject of international law. That, however, was not so. The question was not a new one, save in its contemporary extent and development. It had been familiar since the conclusion of the treaties concerning minorities, which had conferred certain rights on all persons inhabiting the territories defined by them. No suggestion had, however, been made that persons inhabiting those territories had thereby become subjects of international law. States signatories to the treaties had merely been obliged to insert clauses in their constitutional law concerning the protection of minorities, so that the provisions would be binding both on the States and on the individuals concerned, but within the framework of municipal law.

38. The rules of criminal law were somewhat analogous when drafted to protect the higher interests of the family of nations. There, too, the rules of criminal law embodied in treaties became integrated in municipal law. Accordingly, it was hard to see any good grounds for regarding the individual as a subject of international law. Even if the Draft Covenants on Human Rights under consideration by the United Nations were completed and put into effect, they would not alter the situation in any way because they would merely embody international obligations which States would be bound to accord to the inhabitants of their territory. It must therefore be concluded that, save in exceptional cases which merely confirmed the rule, the individual had no direct claim to the protection of the rules of international law.

39. The Commission must seriously consider whether, if its codification was to receive the assent of States and governments, in its future work, it would be wise to base its drafts on a concept accepted by certain learned authors, but which did not form part of contemporary international law.

40. Sir Gerald FITZMAURICE said that he could only accept with great reservations the principle that an individual might have rights and obligations under international law. He could not follow Mr. Scelle all the way, although he recognized the cogency of his views. Current ideas about the position of the individual in international law had done little more than introduce an element of confusion into an area which had hitherto been relatively well regulated in accordance with the traditional idea that international law ruled as between State and State, and had done little in practice to improve the position of the individual.

41. It was perfectly possible to hold that the individual had rights and obligations, but he could only assert them through governments and—although that was more open to dispute—could only be made to comply with obligations when the State enforced them in its municipal law. He would not, however, wish it to be supposed that he was not aware of a certain evolution which must, of course, be taken into account. The traditional system of State responsibility already took account of the position of the individual and even of penal responsibility in connexion with him, because, in the case of certain injuries to foreign private persons, the State was obliged to make reparation and to see that the responsible official was punished. He therefore wondered whether it was necessary to import new ideas into the traditional law, which already covered much of the ground. It might be said in theory, with considerable force, that an individual was possessed of rights *vis-à-vis* a foreign State; but those rights could be asserted only through the State, so that that State was, in a sense, obliged to make a complaint by one of its nationals its own complaint.

The meeting rose at 1 p.m.

372nd MEETING

Thursday, 21 June 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

State responsibility (item 6 of the agenda) (A/CN.4/96) (*continued*)

1. The CHAIRMAN invited the Commission to consider the bases for discussion contained in Chapter X of his report on International Responsibility (A/CN.4/96).

Chapter X: Bases for discussion

2. Mr. FRANÇOIS said that he rather doubted whether the criminal responsibility of States really existed. The Special Rapporteur himself had stated in his report (p. 26): " While international criminal responsibility *per se* is outside the scope of the present codification, there are important reasons why it should not be ignored completely in the study of some at least of the cases of responsibility with which this codification is concerned ". Even if the topic were restricted to the specific issue on the lines laid down by the Hague Conference on the Codification of International Law of 1930, the new principle must be taken into account, and the Commission must consider whether the principle of the criminal responsibility of the State existed, since its decision would be likely to affect the question with which it was to deal.

3. The idea that the international community could inflict punishment on a State had been contested on the grounds that the imposition of penalties was a matter exclusively for the sovereign State as the representative on earth of divine right, and that the international community was not a super-State. He did not accept that view, because a State might very well be threatened with punishment as a preventive measure in the interests of the maintenance of peace. The basis for the former view was probably that of revenge (*lex talionis*), whereas the latter was designed to prevent a breach of the rules of international law. He could therefore accept in principle the idea of the criminal responsibility of States, but was very dubious whether international law recognized it in practice. There had been cases in which the criminal responsibility of States had been accepted, notably the *I'm Alone* case[1] but there had been many more cases in which the principle had been contested and courts and arbitral tribunals had refused to inflict punishment on States on the ground that the international community was not empowered to do so. In the *Carthage* case[2] between Italy and France before the Permanent Court of Arbitration, France had demanded that the court impose a symbolic fine of one franc, but the Court had refused, on the ground that it was a sufficient penalty for the court to hold that the State in question had been at fault and that any other penalty would exceed the purpose of international jurisdiction.

4. The state of law had probably not altered after the Nuremburg Trials. In fact, precisely the reverse was true. At Nuremburg the issue had been not the criminal responsibility of a State, but the responsibility of authors of criminal acts even when they had been organs of the State. In other words, the Court had denied the criminal responsibility of States and had reintroduced the criterion that " the King can do no wrong ". Mr. Scelle had argued[3] that that criterion had become obsolete, but, with respect, his interpretation had not been quite complete. That criterion did not mean that the King could not commit illegal acts, but merely that such acts could not be imputed to the King or State, but only to the King's advisers or the organs of State. The whole concept of ministerial responsibility rested on that criterion, and it had in fact been applied at the Nuremburg trials. It was not nceessary to impute criminal acts to the State, and perhaps not even desirable, since that would envenom relations between States. He himself preferred a system dealing only with civil responsibility, completed by the acceptance of criminal responsibility on the part of private persons, officers or organs of State. That implied a return to the criterion laid down by the Preparatory Committee of the Codification Conference at The Hague (1929):

> Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

5. Mr. SCELLE said that he entirely agreed with Mr. François and accepted the criticism that he had not fully expressed his thought in his previous remarks. He agreed that as a concept the criminal responsibility of States could not exist. Since the State as a personality was a legal fiction, it could not have criminal responsibility, but merely objective responsibility as liable to make reparation where an individual could not do so. That was the doctrine of the entire younger school of French jurists, none of whom would accept the criminal respon-

[1] Whitman, *Damages in International Law*, Washington, 1937, 1943.

[2] *Revue générale de droit public*, 1913.

[3] A/CN.4/SR.371, para. 33.

sibility of States. According to that doctrine, the State as a personality disappeared and was replaced in criminal responsibility of by a minister, a private person, a member of an association, or even a commercial concern. The *personne morale* was a convenient legal fiction, and there was no need to give it a personality, much less inflict punishment upon it. He therefore went rather farther than Mr. François, but the basis of his thought was the same.

6. Mr. AMADO said that he, like Mr. Scelle, had been surprised to find reference to the criminal responsibility of States in the Special Rapporteur's report. No doubt the Special Rapporteur had not wished to overlook any of the new trends in international law, but the concept of the criminal responsibility of States was inconceivable. All international jurisprudence militated against such a concept. The leading judgment had been that in the *Carthage* case, 16 May 1913 [4] and had been couched in the following language:

> In case a Power should fail to fulfil its obligations, whether general or special, to another Power, the statement of this fact, especially in an arbitral award, constitutes already a serious penalty.

A supporting judgment had been that of the Mixed Claims Commission (United States and Germany) in the *Lusitania* case,[5] as follows:

> This Commission is without power to impose penalties for the use and benefit of private claimants when the Government... has exacted none.

The arbitral award of 31 July 1928 on the *Naulilaa* incident [6] provided another precedent, in which the Court had refused to accept a Portuguese claim for penal damages against Germany for violation of the neutrality of Angola and in compensation for violations of Portuguese territory.

7. The obligation to make reparation in fact took the form of restitution and the restoration of the original state of affairs (*restitutio in integrum*) by the abrogation of the law or decree inconsistent with international law, although that form of restitution was not always possible. Reparation might also be in the form of moral satisfaction, in the shape of an apology given with the appropriate solemnity or a salute to the flag. It might also take the form of domestic sanctions by the administrative or disciplinary punishment of the officials responsible, or else the payment of a pecuniary indemnity. The latter was the normal form of reparation, as had been shown by the Permanent Court of Arbitration in its judgment of 11 November 1912 in the case relating to the Turkish war indemnity to Russia.[7]

The various responsibilities of States are not distinguished from each other by essential differences; all resolve themselves or finally may be resolved into the payment of a sum of money, and international custom and precedent accord with these principles.

8. That the payment of pecuniary damages was really almost the only way of obtaining reparation might be deplorable, but it was a fact. A State could not be imprisoned; it could only be asked to pay damages and to exhaust all local remedies. He, therefore, entirely agreed with the views expressed by Mr. Scelle and Mr. François.

9. Mr. KRYLOV agreed that it was impossible to speak of the criminal responsibility of States. It should be observed, however, that in basis for discussion No. 2 the Special Rapporteur had attributed criminal responsibility only to individuals. He himself would have preferred that the question even of the criminal responsibility of individuals be left aside for the time being, and that the Commission confine itself to the topic of the civil responsibility of States for damage caused to the person or property of aliens.

10. The Commission had already done a great deal of work on the criminal responsibility of individuals. That work might, however, be carried considerably further. It had been somewhat impeded by the political rigidity of Vyshinsky and the attitude of the United States. Mr. Spiropoulos had worked hard on the subject, although he himself did not agree with every line of Mr. Spiropoulos' reports.[8]

11. In his personal view, the distinction drawn between active and passive subjects of international responsibility was undesirable; he could see no value in the term " passive subjects ". The person whose interest or right had been injured was not passive; at the most, he was unfortunate, but was defending himself. Unless the terminology was definitely required, the distinction was purposeless.

12. Mr. SANDSTRÖM observed that Mr. François had raised the same problem as Mr. Krylov—namely, whether the criminal responsibility of the individual was a concept which existed in contemporary international law. The Commission's draft Code of Offences against the Peace and Security of Mankind [9] had deliberately omitted the question of whether the principles underlined at the Nuremburg trials were principles of existing international law. It was doubtful whether the criminal responsibility of individuals existed before any code had laid down penalties for offences.

13. Sir Gerald FITZMAURICE had no criticism to make of basis for discussion No. 2 as it was clearly not confined to the question of the responsibility of States, since individuals and international organs were referred to in paragraph 2. If the Commission accepted the proposal by the Special Rapporteur that codification should be confined to the law on the responsibility of States for damage caused to the person or property of aliens, the other questions would not arise at that stage in the Commission's work.

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[4] G. G. Wilson, *The Hague Arbitration Cases, Boston and London, 1915*, p. 366.

[5] Mixed Claims Commission (United States and Germany), *Administrative Decisions*, Washington, 1925, p. 31.

[6] Briggs, *The Law of Nations, Cases, Documents and Notes*, New York, 1938, pp. 677-679.

[7] G. G. Wilson, *The Hague Arbitration Cases*, Boston and London, 1915, p. 307.

[8] A/CN.4/25, A/CN.4/44, A/CN.4/85.

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

14. The penal element undoubtedly came into the question, as States had obligations, under traditional international law, in certain circumstances and as part of the reparation due to other States, to punish officials and private persons in case of breach or non-observance of an international obligation. The State might even have to pay what were called exemplary damages, but that did not necessarily imply criminal responsibility. Nearly all countries had a system of inflicting damages over and above the pecuniary extent of the injury where courts held that a moral element was involved. That, however, was a process in civil law, and the person against whom exemplary damages were assessed did not thereby become a criminal. True, there had been cases in international jurisprudence, such as the *I'm Alone* case, in which damages had been inflicted over and beyond strict *restitutio in integrum*, but all such cases came within the ambit of the civil responsibility of the State and had not thereby been transformed into the nature of a criminal responsibility.

15. Mr. SPIROPOULOS observed that he had already remarked at the previous meeting[10] that the question of criminal responsibility of individuals had been dealt with by the Commission in connexion with the Draft Code of Offences against the Peace and Security of Mankind. As that Code was still before the General Assembly, the topic should not be dealt with again until the Assembly had given a decision on it.

16. The Commission had deliberately excluded the question of the criminal responsibility of States when it had discussed that code, and he himself had argued against Vespasiano Pella's view in connexion with the code rather than with the Nuremburg trials.

17. Sir Gerald Fitzmaurice had said that in civil law there existed a system of inflicting damages exceeding the extent of the injury. As a theory, the idea of punishing a State for criminal responsibility was not an absurdity, as Pella had shown. The idea was conceivable as a consequence of a war and exemplary damages might, in theory, be levied against the State, not as a legal fiction, but as a collectivity. The Commission, however, should not enter into that topic at the present stage.

18. Mr. SCELLE drew attention to the confusion caused by the misuse of the terms " active subjects " and " passive subjects " of international responsibility in, at any rate the French text of, bases for discussion Nos. II and III. The French meaning of those terms was the exact opposite of that attributed to them. The " sujet passif " was the State that was obliged to pay reparation, whereas the " sujet actif " was the State in person who received the reparation. He himself had been completely misled in his first reading of the report and he suggested that a note should be added pointing out that difference in terminology.

19. Mr. KRYLOV remarked that that was precisely why he had advocated avoiding such terminology.

20. Sir Gerald FITZMAURICE said that the same criticism applied to the English text.

21. Mr. LIANG, Secretary to the Commission, said that the terminology in question would probably not appear in any rules that the Special Rapporteur submitted to the Commission. It was not necessary to introduce controversial terminology in the text of articles, although the distinction might be useful in a doctrinal analysis of concepts and to clarify fundamental ideas. Another example of unusual terminology was the term " real owner ", in basis for discussion No. III, paragraph 3; the correct term for the victim of an injury would be " beneficiary ".

22. Mr. ZOUREK thought that the criticisms already voiced arose from the fact that in certain respects the report on international responsibility went farther than was strictly required by the nature of the topic, for it concerned aspects of international responsibility in general. He shared the objections, in particular those raised by Mr. François,[11] with regard to the principle advanced in respect of the criminal responsibility of States. The theory had not been recognized in international law, nor had it been adopted by the Commission in its Draft Code of Offences against the Peace and Security of Mankind. Moreover, it had little practical value, for in cases where theoretical damages might be contemplated, the individuals or the State causing the injury would in fact never be in a position to make adequate reparation, let alone to pay a collective fine. The case of the Nazi regime was a case in point.

23. With regard to basis for discussion No. II, a question to be decided was whether the international responsibility of the State was engaged solely in the case of a fault (*culpa*) on the part of an organ of the State or whether it could be enlarged to include the theory of risk. In that connexion he recalled Mr. Amado's reference[12] to that theory. The basis for discussion he had mentioned seemed to start from the idea that international responsibility was the consequence of a breach or non-observance of an international obligation, which amounted to acceptance of the theory of causality. As to the question whether proof of fault should be required in all cases, no decision could be taken without a thorough examination, which should take into consideration the various categories of damage.

24. The system proposed in basis for discussion No. III certainly went farther than was permitted by existing international law. The idea that foreign private individuals might be passive subjects of international responsibility if the injury affected their person or property was a major innovation. He doubted whether the recognition of that concept would prove to have practical value, because in fact it would always be the State that would bring an international claim for the damage sustained—save, of course, in cases where a convention made special provision for an individual to bring such a claim. It was also a principle that States would not be able to accept. The existing system, as defined by the International Court of Justice in the cases mentioned in the report, was that only the State was recognized as a passive subject of

[10] A/CN.4/SR.371, para. 10.

[11] See paras. 2-4, above.

[12] A/CN.4/SR.370, para. 47.

international responsibility in all cases, not merely in those in which it had a " general interest ". For those reasons, he could not support the adoption of the principle.

25. Faris Bey el-KHOURI said that the reason why the criminal responsibility of a State entailed by the breach or non-observance of an international obligation was not recognized in international law was the practical difficulty of imposing an adequate penalty. In cases of aggression by a State resulting in injury to persons or property of another State, the individual authors of the injury could not make reparation, for they were acting under the obligations of municipal law. It was a basic principle of jurisprudence, however, that criminal offenders should be punished, and in such cases, since the whole community was the guilty party, punishment should be meted out to the State in the only form in which a penalty could be applied, which was a fine in money. That concept was perfectly defensible in international law, for a State was a legal entity; it was moreover, in accordance with the Charter of the United Nations. There was nothing revolutionary in such an approach, and the Commission should take a firm stand in establishing that concept.

26. Mr. SANDSTRÖM observed that the question of the subjects of international responsibility had wide implications. He doubted whether adoption of the principles enunciated would in fact operate to the benefit of the private individuals concerned. In the first place, the legal procedure entailed would be extremely expensive; moreover, it was difficult to conceive an international claim for damage being made by a private individual without the support of the State of which he was a national.

27. Mr. Zourek had raised an extremely important point with regard to the application of the theories of risk and fault as criteria for establishing international responsibility. The trend in municipal law seemed to favour the idea that there was no need to prove fault in order to impute responsibility, a principle that was applied in Scandinavian countries in respect of industrial accidents, particularly those occurring in dangerous occupations. An analagous responsibility in the international field was perfectly conceivable in the case, for instance, of damage inflicted by atomic bomb tests, as witness the damages paid by the United States Government to Japanese fishermen after the Bikini atoll explosion.

28. Mr. SPIROPOULOS said that acceptance of the principle enunciated in paragraph 3 of basis for discussion No. III would entail a complete modification of international relations. Under existing international law, in cases of violation of the rights of a private individual, the State concerned had the right to intervene. If, however, the individual were to be regarded as the real owner of the injured interest or right and as having the capacity to bring an international claim for the damage sustained, an international convention establishing the compulsory jurisdiction of an international organ would be required. Otherwise a State could always intervene, with the result that the private individual would receive no satisfaction. The concept therefore had a purely theoretical value. The proposed change, which would have widespread international repercussions, might be possible at some future date, but its practical implementation would call for the prior establishment of a system. There was no gainsaying the fact that in existing practice the State was the real owner of the injured interest or right.

29. The question of responsibility without fault was a basic point of vital importance that must be dealt with. The Hague Codification Conference had not taken it up, although the German author Strupp had devoted some attention to it.[13]

30. Mr. KRYLOV said that the question of the criteria of fault and risk mentioned by Mr. Zourek and Mr. Sandström was an important one that must not be disregarded. Some twenty years previously, he himself had written a monograph on the question of responsibility, in which he had studied the major cases in international law that had occurred during the nineteenth century. Following the German authors, he had concluded that the only satisfactory criterion that could be applied was the principle of fault. In passing, he might mention that the court of arbitration at Geneva in 1872 in the *Alabama* case[14] had implicitly based its finding on that concept. His studies had led him to the conclusion that in questions of the responsibility of States, the theory of risk, although applicable in administrative and municipal law, was not a satisfactory basis. The only adequate criterion was the concept of fault.

31. Mr. SANDSTRÖM said that the question was not necessarily the simple one of choosing between the two alternatives of the criteria of fault and risk. It was possible to conceive of a mixed system, such as existed in civil jurisprudence in most countries, and a domestic system based on responsibility without fault might well be applicable in the international field.

32. Mr. SALAMANCA said that, in addition to the continental theory of fault, with its implication of intention, the Anglo-Saxon theory of direct risk, applicable to the injury caused, should also be considered. That theory was based on three principles—intention, responsibility without fault, and causality, of which the second and third were the most important. The application of the Anglo-Saxon theory in the international field would result in an extension of the responsibility of the State, whereas, according to the theory of fault, State responsibility was restricted. In the latter case, the State might be accused of negligence as a result of the breach or non-observance of an international obligation resulting in injury to some internationally recognized interest or right; but, if it were to argue that the injury inflicted could not have been foreseen or prevented, its position would certainly be final. In cases under civil municipal law, the theory of direct risk was more satisfactory, but in international law with regard to responsibility he would prefer the concept involving a more restricted responsibility.

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[13] Karl Strupp: *Das Völkerrechtliche Delikt.*

[14] A. de Lapradelle & N. Politis: *Recueil des arbitrages internationaux*: Vols. II and III.

33. One or other of the criteria, however, must be adopted, for the question was of major importance. The consensus of opinion in the Commission seemed to favour the theory of fault, and, on the international level, his own preference would be for that criterion, largely on account of the numerous well-established precedents which would form an essential basis for decisions in specific cases. In international law there were far fewer precedents in the case of the principle of direct risk. There was no doubt that the Commission should clearly establish the distinction between the two concepts and, in its choice, it would go to the very heart of the question of state responsibility.

34. With regard to basis for discussion No. IV—Responsibility in respect of violations of the fundamental rights of man—the Special Rapporteur's view that the draft conventions on human rights had profoundly affected the situation had found favour in some countries. It was not only a question, however, of the determination of the " fundamental rights of man "; what was also involved was the establishment of a special international authority to deal with cases of alleged violation of rights. That question, in fact, had already been raised. In that connexion, the problems that had faced the Commission in its consideration at its second session of the question of international criminal jurisdiction would arise anew, and it would certainly be found that such questions were of purely theoretical interest and had no practical value. As he had pointed out at the previous meeting,[15] although there might be general recognition of the " fundamental rights of man ", in the field of implementation there were wide divergencies. Issues of national sovereignty were involved, and he failed to see how the principle put forward in paragraph 2 could possibly be given practical implementation in existing world conditions.

35. Faris Bey el-KHOURI, referring to basis for discussion No. IV, observed that since the French Revolution the main fundamental human rights had been embodied in the constitutions of most countries. The enunciation of those rights in constitutions was, however, regarded as a basis for legislation and not for administrative action. Furthermore, the constitutional guarantees of human rights, in his part of the world at least, did not apply to aliens, whose treatment was governed largely by conventions based on the principle of reciprocity. He did not think, moreover, that those who had drawn up the Universal Declaration of Human Rights had had in mind that the rights should be applied to aliens. Thus, the idea contained in basis for discussion No. IV that fundamental human rights should form an integral part of international law was an innovation and could not be regarded as reflecting existing law.

36. Mr. FRANÇOIS said that paragraph 1 of basis for discussion No. IV constituted a very important innovation which might help to bridge the gap between the continental and the Latin American conceptions of the treatment of aliens, which had been the main reason for failure to reach agreement on that question at the 1930 Codification Conference at the Hague.

37. He could not agree with Faris Bey el-Khouri that the human rights embodied in constitutions were only for the guidance of legislators or that they did not apply to aliens. The desire to improve the status of stateless persons had, as a matter of fact, been one of the reasons for the establishment of the Universal Declaration of Human Rights. He rather doubted, however, whether the principles contained in basis for discussion No. IV had any immediate practical value. The Universal Declaration had no legal force, and attempts to evolve general conventions on human rights had not so far borne any fruit. A convention on human rights had admittedly been adopted in Europe, but its chief value lay in the fact that it established a tribunal to deal with complaints—a tribunal whose jurisdiction had so far been accepted by very few States. In any case, to settle disputes a tribunal must have clear criteria on which to base its judgments, and those laid down in the convention were vague—too vague, in fact, to be of much use to the Commission.

38. There appeared to be a contradiction between paragraphs 1 and 2 of the text. According to paragraph 1, the State was under a duty to ensure to aliens the enjoyment of the same civil rights and to make available to them the same individual guarantees as enjoyed by its own nationals, the fundamental rights of man being then offered as a minimum standard for those rights and guarantees. Paragraph 2, however, went on to say that " In consequence in cases of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility would be involved only if internationally recognized 'fundamental human rights' are affected ". With respect to aliens, however, the State, according to paragraph 1, was internationally responsible for more than the observance of fundamental human rights.

39. Sir Gerald FITZMAURICE said that he too was somewhat puzzled by paragraph 2, which seemed to imply a much wider application of the test of violation of human rights than was possible. An international wrong might be committed without any fundamental human right having been violated.

40. The idea contained in the basis for discussion was very interesting, but called for some investigation. The international standard of administration of justice and the rule of international law in its respect was fairly clear—namely, that a State discharged its international responsibility towards an alien or a foreign State in matters of justice if it gave the alien national treatment, always provided that the usual practice of justice in the State concerned was in conformity with international standards. The standard had never been satisfactorily defined, however. International tribunals, though often basing their findings on the failure of the treatment under dispute to conform to the international standard of justice, refrained from specifying what the standard was. Undoubtedly in countries where justice was administered in such a way or where the law was such that fundamental human rights were not observed, it was

[15] A/CN.4/SR.371, para. 20.

extremely probable that the international standard of justice was either departed from or not achieved. The two concepts of " international standard of justice " and " observance of fundamental human rights " might be found not completely to coincide. The international standard having been set hitherto at a rather low level, cases might arise where fundamental human rights had been denied, and yet it would be difficult to claim that the international standard of justice had not been achieved. On the other hand, cases might arise where no denial of human rights was involved, but where there had nevertheless been a departure from the international standard of justice.

41. Mr. ZOUREK said that basis for discussion No. IV sought a solution for a very thorny problem in what he regarded as a good direction. The draft covenants on human rights were, however, only in course of elaboration by the United Nations, and, in the absence of such general instruments, he, like Mr. François,[16] feared that the ideas enunciated in the text would not provide any basis for settling cases in practice. Naturally, when the draft covenants were ratified, they would constitute a very valuable contribution to the question of state responsibility. Until then, however, the Commission, while taking into account the ideas on which the draft covenants were based, must draw on other principles, and in particular that of the equality of aliens and nationals, which had often been stressed in international instruments and conferences. The question had been thoroughly dealt with in the report, where the history of the thesis was traced from the first International Conference of American States in 1889-1890, the Convention on Rights and Duties of States signed at Montevideo in 1933, the " Bustamante Code ", the Convention on the Status of Aliens signed at Havana in 1928, the Draft Convention on the Treatment of Foreigners prepared by the League of Nations Economic Committee for the international conference on that subject in 1929, and finally the report of the sub-committee of the League of Nations Committee of Experts (Guerrero report), in which it was stated that " the maximum that may be claimed for a foreigner is civil equality with nationals ".

42. Sir Gerald FITZMAURICE, referring to basis for discussion No. V, wondered whether the terms used in the title, and in particular the term " exoneration ", were entirely appropriate. Failure to resort to local remedies was not necessarily an exonerating circumstance. In some cases, as the Special Rapporteur himself had pointed out, it could mean that no international wrong had been committed at all. There were two types of cases involved: those in which the right to bring a claim on the international plane was suspended or deferred until all local remedies had been exhausted, and the other cases in which there could not be any question of an international wrong until local remedies had been exhausted. The classic example of such a case was a claim of denial of justice in domestic courts. In such an instance, no international wrong had been committed until the denial of justice in a lower court had not been remedied or had been repeated in the higher courts. In such cases, the question of exoneration simply did not arise. He wondered too whether it was quite correct to refer to the renunciation of diplomatic protection as an exonerating circumstance. The fact that a private person could not invoke the protection of his government affected not so much the responsibility of the State against which he had a claim, as the right of the State of which he was a national to bring a claim. But such matters were mere questions of terminology.

43. As far as substance was concerned, he must confess to some doubts regarding the proposals with respect to the " Calvo clause ". As he understood the international law on the subject, private persons and companies were free to, and often did, include a clause in contracts by which they undertook not to invoke the aid of their governments. Such a clause could not, however, be binding on the government of the State of which the person or company was a national, should that State consider that a wrong calling for international intervention had been committed. If the Special Rapporteur meant to suggest that a State had a right to intervene only when it had some direct interest in a claim, in other words, only in cases where it had suffered an injury distinct from that done to its national, his formulation constituted an excessive restriction of the right of a State to intervene. States frequently had an interest in making a diplomatic claim, even when they had suffered no injury distinct from that suffered by their national. As a matter of fact, all States might be said to have a general interest in the treatment of aliens. He felt that it must be recognized that States might have an interest other than a direct pecuniary interest in a claim, and hence have a right to intervene.

44. Mr. SALAMANCA, recalling his previous remarks[17] on *a priori* diplomatic protection with reference to mutual security agreements, suggested that the question might be studied in connexion with basis for discussion No. VI. Since the amount and form of compensation were specified in such agreements, any reparation awarded by an international tribunal would have to coincide exactly with the terms of the agreement, and no additional damages could be given as in municipal civil liability cases. The agreements in question, which were quite numerous, had a considerable bearing on the question of international responsibility. They eliminated the individual as a subject, limiting responsibility to that of State to State. They settled the measure of reparation, the quantity of reparation which the protecting State must pay the investors and the form in which it must be paid. They also eliminated the question of the punitive function of reparation.

45. Mr. ZOUREK said that he was not in favour of taking the punitive function of reparation into account. Any penalty, in the exceptional cases in which it was imposed, was not a penalty in the penal sense but rather a conventional sanction for the equivalent of moral prejudice.

46. He wondered whether the three criteria given in

[16] See para. 37, above.

[17] A/CN.4/SR.371, para. 21.

paragraph 3 for fixing the character and measure of reparation were not too exacting. Incidentally, the statement in the last sentence of the paragraph—" it should be determined by the real owner of the original interest or right "—referred, he assumed, to the quantity of the claim rather than to the actual quantity of reparation. Injured parties frequently submitted exaggerated claims in order to leave some margin for negotiation.

47. Referring to paragraph 1 of basis for discussion No. VII, he remarked that case law was consistent on the point that an " international claim " was to be regarded as a new claim in all cases and not merely in the one mentioned at the end of the paragraph.

48. Sir Gerald FITZMAURICE agreed with Mr. Zourek on the last point, which was perhaps more of theoretical than of practical interest. He would have thought that an " international claim " must almost inevitably be a new claim, since a totally different field of law came into play. A decision on a claim brought by a private person under municipal law might be correct under that law and not under international law, or, if one took a monistic view of law, correct under one section and incorrect under another section of law. Perhaps the Special Rapporteur had merely stated his idea in rather too sweeping a fashion.

49. Mr. LIANG, Secretary to the Commission, pointed out that the Spanish original used two different terms in paragraphs 1 and 2: first an " international claim " and then " a claim of one State against another ". The difference was not so clearly brought out in the English text.

50. According to traditional international law, an international claim could only be a claim of one State against another. That was borne out by the title of the claims before the United States and Mexican Mixed Commission, which ran: " United States versus Mexico (Hopkins case) ", " United States versus Mexico (Janes case) ", and so on. From the way the Special Rapporteur approached the subject in his report, it might be argued that he meant claims of an international character—that was, claims containing an international element—but in the text of the basis for discussion it was clear that an " international claim " and an " inter-state claim " meant the same thing. In his opinion, the problem could not be solved until the Commission had settled the question of whether or not it was the individual that brought the claim against a State.

51. Whether the international claim was a new one or not depended on the approach adopted. According to traditional international law, even when a claim brought by a State was based on a claim brought by an individual before the local courts, the State's claim was not only new, but entirely independent of the local court case.

52. Mr. AMADO pointed out that, according to accepted doctrine, international responsibility was always a relation between one State and another. International responsibility was based on the supposition that a State claimed satisfaction for some injury done to it. Such injury could be either a direct wrong—such as violation of the rights of the flag, a breach of international law—breach of a treaty, for example, or an injury suffered by a national. According to the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case [18] it was an elementary principle of international law that a State was entitled to protect its nationals who had suffered injury through acts contrary to international law committed by another State from which they had failed to obtain satisfaction through ordinary channels. A similar view was expressed by Max Huber in his arbitral award [19] of 1 May 1925 on United Kingdom claims in the Spanish Zone of Morocco —namely, that once the State to which the claimant belonged made a diplomatic intervention on behalf of its national, quoting either conventional rights or principles *juris gentium* applying apart from treaties on the rights of aliens, a new claim of one State against another was born.

53. Mr. SPIROPOULOS said that he did not think there was any need for a prolonged discussion of the question. The formulation of basis for discussion No. VII would have to be modified in the light of the Commission's conclusions regarding basis for discussion No. III. According to those conclusions, it was evident that the State's claim was quite distinct from that of the individual and must be based on an alleged violation of international law. He did not see how any other view was possible without accepting the Special Rapporteur's thesis that the individual should be allowed to carry his claim on to the international plane.

The meeting rose at 1.05 p.m.

[18] *Publications of the Permanent Court of International Justice*, Series A, No. 2, 1924.

[19] United Nations publication: *Reports of International Arbitral Awards*, Vol. II, 1949, p. 633.

373rd MEETING

Friday, 22 June 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM,

Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

State responsibility (item 6 of the agenda) (A/CN.4/96) (*continued*)

1. The CHAIRMAN, summing up the Commission's discussion in his capacity as Special Rapporteur, said that, although in the existing state of international law there were incontestably two classes of responsibility, civil and criminal, there could be no doubt that the Commission's task was solely to codify the law on civil responsibility. From the debate on basis for discussion No. I, it appeared to be the unanimous view of the Commission that the international responsibility of States was limited to a duty to make reparation *stricto sensu*. His purpose in studying both types of responsibility in his report had merely been to establish a distinction between the two in order to facilitate the Commission's task.

2. A similar problem arose in connexion with basis for discussion No. VI. In future reports he would be at pains to avoid the intrusion of any punitive element in the concept of reparation, despite the fact that such an element was undoubtedly to be found in certain international arbitral awards and, above all, in the diplomatic practice of States with regard to claims. He agreed that the question of criminal responsibility could arise only with reference to individuals.

3. The question of responsibility without fault, referred to during the discussion, was one which he had not touched upon in his report because of the serious objections to the concept which he had discovered when studying it. From the case law of the Permanent Court of International Justice, the International Court of Justice, various claims commissions, and other international tribunals, the almost unanimous conclusion emerged that only the violation or non-observance of an international obligation could give rise to State responsibility. Furthermore, the concept of responsibility without fault not being clearly definable in international law as it was in municipal law, he could conceive of an immense number of cases in which, were the concept adopted, a State might be regarded as responsible without any precise grounds being adducible for its responsibility. The introduction of such a concept into international law would widen the scope of international responsibility almost indefinitely. He would nevertheless study the question and submit proposals in his next report for the Commission's consideration.

4. In connexion with basis for discussion No. III, the first question raised had been one of terminology. He agreed that the terms " active subject " and " passive subject " of international law, although used by some authorities, were not universally valid or accepted. Defective as they were, however, he had had no alternative but to use them in order to distinguish the two problems with which he had to deal: that of the imputability of responsibility and that of the ownership of the injured interest or right. In traditional international law no such terminological problem arose, the State being the sole subject of responsibility and the sole owner of the injured interest or claim. But, in present circumstances, when there were subjects other than States whose interests might be affected by a violation or non-fulfilment of an international obligation, some distinction was necessary.

5. The Commission had also discussed the complex substantive problem of whether a private person was a subject of international law. The question was, however, largely academic and need not be settled in the particular cases with which he had to deal. Admittedly, the bald statement that a private person was a subject of international law would be difficult to accept. On the other hand, when studying the draft Code of Offences against the Peace and Security of Mankind, the Commission had found no difficulty in accepting the thesis that the individual was a subject of criminal responsibility, thereby directly admitting that the individual was a subject of international obligations. And there were other cases which pointed to the same conclusion. Whether those quite numerous cases justified regarding the individual as a subject of international law was another matter. But the fact could not be denied that international law now imposed certain obligations on and accorded certain rights to the individual. The question which concerned the Commission, however, was whether aliens, when injured parties, were sole owners of the injured interest or right. Though he had some doubt on that point, he had had to bear in mind the many concrete cases in which the State had not concerned itself, and indeed had had no reason to concern itself, with the injury to an individual, In such cases, unless the alien individual were recognized as the owner of the injured interest or right, no wrong would have been committed, and the alien would be deprived of all protection from international law. It was precisely in order to avoid placing the alien individual in such a situation that he had included the thesis of the capacity of the individual. Naturally, such considerations in no way affected the right of the State to take up the claim on the individual's behalf or on the grounds of a " general interest " in the case.

6. Although the " general interest " of a State was not a very clearly defined concept, it was one which emerged from certain major judgments and awards. It was an attempt to preserve the traditional idea that a State took over and made its own the interest of its national when submitting a claim for reparation. In cases where it did not do so, however, the need arose for an additional concept to ensure that the individual was not completely deprived of his rights as he had often been in the past.

7. Referring to basis for discussion No. IV, he said that he had noted with satisfaction the broad agreement among members of the Commission on the possibility of reconciling the concept of the international standard of justice with the Latin-American principle of the equality of aliens and nationals. The task was no easy one, but he felt that the Commission should endeavour to find a compromise formula. If it succeeded, it would have solved the most difficult problem of the conflict between two diametrically opposed schools of thought.

8. Although his views on the nature of an international

claim as set out in basis for discussion No. VII might appear revolutionary, in reality they were not. He of course agreed that in all cases in which the State could invoke a general interest, it had the right to lodge an international claim which would be new and quite distinct from that of the individual. His object in including the disputed passages had been to distinguish from others those cases in which, under agreements between States, the individual had the right to appear before an international tribunal as the entity directly lodging the claim, and at the same time to avoid introducing the idea inherent in the " public character " of a claim, since that idea was inconsistent with the real nature of the cases to which he had just referred. Such cases, though described by some members as exceptional, were not infrequent. Apart from the example of the Central American Court of Justice and the Mixed Arbitral Tribunal for Upper Silesia (which had dealt with more than 2,000 individual claims), there was the more recent instance of the Treaty between the Federal Republic of Germany and the United States of America under which a private person, recognized as the owner of an injured right, could have direct recourse to an international tribunal without the intervention of his government, except in so far as his government might be said to have made an anticipatory intervention when establishing by convention an international legal system in which the individual appeared as a party. It was with such cases in mind that he had stated, in basis for discussion No. III, that " the real owner of the injured interest or right should be recognized, in principle, as having the capacity to bring an international claim for the damage sustained ". Whether the individual possessed such capacity in practice would depend on the circumstances of the disputes. Since the examples he had quoted suggested that the Commission was faced with a practice which, though only beginning, showed every sign of continuing, he considered it inadvisable to do anything to discourage its further development.

9. Reference had also been made to the mutual security agreements concluded by the United States of America with, among others, some Latin American countries, the Philippines and Yugoslavia. Such agreements, generally drafted in much the same terms, related, however, only to specific cases of responsibility with regard to investments made under the United States Economic Co-operation Act of 1948. They did not appear to affect the " Calvo clause ". The State could intervene only when the private person relinquished his claim to the protecting State in return for reimbursement of his loss; and in cases where the private person had already renounced diplomatic protection, the protecting State would be powerless to act unless some breach or non-observance of an international obligation were also involved. Though the agreements could not be said to play a very large part in the general scheme of international responsibility, he would take them into account in his efforts at codification.

10. Mr. SPIROPOULOS said that the Special Rapporteur still appeared to adhere to the thesis which formed the very basis of his report—namely, that the individual as owner of an injured interest or right was entitled to bring an international claim for the damage sustained. That thesis had been accepted by only one member of the Commission, and had been rejected, with varying degrees of emphasis, by all the others, except himself (Mr. Spiropoulos). Since a Special Rapporteur could hardly continue to submit reports which ran counter to the majority view, it was obvious that the situation must be regulated. That was, in fact, the object of his intervention at so late a stage.

11. The Special Rapporteur's report had the merit of containing a number of new ideas. Unfortunately, those ideas, though quite in place in a theoretical work, were too novel for inclusion in a codification of the law on state responsibility. The Commission, however, should not adopt too conservative an attitude and reject them out of hand, In the quarter of a century since the Codification Conference at the Hague, developments had taken place which could not be ignored, and one such development was the conclusion of a Convention on Human Rights by some of those European countries which had created international law in the first place. Many governments, his own included, had not accepted the provisions giving private persons the right to bring complaints against their own State before an international tribunal, but the important point was that certain governments had, and that the tribunal was already seized of some hundred private complaints. On the basis of that precedent and of others cited by the Special Rapporteur, it might be possible to evolve a compromise principle.

12. After all, in many disputes involving individuals, but where no breach of international law was alleged, the appearance of the claimant State before the International Court was a pure formality. The individual was the real protagonist, his choice of counsel being automatically approved by his government. Why not, therefore, enunciate the principle that the State might grant its nationals the right, which they otherwise would not possess, to appeal directly to the International Court? Naturally such a course would be exceptional and proper provision would have to be made for it in an international convention. Another, more ambitious, solution would be to recognize the right of the individual to appeal directly to the International Court, the State of his nationality retaining the right to veto such action.

13. Faris Bey el-KHOURI observed that, though the International Court might agree to allow the individual to appear before it on behalf of his government, it would not and could not permit him to appear on his own behalf. For Mr. Spiropoulos' proposal to be put into effect, the Statute of the Court would have to be revised.

14. Mr. SPIROPOULOS admitted that such a system would naturally have to be sanctioned by an international agreement—which the legal advisers of the national departments concerned would have a full say in drafting. And the system would apply only to those States which had accepted the optional jurisdiction clause of the Statute of the International Court.

15. The CHAIRMAN, speaking as Special Rapporteur, said that the purpose of the discussion was to provide guidance for the Special Rapporteur, who would take due account of the opinions expressed. Because he still

maintained the viewpoint set forth in his report, which was obviously not shared by all the members of the Commission, he had in his previous statement attempted to explain his position as set out in the method of formulation that he had adopted—namely, a series of bases for discussion.

16. In reply to Mr. Spiropoulos, he would repeat what he had already stated with regard to the question of intervention in the matter of State responsibility in the international field—that his approach had been based on the need to leave the door open for the development of the principles established by the Central American Court of Justice, and originally by the Mixed Arbitral Tribunal for Upper Silesia, and which were also found in the treaty between the United States and the Federal Republic of Germany, which contained a provision authorizing foreign private individuals to lodge a claim in respect of injury sustained, without the intervention of the State. If, as he inferred from Mr. Spiropoulos' statement, the Commission took a contrary view on all the cases he had quoted, the only conclusion that could be drawn would be the inconceivable one that the Commission had set its face against the existing practice of international law. He urged the Commission to defer taking a definite decision until he had submitted his second report in 1957.

17. Faris Bey el-KHOURI said that the Commission had merely been engaged in a general discussion; there was no question of taking any decision in the matter. It should be left to the Special Rapporteur to prepare a further text for consideration at the ninth session.

18. Mr. FRANÇOIS, concurring, said that it would be premature to take a decision which would tie the Special Rapporteur to a particular course. The discussion had been too brief for the close consideration that the subject deserved, and it could not be claimed that any clear consensus of opinion had emerged. The Special Rapporteur would no doubt bear in mind Mr. Spiropoulos' interesting suggestion. The discussion should now be closed and the Commission should pass on to the next item on its agenda.

19. Mr. SCELLE entirely agreed with Mr. François. The question should not be pre-judged on the basis of any such preliminary discussion, but there was no point in continuing the discussion at present.

20. Mr. ZOUREK, demurring, said that Mr. Spiropoulos had correctly interpreted the mind of the Commission as regards the lack of capacity of the individual to lodge an international claim for damages for injury. It must always be kept in mind that the Commission's report would be submitted to the General Assembly, which was the body that would take any final decision. In view of that condition, it was imperative that the Commission should not depart in any way from the provisions of existing international law. He was, however, in full sympathy with those who urged that further time should not be spent on a purely academic discussion.

21. Mr. LIANG, Secretary of the Commission, said that if it had been decided that the Commission should issue a directive to the Special Rapporteur, it would have been necessary to indicate clearly what should be his general approach and, in consequence, more time would have been allotted to the discussion of what was a very broad topic. It had been understood from the outset, however, that the general discussion should not be followed by any immediate decision and that the Special Rapporteur would be free to continue his work in the manner that he saw fit. No difficulties would arise if there were complete identity of view between the Special Rapporteur and those members of the Commission who differed from him. The divergence of view was no reason for the Commission attempting to take any decision before it had considered a text of specific draft articles. The appropriate time for recommending any modification of his report to the Special Rapporteur would be when the draft articles were before the Commission. It had always been the Commission's practice to pronounce on topics studied by special rapporteurs in that form.

22. Mr. SALAMANCA urged that the discussion should be closed. The Commission would always respect the tenacity with which a sincere minority opinion might be maintained, but he was convinced that it could command the full collaboration of Mr. Spiropoulos.

23. The CHAIRMAN, speaking as Special Rapporteur, said, in reply to Mr. Spiropoulos and Mr. Zourek, that a distinction must be drawn between the case in which the preparation of a report on a given topic was entrusted to a special rapporteur, and the preparation by a special rapporteur of a draft convention upon which the Commission would take a decision, which would be followed by the special rapporteur in continuance of his task. In the former case, the special rapporteur would have complete freedom in his approach to the subject, because no directive would have been given him. In his report on international responsibility he (the Special Rapporteur) had not submitted draft articles, but had merely put forward certain ideas in the form of bases for discussion, upon which the Commission could not take a formal decision. If he were to submit a further report, he would enjoy exactly the same freedom of judgment, although that report would obviously be prepared in the light of the discussion at the present session. The difference of opinion that had emerged did not necessarily mean that his view conflicted with that of the Commission, for there had been only two dissentient voices.

24. Speaking as Chairman, *he declared the general discussion on state responsibility closed.*

25. Mr. KATZ, Director of International Legal Studies in the University of Harvard, speaking at the invitation of the Chairman, gave a brief summary of the study being undertaken by his department on the topic of international responsibility.

26. The starting point of the study was the Harvard Research draft convention of 1929 on the responsibility of States. The far-reaching developments that had taken place in the field of international responsibility since that period called for something more than a mere revision of the earlier text, and what was proposed was a thorough re-examination of the entire problem, drawing upon all the source material available. The specific topic of study

was the responsibility of States, in the civil sense, in respect of injury sustained by foreign private individuals. It would not be related to the problems arising out of the duty of a State to make reparation to another State on account of injury sustained directly by the latter State, nor would it deal with the responsibility of a State to render measures of redress other than reparation, such as apology, the rendering of honours and the punishment of the guilty party.

27. The work would be the sole responsibility of the Harvard Law School and it was hoped that it would be accepted as a contribution to a general understanding of the subject. If, also, the study were to prove of use to the Commission, that would be a source of particular gratification to him and his colleagues.

Consular intercourse and immunities (A/CN.4/98) (item 5 of the agenda)

28. Mr. ZOUREK, Special Rapporteur, introducing the item, submitted the following list of questions on which he desired the opinion of members of the Commission.

1. *Scope of codification*

Do the members of the Commission share the Special Rapporteur's view that his task is not only to codify the rules of customary international law but also, by examining international treaties and particularly consular conventions and national legislation relating to consuls, to deduce principles likely to be accepted by States representing all the economic and legal systems of the world ?

2. *Form of codification*

Do the members of the Commission consider that the codification of consular intercourse and immunities should take the form of a draft convention or draft articles relating to consular intercourse and immunities as the Special Rapporteur proposes that it should, or do they consider that a different form should be adopted ?

3. *Honorary consuls*

Should the draft articles on consular intercourse and immunities include provisions concerning honorary consuls ? If so, it will be necessary to decide, in the light of the fact that many States do not recognize or appoint honorary consuls, whether two draft conventions should be prepared or whether the provisions concerning honorary consuls should be inserted in a single draft, the final clauses of which would provide that States whose legislation does not recognize honorary consuls need not accept the chapter relating to them.

4. *Consular representatives*

Do the members of the Commission consider it desirable to introduce the following classification of consular offices:

(*a*) Consuls-General
(*b*) Consuls
(*c*) Vice-Consuls
(*d*) Consular agents.

5. *Consular duties*

Should the Special Rapporteur endeavour to formulate a definition of consular duties, based on the examination of consular conventions and national legislations, or should he, as he proposes, leave the matter to national legislations by inserting an article which might be worded as follows:

"Subject to the conventions in force, the functions and powers of consular representatives shall be determined, in conformity with international law, by the States appointing them."

6. *Relationship between the rules contemplated and previous consular conventions*

What should be the relationship between the rules contemplated, assuming that they are accepted by governments, and the very numerous bilateral conventions, in particular consular conventions ? It seems reasonable to provide in the draft that the proposed rules shall not affect existing bilateral conventions, the general convention applying in such cases only to questions not regulated by the bilateral conventions. The answer to this question is calculated to affect the method of work and the content of the draft to be prepared.

29. The theoretical aspect of the subject raised no difficulties. The problem was rather to find formulae which, while representative of customary international law, at the same time would generalize the provisions of the numerous international treaties and, in particular, of consular conventions. He would disregard for the moment provisions in respect of immunities, as there were not many such based on customary law. There were, however, numerous provisions in consular conventions, which constituted a corpus of law adopted by States on a basis of reciprocity.

30. In that respect, a study of national legislation relating to consuls was of particular importance. In all countries, the status of consular agents was materially affected by the provisions of municipal law concerning, on the one hand, the organization of consular services and, on the other, the legal status of foreign consuls. Such a study would fill many gaps and at the same time provide solutions for a number of obscure or controversial problems. It would, moreover, materially assist the establishment of principles concerning exemption from customs duties, which would be acceptable to many States. For example, many national legislations contained provisions in that respect for the duty-free entry of certain goods on the basis of reciprocity. The list of articles admitted free of duty varied from country to country but a comparative study of the relevant laws disclosed that three main categories of articles were admitted free of duty by most countries, namely, national flags and emblems, consulate office furniture and the personal effects of consular representatives and their families. It could therefore be presumed that a provision to the effect that the three categories of articles just mentioned should be admitted free of duty would be acceptable to a very large number of governments.

31. One difficulty lay in the fact that documentation on the texts of national laws was out of date, for Feller & Hudson's work had been published in 1933.[1] The Secretariat of the United Nations was preparing a new collection of such laws and regulations, but as yet not all the texts were available, a fact which explained the delay in the drafting of his report. That was not a serious matter, however, because in view of the Commission's heavy agenda, there would in any event have been no

[1] Feller & Hudson: *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, 1933.

opportunity for a detailed discussion on the topic at the present session.

32. In order to facilitate the discussion, he would take his questions *seriatim*, beginning with:

1 & 2. *Scope and form of codification*

A restriction of his task to the codification of the rules of customary international law would inevitably give an air of incompleteness to the first part of his report, for it would entail the omission of several items that were codified in multilateral conventions, such as that signed at Caracas in 1911 by five Latin American States, and the Havana Convention on Consular Agents of 1928, and also in many bilateral consular conventions and other treaties containing provisions relating to consuls. Another solution would be to codify, quite apart from the rules of customary international law, the principles generally observed by international conventions, particularly consular conventions, and by the laws of the various countries. That solution would permit the preparation of a much more complete scheme of codification and would have the advantage of generalizing the application of principles derived from an analysis of international conventions and a study of national laws, if those principles were adopted by the Commission and approved by the General Assembly. That was the method he proposed to adopt.

33. Mr. AMADO said that he entirely agreed with the Special Rapporteur that his task was not only to codify the rules of customary international law, but also to deduce principles likely to be accepted by all States by examining international treaties and particularly consular conventions and international legislation relating to consuls.

34. Mr. LIANG, Secretary to the Commission, said that the Secretariat had been aware that the collection of laws and regulations relating to consuls made by Feller & Hudson was not up to date and was attempting to complete it. They had already sent the Special Rapporteur a number of texts, and hoped to be able to supply him with more before the end of the year.

35. It was to be feared that if the codification took the form of a draft convention it would meet with difficulties because the question of consular intercourse and immunities, being mainly governed by bilateral treaties, was unlikely to arouse very much interest. It should preferably take the form of draft articles upon which States might draw for the purposes of concluding bilateral conventions.

36. Mr. SPIROPOULOS agreed that the draft should certainly state principles likely to be accepted by States representing all the economic and legal systems of the world. It should not be a codification of existing rules, for there were very few, but rather the deduction of certain rules from the existing conventions. With regard to the form of codification he agreed with the Secretary that there was likely to be little interest in a general convention. The Commission should rather prepare a form of model treaty upon which States might base themselves for drafting their own treaties, with certain reservations.

37. Mr. SCELLE agreed that the form of codification should be model articles rather than a general convention. Existing bilateral treaties embodied many provisions which would not be generally accepted in a convention.

38. Sir Gerald FITZMAURICE also agreed with those views. Undoubtedly the Special Rapporteur would have to deduce his principles mainly from international treaties and consular conventions, but there was in fact a certain amount of customary international law on the subject, which the Special Rapporteur might embody in a separate section of his report. He should also take into account a number of very recent consular conventions, such as those concluded between the United Kingdom and Mexico, Sweden and the United States. They had been the result of very careful consideration in the light of modern conditions and of many weeks of negotiation. The Special Rapporteur should find them a useful guide to the latest thinking on the subject.

39. The CHAIRMAN, speaking as a member of the Commission, agreed with the Special Rapporteur that he should deduce principles from international treaties and consular conventions, not merely codify the rules of customary international law on the subject. He also agreed that the Commission should draft articles relating to consular intercourse and immunities, rather than a general convention. As the treatment of the draft on arbitral procedure by the Sixth Committee had shown, however, the Commission should harbour no illusions that the model treaty which had been suggested as a basis for regional or bilateral conventions would encounter less opposition in the General Assembly than a draft convention.

40. Mr. SALAMANCA agreed that the scope of codification should be as broad as possible. The Commission might well leave open the question whether a model treaty, a code or a general convention would be preferable and the General Assembly might be asked for its opinion when the topic came before it. The actual drafting would not be greatly affected by the final choice of form.

3. *Honorary consuls*

41. Mr. ZOUREK, Special Rapporteur, passing to his third question, observed that the existence of honorary consuls complicated the work of codification, since the same immunities were not afforded to both categories of consul in consular conventions and national legislation. The League of Nations committee of experts on the progressive codification of international law had been opposed to the category of honorary consuls, and the practice of States and the legal doctrine were not uniform on that point. There were, however, very many States which did recognize the institution. When the committee of experts for the codification of international law had suggested in its questionnaire the abolition of honorary consuls, some governments, in particular those of the Netherlands, Finland and Switzerland, had raised objections on financial grounds. The rules concerning honorary consuls should therefore be codified, but the question was how to do it technically, whether in two draft conventions or in a single draft, containing a special chapter devoted to honorary consuls, the final clauses of which would provide that States whose legislation did

not recognize honorary consuls need not accept the chapter relating to them.

42. The question would be easier to solve if the codification were to be in the form of draft articles, as they would not have to be submitted to States for signature, or accession. He agreed, however, with Mr. Salamanca that it would be best to await the governments' final opinion, to prepare the codification in the form of a draft convention and then see whether the General Assembly would be willing to adopt it as a general convention. It it were not so willing, then it could take the form of a model treaty.

43. Mr. AMADO pointed out that certain countries attached very great importance to honorary consuls. Brazil had found its honorary consuls at Lausanne and Louvain, where there were several hundred Brazilian students, extremely useful. To codify the rules relating to honorary consuls would, however, be difficult and it would perhaps be even more difficult to make provision for them in a general convention. Yet the importance of honorary consuls in the general relations between States must not be overlooked. He himself could not decide at that stage whether it would be better to place the rules concerning them in a separate chapter, but their status should be defined in two or three rules.

44. Mr. FRANÇOIS said that the Netherlands attached the very greatest importance to the question of honorary consuls, as it had appointed only twenty career consuls, but five hundred honorary consuls. Any proposal that honorary consuls should be transferred to the career service could not be entertained. It was not merely a question of expense. The Netherlands needed consuls in all the ports in the world, even the smallest, but as a career consul in one of the smallest ports would not have enough work, a person was appointed who already had some other employment.

45. The Special Rapporteur had not correctly posed the question of honorary and career consuls. Whether a consul was regarded as an honorary or a career consul was purely a domestic matter. There were only two essential differences between them: training and remuneration. A career consul obtained his post by examination and received a fixed salary, whereas an honorary consul was not appointed by examination and did not receive a fixed salary.

46. If, on certain points, the legal status of honorary consuls seemed to differ from that of career consuls, it was due to the fact that certain general rules—on nationality, the exercise of other professions, etc.—applied in practice only to honorary consuls. In several consular treaties there were no special provisions for honorary consuls, and generally speaking, the rules they formulated covered, theoretically, both categories. So far as he was aware, no State refused to recognize honorary consuls merely on the ground that they were not career consuls.

47. Accordingly, he must take issue with the whole basis of the Special Rapporteur's third question.

48. Mr. SPIROPOULOS observed that the point brought out by Mr. François showed that the Special Rapporteur would have to make a very thorough examination of the question. The Special Rapporteur had obviously not intended to deny the existence of honorary consuls and their rights, as was clear from his question whether the draft articles on consular intercourse and immunities should include provisions concerning honorary consuls. He appreciated Mr. François' point, since small countries could not afford many career consuls, but he was not at all sure that their legal status was precisely the same as that of honorary consuls. The latter did not enjoy the same immunities as career consuls, who to some extent were afforded the same rights as diplomats. He hoped that the Special Rapporteur would be able to say at the next session to what extent honorary consuls also enjoyed such immunities.

49. Faris Bey el-KHOURI observed that the whole problem lay in the distinction as regards immunities and exemptions, and that must guide the Commission. Many States were unwilling to grant such immunities and exemptions to honorary consuls having the nationality of the State to which they were accredited.

50. Mr. SANDSTRÖM remarked that the topic of consular intercourse and immunities bore some relation to that of diplomatic intercourse and immunities, for which he was the Special Rapporteur. In dealing with diplomatic immunities in his report, he had touched on the question of the possibility of appointing agents of the nationality of the country to which they were accredited, and had proposed that they should be afforded a special type of immunity, in accordance with the present rules of international law. He had not, however, examined the position of consuls, since they received very restricted immunities.

51. Mr. AMADO agreed that honorary consuls were of great importance, but he could not at that stage attach quite so much importance to them as Mr. François did. The Special Rapporteur himself had not yet come to a decision. There were obvious differences between career and honorary consuls with regard to immunities and privileges. He could not entirely agree that no distinction should be drawn between the two types of consul as the matter was not so simple as Mr. François contended.

The meeting rose at 1.05 p.m.

374th MEETING

Monday, 25 June 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Consular intercourse and immunities (A/CN.4/98) (item 5 of the agenda) (*continued*)

3. *Honorary consuls* (continued)

1. The CHAIRMAN invited the Special Rapporteur to reply to the points raised at the previous meeting on the third question in connexion with his report on consular intercourse and immunities.

2. Mr. ZOUREK, Special Rapporteur, said that it would expedite the work if the Commission could agree on a definition of " honorary consuls " or " *consules electi* ". As a general rule such consuls were chosen from persons already resident in the country of their duties and performed them in addition to some gainful activity. They could be nationals either of the country of residence, or of the appointing State or of a third State. According to Mr. François, the difference between career consuls and honorary consuls was slight, consisting mainly in the fact that honorary consuls were not recruited by examination, had no special training, and were unpaid. In his opinion, however, the essential difference was that career consuls were bound by a contract of service to the State which sent them, whereas honorary consuls were not and were consequently not subject to the same discipline. The question of payment was not decisive. An official could be regularly appointed and yet unpaid. A career consul remained a career consul, even though the State which appointed him might pay him none or only part of the usual emoluments. The municipal laws of certain countries lent support to his view of the nature of an " honorary consul ". Article 4 of the Finnish Consular Act of 1925, for instance, divided consuls into career consuls, whether paid or unpaid, and others chosen on the spot. The fact that, under the law of some countries, career consuls were allowed to engage in gainful activity in addition to their consular duties might appear to render the difference between the two categories very slight, but that was only an appearance, for career consuls were still officials.

3. Honorary consuls, owing to their different legal status and relation to the State of reception, did not enjoy the same privileges and immunities as career consuls. They generally enjoyed no immunity of jurisdiction, except with respect to acts performed in the course of their duties. They enjoyed no immunity from arrest or detention and no special treatment with regard to liability to subpoena. They were not exempt from taxation or from the payment of customs duties. Career consuls engaged in gainful activity in the country of reception were not exempted from customs duties either, but that did not affect the fundamental difference between the two categories. In view of the special status of honorary consuls, he thought it advisable to devote a special chapter to them in the report he proposed to prepare.

4. Sir Gerald FITZMAURICE said that, while he to a large measure agreed with the considerations put forward by Mr. François at the previous meeting,[1] he agreed with the Special Rapporteur that a special section was required to deal with the respects in which honorary consuls differed from career consuls. The essential difference between the two categories was not so much that one was " honorary " and the other " career ", since honorary consuls, though not permanent officials, were in the temporary service of the State they represented, but rather that honorary consuls were normally of the nationality of the country of residence—a fact which might give rise to differences in the personal or semi-personal treatment which the local government was obliged to extend to them. In that respect their position was not unlike that of diplomatic officers appointed from nationals of the country of reception.

5. Mr. FRANÇOIS doubted whether it would be possible to produce a satisfactory special chapter on honorary consuls, as there were so many different types. Some honorary consuls were sent from their country of nationality, just like career consuls, but had no special training and received no pay. Incidentally, the Special Rapporteur's distinction between officials and non-officials did not apply in the case of the Netherlands, which regarded all honorary consuls as officials. The undoubted differences in the privileges and immunities accorded to various types of consul depended not on whether they were honorary or career consuls, but on whether they engaged in gainful activity in addition to their consular duties. That it was impossible to draw any clear distinction between the two categories was suggested by the existence of conventions which made no separate mention of them. In the convention between the Netherlands and the United Kingdom, for instance, consuls were distinguished only according to whether they engaged in any other activity and whether or not they were nationals of the appointing State.

6. Mr. SPIROPOULOS observed that, whatever view one took, it was obvious that the Commission was confronted with a complex problem which would require close study.

7. Mr. ZOUREK, Special Rapporteur, replying to Faris Bey el-Khouri,[2] said that honorary consuls did not and could not enjoy the privileges and immunities attaching to the position of a career consul. Irrespective of their nationality, they were by definition chosen on the spot and always domiciled in the State of reception. International law did not recognize their entitlement to any immunity other than that of jurisdiction for acts performed in the course of their duties, and even that

[1] A/CN.4/SR.373, paras. 44-46.
[2] A/CN.4/SR.373, para. 49.

immunity attached not to the consul personally, but to the sovereignty of the appointing State.

8. He had been interested by Mr. François' statement that, under Netherlands law, honorary consuls were regarded as State officials. From the standpoint of international law, however, such so-called honorary consuls should be regarded as career consuls and, he thought, accorded the same treatment.

9. Mr. AMADO said that he could not see how persons not of the nationality of a particular State, and not resident in that State, could nevertheless be regarded as officials of that State. It would be impossible to take any disciplinary measures against them.

4. *Consular representatives*

10. Mr. ZOUREK, Special Rapporteur, turning to his fourth question, said that it would save a great deal of confusion and minor disputes if consular representatives were properly classified in the same way as diplomatic agents had been for well over a century. A classification similar to that he suggested was to be found in many bilateral conventions and in the national legislation of numerous countries. Though all countries had the first three classes: consuls-general, consuls and vice-consuls, the fourth class, " consular agents ", was not recognized by all legislations. In some countries that fourth category of consular representative was either not found at all or bore a different title. In Switzerland, for example, it appeared under the name of " consular attachés ".

11. The existing terminology was somewhat confusing. The term " consular agent " was used for various purposes: as a generic term covering all types of consul—in the Havana Convention of 1928 on consular agents, for example; to describe officials put in charge of minor posts and appointed not by the government but by the resident consul-general, the consul, or even the vice-consul; and to designate what were generally known as honorary consuls, as in the French Ministerial Order of 1833. In view of such confusion, it would be a great improvement if the Commission recommended the use of the term " consular representatives " instead of " consular agents " to describe consuls in general. The proposed classification naturally applied only to heads of consular offices and in no way affected the hierarchy established by the various countries within their own consular services.

12. Mr. FRANÇOIS said that, while he agreed in principle with the Special Rapporteur, he wondered whether a different term could be found for the fourth category. The term " consular agent " generally embraced all categories of consul, the term " consular attaché " being usually applied to the fourth.

13. Mr. AMADO said that in Brazil a term corresponding to " consular assistant " was used to describe the fourth category. Such persons could be either nationals or foreigners, and, if foreigners, were not recruited by examination but merely required to produce evidence of moral and professional qualifications.

14. Sir Gerald FITZMAURICE said that the first three categories undoubtedly existed in the administration of all countries and should be included in the classification. He agreed with the idea of establishing a fourth category provided it covered a large variety of officials. Different countries adopted different systems and nomenclatures and he understood that some services had a category of pro-consuls. Since use of the words " consular agent " as a generic term would lead to confusion, he would prefer another expression.

15. Mr. SANDSTRÖM agreed with Mr. François on the desirability of finding another term for the fourth category, although in some languages, such as German and Swedish, the term " consular agent " was not liable to be misunderstood.

16. Mr. ZOUREK, Special Rapporteur, reiterated his proposal that the Commission recommend that the expression " consular representative " be used as the generic term for all consular officers, and the expression " consular agent " reserved for the fourth category. The term " consular agent " was already used in a large number of treaties and national regulations to describe the fourth category and adoption of another term would create serious difficulties. It should, on the other hand, be possible to secure acceptance of the title " consular representative " as a generic term. It was to be found in international instruments, such as the conventions of 1920 between Denmark and Finland, and Germany and Finland, the Provisional Agreement of 1936 between Afghanistan and the United States of America and the Convention on Consular Representatives between Chile and Sweden. If, however, the Commission preferred the expression " consular agent " as a generic term, it would first be necessary to see whether States were willing to adopt it. He would, at all events, include in his report a paragraph on the defects of existing terminology.

5. *Consular duties*

17. Mr. ZOUREK, Special Rapporteur, turning to his fifth question, said that the exact scope of consular duties was not defined by general international law. Some duties, such as the protection of trade, activities in connexion with shipping and assistance to nationals, were already recognized by customary international law. Others were based only on bilateral agreements, national legislation or usage.

18. The purpose of his question was to discover whether the Commission thought it advisable in the present state of international law to attempt to codify the duties of consuls at all. So far, the bodies concerned with the codification of international law in respect to consuls had not ventured to do so. The Havana Convention on Consular Agents of 1928 merely stipulated in article 10 that " Consuls shall exercise the functions that the law of their State confers upon them without prejudice to the legislation of the country in which they are serving. " The sub-committee of the League of Nations Committee of Experts on the Progressive Codification of International Law had reported that it did " not think it necessary to define the functions of consuls by way of a convention, because these functions are perfectly well known and do not give rise to any disagreement, and because the determination of such functions is rather a matter of domestic law, since each State is alone able to determine the func-

tions of its own officials ".[3] The Committee of Experts itself, in a less categorical statement, had nonetheless deferred consideration of the question.

19. While it was always possible to codify the question by collating the points on which the various conventions and national regulations were agreed, which was the method followed in preparing article 11 of the Harvard draft, he thought it would be unwise to attempt to fix the duties of consuls of all States in a rigid formula. The nature of a consul's duties depended on the economic life of the State he represented and would differ according to whether it was a maritime or inland country or whether it maintained economic missions abroad. Feeling it wiser to leave the matter as it had been regulated so far, namely, by international conventions and national law, he had prepared a draft text on the subject, merely as a statement of principle. Naturally the national law of the sending State must not conflict with international law. For example, consuls authorized under the national law of the sending State to celebrate marriages and act as conciliators or arbitrators between their nationals could do so only when the law of the State to which they were appointed permitted, since otherwise such acts would constitute an encroachment on that State's territorial sovereignty.

20. Mr. FRANÇOIS said that the Commission must surely have envisaged that the draft would contain something about the scope of consular duties, which was one of the most important subjects of the topic under discussion. The Special Rapporteur, who was apparently intending to restrict the draft to consular privileges and immunities, had himself admitted that there was a wide divergence of opinion over the nature of consular duties which, as he had pointed out, were defined by agreements between States. That being so, the wording he had proposed on the subject could not suffice, and a model treaty containing no provision about such consular functions would be defective. He therefore hoped, despite the difficulty of such as task, that the Special Rapporteur would at least attempt to frame such a provision.

21. Mr. SPIROPOULOS agreed with Mr. François, because a model treaty must be capable of replacing existing agreements. A possible solution might be to allow reservations to the clauses relating to consular duties so that in that respect existing agreements would remain in force.

22. Mr. KRYLOV believed that the value of the draft would be greatly diminished if it did not deal with the vitally important question of consular duties. They were very varied in nature and needed to be systematized.

23. Sir Gerald FITZMAURICE agreed, but pointed out that in a sense the Special Rapporteur was right, because many consular functions had not originated in a specific agreement between two States but had resulted from certain duties being given to consuls by the law of the appointing country, the discharge of which had not been prohibited by local laws. However, he shared the opinion that a model treaty must contain clauses relating to the general nature of consular functions, as distinct from certain specific duties, because much of the law on consular privileges and immunities revolved round those functions.

24. Mr. SANDSTRÖM said that if the draft were to take the form of a model treaty, a form which the Special Rapporteur had apparently not contemplated at the outset, some mention must be made of consular duties though they could not be fully enumerated. It would then be more appropriate to specify that they were determined rather in conformity with international custom than with international law.

25. Mr. SCELLE pointed out that, for many centuries, consuls had exercised a kind of independent jurisdiction because of the need for regulating the relations between the nationals of one country when abroad. That essential feature of consular intercourse should occupy an important place in a model treaty because international law had not only to regulate relations between States, but also between individuals. It was essential that the duties of consuls should be defined by international law since there were many matters for which existing treaties did not legislate.

26. Faris Bey el-KHOURI said that numerous new States which had recently come into existence looked to the Commission for detailed guidance on consular duties and functions. He was therefore convinced that the draft should be as comprehensive as possible without being restrictive.

27. Mr. ZOUREK, Special Rapporteur, said that he had perhaps not made it sufficiently clear in his introductory remarks that he intended to devote the first part of his report to consular intercourse and the second part to consular immunities.

28. With regard to Mr. François' point, it was, of course, possible to include an article listing consular duties as established in conventions, bilateral agreements and national legislations. They included, among others, the general protection of trade interests, certain functions connected with maritime questions, assistance to aircraft, the issue of visas and passports, legal assistance to foreigners, certain services connected with the income of nationals resident in the country concerned, the duties of a civil registrar such as the celebration of civil marriages, registration of nationals, notarial functions, the settlement of inheritances abroad, guardianship, the settlement of problems connected with nationality, attestation of documents and certain arbitral and conciliatory functions.

29. The important question was whether such a codification of consular duties would be well received by governments. In due course their comments would show whether they would be disposed to accept an article of that kind in a general convention of whether they would prefer something less rigid. As regards form, he still maintained that the ultimate object should be codification by means of a multilateral convention, if feasible, because that was the only means of synthesizing all the principles involved. If a general convention obtained support,

[3] League of Nations Publications: A.15. 1928. V. [C.P.D. I 117 (I)], p. 14.

there was a disadvantage in adding an article codifying consular duties in a model treaty, because it might have a restrictive effect in those countries where the duties had grown up by custom. However, that question could be settled when the Commission discussed the whole subject in greater detail.

6. *Relationship between the rules contemplated and previous consular conventions*

30. Mr. ZOUREK, Special Rapporteur, coming to his sixth and last question, believed that in spite of the Secretary's scepticism about the possibility of States accepting a general convention, the Commission should not abandon all hope from the start because such a convention, if feasible, would be the quickest method of achieving a general codification. If, in due course, the comments of governments showed that the hope was a vain one, then the draft articles might serve as a model. Personally, he thought that there was no *a priori* reason why a general convention should not be acceptable to all States, which were already bound by numerous consular conventions or bilateral agreements. Clearly, the content of the draft and the method of work would depend on whether the draft was intended to replace all existing agreements or not. In order to ensure the success of codification it was necessary to lay down that those specific agreements would remain valid and that the general convention would only regulate questions not dealt with in earlier instruments. But, of course, States would be free to abandon the latter in favour of the general convention.

31. Mr. SPIROPOULOS considered that the question should be left open for the time being.

32. There being no further comments, Mr. ZOUREK, Special Rapporteur, thanking members for their observations, concluded that he should prepare draft articles suitable for presentation in the form of a general convention. Once the comments of governments had been obtained, the Commission could take a final decision on the form which the articles should take. He would include a clause concerning the scope of consular duties, about which he had expressed certain reservations during the present discussion, and it would be for the Commission to decide later whether his definition was acceptable. With regard to other points, he would take members' views into consideration without necessarily following them.

The CHAIRMAN *declared the discussion on consular intercourse and immunities closed.*

Consideration of the Commission's draft report covering the work of its eighth session (A/CN.4/L68 and Addenda thereto)

33. The CHAIRMAN invited the Commission to consider the draft report covering the work of its eighth session (A/CN.4/L.68 and Addenda thereto).

34. Mr. FRANÇOIS, Rapporteur, introducing the draft report, suggested that, as the section containing an account of the discussions on items 3, 5 and 6 was not yet complete, the Commission might first take up chapter II, which dealt with the law of the sea. Since it had been decided to submit a comprehensive report to the General Assembly concerning all the Commission's work on that topic over the past years, he had incorporated any material from former reports necessary for an understanding of the final text, so as to save members of the General Assembly from having to refer to earlier documents. Where texts previously adopted had been modified he had given reasons, because without such explanations the value of the final text would be considerably impaired. He had adhered, perhaps somewhat more extensively, to the Commission's practice of making it clear when the decision on an important issue had not been unanimous, indicating what had been the view of the minority, in the hope that that would reduce to a minimum the number of reservations entered by members.

35. As the Commission had not yet had an opportunity of examining the texts of those articles which had been referred to the Drafting Committee, they might be presented by its chairman with an explanation of the changes made, after which he himself could introduce the texts of the comment.

36. Mr. KRYLOV said that the Rapporteur was right to have drawn attention to the fact that the Commission was following a somewhat irregular procedure. It should first have approved the texts submitted by the Drafting Committee and then have considered the draft report as a whole, including the commentary. However, he was aware that the exigencies of time made it difficult to carry out the work in two stages, and would therefore make no formal objection.

37. Mr. PAL suggested that it would expedite consideration of the draft report if it were agreed that the sole purpose of such consideration was to ensure that the views of the majority of the Commission were accurately reflected and that in voting for or against any article or passage in the report members were not indicating their agreement or disagreement with the substance of that article or passage, but merely whether or not it did in their opinion reflect the majority view accurately.

38. The CHAIRMAN pointed out that the majority of the articles had already been approved by the Commission. For the remainder, the Drafting Committee had in certain cases simply been instructed to make a change which the Commission had agreed was necessary. Finally, there were a very few cases in which the Drafting Committee had been instructed to re-draft the article in order that the Commission might see how an idea expressed by one or more of its members would appear in the text. It was only on those articles that it was necessary for the Commission to vote, although any member could of course request a vote on any article or passage in the report with regard to which he wished to record a reservation. He then invited the Commission to consider the draft report paragraph by paragraph.

Chapter II: Law of the Sea

Introduction (A/CN.4/L.68/Add.1)

39. In response to an observation by Mr. SANDSTRÖM concerning the layout of the introduction, the CHAIRMAN and Sir Gerald FITZMAURICE suggested that subheadings reading " Regime of the high seas ", " Re-

gime of the territorial sea " and " Scheme of the present report " be inserted after paragraphs 1, 8 and 15 respectively, while Mr. EDMONDS suggested that paragraph 17 be inserted after paragraph 1, before the first subheading.

It was agreed that it should be left to the Rapporteur to decide the final layout of the introduction, in the light of the various comments and suggestions made.

40. The CHAIRMAN proposed that, in paragraph 7, a suitable reference be made to the fact that, in considering the regime of the high seas at its seventh session, the Commission had taken into account the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (" the Rome Conference ").

It was so agreed.

41. Sir Gerald FITZMAURICE, referring to paragraphs 19 and 20, conceded that, with the law of the sea, it was probably difficult to maintain a clear distinction between the codification and the progressive development of international law, but felt that was much less true of other items on the Commission's programme of work. Such being the case, paragraph 20 was worded in an unnecessarily general way.

42. Mr. EDMONDS felt that the first sentence of paragraph 20, which stated that " the Commission has become more and more convinced that the very clear distinction established in the Statute between these two activities cannot be maintained in practice ", was in any case too categorical. The words " cannot be maintained in practice " should be replaced by " is difficult to maintain ".

43. Mr. FRANÇOIS, Rapporteur, accepted that amendment, to which could be added the words " especially as regards the law of the sea ", in order to meet the point made by Sir Gerald Fitzmaurice.

44. Mr. ZOUREK felt that, in view of the Commission's insistence in previous reports that rules or articles approved by it expressed the existing law, the last sentence of paragraph 20, which stated that the Commission had abandoned the attempt to distinguish between articles which came within the category of codification and those which came within the category of progressive development, should also be toned down.

45. Mr. SANDSTRÖM agreed with Mr. Zourek. The last sentence of paragraph 21, which stated that " in general the rules adopted by the Commission will not have the desired effect unless they are confirmed by a convention ", was open to the same objection, that it went too far.

46. Mr. FRANÇOIS, Rapporteur, recalled that the idea of a clear distinction between the codification and the progressive development of international law had been most warmly defended within the Commission by Sir Hersch Lauterpacht, but that the Commission as a whole had been increasingly reluctant to follow him in that direction and had finally abandoned the idea altogether. In the present report, he, as Rapporteur, had accordingly taken it on himself to omit all reference to whether a particular article was *lex lata* or *lex ferenda*, even where such reference had appeared in the Commission's previous reports. Having done so, however, he felt it was imperative to explain why the Commission had changed its practice.

47. Sir Gerald FITZMAURICE agreed that the Commission should not attempt to indicate whether each article approved by it was *lex lata* or *lex ferenda*. It was going too far, however, to say that all attempts to distinguish between the codification and the progressive development of international law must be abandoned. There was a distinction between the two, although it might not always be possible to say exactly where it lay. The point which the Rapporteur wished to make appeared to be made adequately in the first part of paragraph 20, and the last sentence might well be deleted.

48. Mr. FRANÇOIS, Rapporteur, felt that at any rate the first part of that sentence must be retained, in order to show why the Commission had gone back on its previous practice.

49. Sir Gerald FITZMAURICE suggested that in that case, the first part of the sentence in question be amended to read: " At first the Commission tried to specify which articles were in the one category and which in the other, but has had to abandon the attempt."

50. Mr. PAL opposed the deletion of the second part of the last sentence in paragraph 20, since it was necessary in order to explain the first part.

It was agreed that the Rapporteur should re-draft paragraph 20 in the light of the various observations and suggestions which had been made.

The meeting rose at 6.10 p.m.

375th MEETING

Tuesday, 26 June 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea (continued)

Introduction (A/CN.4/L.68/Add.1) (continued)

1. Referring to paragraphs 21 [1] *et seq* the CHAIRMAN, speaking as a member of the Commission, doubted whether it was advisable to recommend that a diplomatic conference be convened for the purpose of concluding a convention on the law of the sea. It was true that such a recommendation would be in accordance with the Commission's Statute, but experience had shown that the vast majority of conventions were ratified by only a handful of States and even their ratifications were as often as not accompanied by reservations. In the case of a convention on the law of the sea, the reservations would most likely be such as to nullify the convention's whole effect.

2. The Commission should not overlook the new source of international law which was represented by the resolutions and declarations of the General Assembly and the other main international organs. Although they had no binding force, they had great moral force, and it should be borne in mind that even conventions were only binding on the States which ratified them. In his view, therefore, the Commission should confine itself to a recommendation to the effect that, if the General Assembly found it impracticable to take the necessary action itself to bring into force the provisions submitted to it by the Commission, it should convene a diplomatic conference for the purpose; in that way the Assembly would be able to instruct the conference to take whatever action seemed best designed to achieve the end in view.

3. Mr. SPIROPOULOS pointed out that, under articles 22 and 23 of its Statute, the Commission was obliged to recommend one of four alternative courses to the General Assembly. With regard to what the Chairman had said, the Commission could be quite sure that the General Assembly would never itself adopt or endorse the rules submitted to it by the Commission. The General Assembly had even been unwilling to adopt the Nuremberg principles, which had simply repeated the relevant parts of the United Nations Charter almost word for word. Every State would object to one article or other of the law of the sea, with the result that the text would have no chance of acceptance as a whole.

4. Mr. SALAMANCA said that he had no objection to paragraphs 21 and 22. The various items on the Commission's programme of work were also on the agenda of the Sixth Committee, and the responsibility for failure to codify international law in a field where the General Assembly had previously decided it should be codified did not rest solely or mainly with the Commission, but with the General Assembly. He was by no means pessimistic, however, about the fate of the Commission's draft on the law of the sea. The General Assembly would certainly not be able to examine the draft in detail, and even if differences of opinion arose about certain parts of it, such differences could always be bridged provided the atmosphere was favourable, as he believed it would in fact be. Nor was he as pessimistic as the Chairman about the possibility of concluding a convention enjoying a wide measure of support. Even unratified conventions often played a useful role in clarifying the issues involved and laying down a norm of international conduct.

5. Mr. LIANG, Secretary to the Commission, recalled that although, in the report on its fifth session, the Commission had suggested various modes of action which the General Assembly might take on the Commission's preliminary drafts on fisheries, the contiguous zone and the continental shelf, the General Assembly itself had not spent much time weighing the comparative advantages of the courses proposed but had taken the action which had governed all the Commission's subsequent work on the whole subject of the law of the sea. There was further evidence to show that the General Assembly, although the Commission's parent body, was not, for various reasons, an ideal forum for the consideration and adoption of conventions of a technical nature. The only technical convention which the General Assembly had itself adopted was the Convention on the Prevention and Punishment of the Crime of Genocide, the previous history of which had placed it in a category apart. As had apparently been foreseen in the Statute itself, the General Assembly was not equipped for, and was most reluctant to undertake, the detailed examination of most of the drafts submitted to it by the International Law Commission; and that seemed particularly true of the draft on the law of the sea.

6. That draft clearly contained so many new elements that if it had to be regarded as coming within the sphere either of the codification or of the progressive development of international law, it must, by and large, be regarded as progressive development. That was the justification for the Rapporteur's proposal that the General Assembly be recommended to convene a conference to conclude a convention. The widespread interest in conservation of fisheries, and the realization of the General Assembly's inability to deal with that subject itself, had led to the convening of the Rome Conference. Similar factors, in his view, would most probably lead to the convening of a new conference to consider the Commission's draft on the law of the sea as a whole. But whether the outcome of that conference would be a convention or, as the Chairman had suggested, a resolution or declaration, was impossible to foretell.

7. In connexion with a suggestion by Mr. Sandström at the previous meeting,[2] he suggested that the last sentence of paragraph 21 be deleted altogether since its gist was

[1] Para. 21 reads as follows:
" 21. In these circumstances the obvious way of giving practical effect to these provisions is to conclude a convention to bring them into force. This does not mean that if a convention is not concluded the Commission's efforts should be regarded as wasted. The mere formulation of certain rules by the Commission may contribute—regardless of whether they are embodied in a convention—to their acceptance as rules of positive law. But in general the rules adopted by the Commission will not have the desired effect unless they are confirmed by a convention. "

[2] A/CN.4/SR.374, para. 50.

already expressed in the first sentence. The words " In these circumstances " at the beginning of the first sentences also appeared to be inappropriate.

8. Mr. SANDSTRÖM said he could certainly agree to the deletion of the last sentence of paragraph 21 but he did not understand Mr. Liang's difficulty over the words " In these circumstances ". The following words, " the obvious way of giving practical effect to these provisions ", might, however, be amended to read " the most suitable way of giving practical effect to those provisions ".

9. Mr. SALAMANCA said that there were really only two alternatives before the General Assembly. If it did not see fit to convene a conference to carry the whole matter farther, it could, in theory, simply take note of the Commission's draft; but in practice, that would be tantamount to referring it back to the Commission for further consideration, since some delegations would undoubtedly argue that certain aspects of the matter needed further consideration. Further consideration by the Commission, however, would in his opinion be fruitless, since the Commission had completely exhausted the whole subject and had carried discussion of it as far as it possibly could in present circumstances. The whole value of paragraph 21 lay in the fact that it made that clear, at least by implication. It might be that its wording could be improved, but it was essential that the Commission should indicate plainly that it could do no more on the law of the sea; otherwise, there was a danger that it would find the whole question on its agenda again at its next session.

10. Mr. PAL agreed that, of the four alternative courses allowed to it by its Statute, only the third and fourth, namely to recommend that the General Assembly should recommend its members to conclude a convention or that it should itself convene a diplomatic conference for that purpose, were appropriate. But what action the General Assembly might take on the Commission's recommendation there was no need for the Commission to consider. Nor was it for the Commission to try to assess the value of its work in the event of the General Assembly's failing to do as it recommended. He accordingly proposed the deletion of the last three sentences of paragraph 21, retaining only the first sentence.

11. Mr. FRANÇOIS, Rapporteur, accepted that proposal. On the other hand, he felt that the words " In the circumstances " were entirely appropriate. The purpose of the preceding paragraph 20 was to make clear that the draft on the law of the sea was in the nature of the progressive development of international law rather than of its codification. It was precisely " in those circumstances " that the conclusion of a convention appeared to be the best way of bringing the draft into force. As Mr. Spiropoulos had said, there was no likelihood whatsoever of the General Assembly's adopting the Commission's draft, if only because its detailed examination would require the advice of a number of experts—on fisheries, on maritime law and so on—whose services had been available to the Commission but were not available to the Sixth Committee. The draft had taken eight years to elaborate and had been prepared with the assistance of all the necessary experts. It was for that reason that he had stated in paragraph 23 that, in the Commission's view, the proposed diplomatic conference had been " adequately prepared " by the work the Commission had done; and it was for that reason too that he felt it would be quite impracticable for the Commission to recommend that the draft be discussed by the Sixth Committee. Another eventuality to be avoided was that the General Assembly, after a discussion which could not be more than superficial, should refer the draft back to the Commission, a decision which would serve no practical purpose.

12. The CHAIRMAN, speaking as a member of the Commission, said that his previous statement appeared to have been misunderstood. He fully agreed with the other members of the Commission that the General Assembly was not the appropriate body to deal with the technical, scientific and economic aspects of many of the questions covered by the law of the sea. As he understood it, the Assembly, after holding a general discussion on the Commission's draft, would either take a procedural decision to take no action or just to take note of the report or, as seemed more probable, to convene a general conference at which the delegations of States would include jurists, biologists and economists. He was accordingly in full agreement with the idea that the Commission should recommend in its report that, if the Assembly found it impracticable to discuss the question of the law of the sea in all its complex detail, it should refer the question to a diplomatic conference.

13. The question he had raised was quite a different one—namely, that of the desirability of stating categorically, as was done in the first sentence of paragraph 21, that the obvious and thus the only way of giving practical effect to the rules which the Commission had enunciated was to embody them in a convention. In the first place, he did not think that the Commission could specify the course which an international conference should adopt. The conference might, for example, wish to adopt a draft convention on the territorial sea, but only a resolution on the subject of the continental shelf. Furthermore, he found it impossible to accept the statement that a convention was the only solution. Such a contention was quite untrue. In current international practice, political assemblies made much greater use of other types of instrument than of conventions. Perhaps he took a rather optimistic view of the efficacy of resolutions adopted by international conferences, but at all events he felt that such resolutions were to be regarded as having a moral and quasi-legislative force and as constituting potential rules of international law.

14. Quite apart from the question of whether a convention was the only solution, he disagreed with the idea of postulating a single convention for the entire law of the sea. Had the Commission merely recommended a single draft convention on the territorial sea alone, the idea would have been relatively acceptable. But a single convention on piracy, collisions, the continental shelf, fisheries and straight baselines, to mention only a few questions, would be so heterogeneous in character as to be unacceptable to States.

15. Mr. AMADO said that he was fully satisfied with

paragraph 21 of the draft report as it stood. The task of the Commission was to develop or codify international law, and the only way in which binding force could be given to the rules that it enunciated was for them to be embodied in a convention. He was rather sceptical regarding the moral force of resolutions adopted by diplomatic conferences. Such a practice was admittedly quite common in Latin American conferences, but was usually employed as a means of enunciating general principles already enjoying wide acceptance. In the case of rules which had been formulated but not yet put into force, the only effective method was that of an international convention.

16. Sir Gerald FITZMAURICE said that the Chairman's point appeared to be that there was a difference between recommending that a conference be convened and recommending what the conference should do. He (Sir Gerald Fitzmaurice) was in agreement with that view. He could not see why a diplomatic conference should be bound to produce a convention. Conferences could take, and had taken, other action, such as the adoption of a resolution or another instrument of a certain utility. Perhaps the views of all the members of the Commission could be met if all but the first sentence of paragraph 21 were deleted and the words " to conclude a convention to bring them into force " in the first sentence were replaced by the words " to convene a diplomatic conference " or by the words " to conclude a convention or some other appropriate instrument ". The first solution would also involve deleting the words " to conclude a convention " from the first sentence of paragraph 23.

17. Mr. KRYLOV agreed with Mr. Salamanca and Sir Gerald Fitzmaurice. The General Assembly and its Sixth Committee could not deal with all the complex aspects of the law of the sea, and the question, after general discussion by the Assembly, would have to be referred to a specialized conference. As a matter of fact, the convening of such a conference was explicitly referred to in the text adopted by the Commission, on the proposal of Mr. Spiropoulos,[3] for the article on the breadth of the territorial sea. Paragraph 21 might be amended on the lines proposed by Sir Gerald Fitzmaurice, provided its main point were retained.

18. Mr. SANDSTRÖM agreed with Mr. Salamanca. As Mr. Spiropoulos had pointed out, however, under article 23 of the Commission's Statute the Commission could not recommend the convening of a conference except in order to conclude a convention.

19. Mr. LIANG, Secretary to the Commission, said that he could not quite follow Mr. Spiropoulos' argument that a conference could only be convened to conclude a convention. Article 23 of the Commission's Statute related to codification of international law and had much less bearing on the progressive development of international law. In his opinion, the Rapporteur was quite right in recommending that the rules enunciated by the Commission should be embodied in a draft convention and that the Assembly should, if it saw fit, refer the question to a conference with a view to the conclusion of a convention. What the conference itself did was quite another matter. It had a variety of courses open to it. The Paris Conference of 1856 had, for instance, merely adopted a declaration against privateering and not a formal convention. The Commission could obviously not specify what the conference was to do, and he did not think that the General Assembly could do so either.

20. As for the question of whether there should be one or more conventions, he did not think that the Rapporteur, when drafting his text, had intended to imply that the whole question must necessarily be dealt with in a single instrument. It might well prove necessary to have one convention on fisheries, another on the continental shelf, and yet another on the territorial sea. Perhaps it would be better to change the words " a convention " in the first sentence of paragraph 21 to " a convention or conventions ".

21. Mr. SPIROPOULOS said that he could not agree with the Secretary's interpretation of article 23 of the Commission's Statute. He did, however, agree with Sir Gerald Fitzmaurice and those who had expressed similar views before. Since there was no point in prolonging the discussion, he proposed that the Commission take a decision on the more important matters of principle and refer the text to the drafting committee for re-drafting.

22. Mr. SALAMANCA recalled that the General Assembly, in its various resolutions on the question, had requested the Commission to codify the entire law of the sea and to submit a single draft on the whole problem. Reference might be made in the Commission's report to the views of the General Assembly regarding the unity of the question.

23. Faris Bey el-KHOURI said that the Commission, in the paragraphs under discussion, was not attempting to tell the General Assembly what it should do but merely making recommendations in accordance with its Statute. It should accordingly submit that part of its report as it stood and leave it to the General Assembly to decide what action it wished to take. The amendments proposed by Sir Gerald Fitzmaurice were unobjectionable but were also unnecessary.

24. Mr. PAL wondered whether it was necessary to retain the last sentence in paragraph 23 which stated that " the Commission considers that such a Conference has been adequately prepared by the work the Commission has done". He was prepared to accept the first sentence of paragraph 21, the whole of paragraph 22 and paragraph 23 less the last sentence.

25. Mr. ZOUREK considered that the proposal to refer to " a convention or conventions " instead of " a convention " in the first sentence of paragraph 21 might be acceptable to the majority of the members of the Commission. Though it was no unusual practice for conferences to vote resolutions not carrying the same force as an international convention, he did not think it necessary to draw attention to that possibility.

26. He was not in favour of deleting the last sentence of paragraph 23, as Mr. Pal had just suggested. The

[3] A/CN.4/SR.362, para. 66.

sentence made it clear that the Commission considered that the codification of the law of the sea had been so prepared that any diplomatic conference convened to discuss it would have all the necessary facts before it on which to base its decisions.

27. The CHAIRMAN urged that the Commission adopt Mr. Spiropoulos' proposal to decide major questions of principle and leave the re-drafting of the relevant portions of the report to the drafting committee. Were that proposal accepted he would indicate what, in his opinion, were the points on which a decision was required, without prejudice to the right of members to call for a decision on others.

It was so agreed.

28. The CHAIRMAN said that first of all, since there appeared to be no objections, he would assume that the Commission was agreed on the desirability of recommending that a diplomatic conference of plenipotientiaries be convened to deal with the law of the sea.

29. The second point was the reason for calling such a conference. Since it was hardly advisable to question the ability of the General Assembly to deal with the subject, he would propose that the Commission draw the Assembly's attention to the fact that many of the questions covered by the law of the sea possessed a variety of aspects, technical, scientific and economic, as well as legal, which were best dealt with by a specialized conference.

30. The third point, the purpose for which the conference should be convened, was a more delicate one, since it raised an important question of principle. If the Commission stated that the purpose of the conference was to conclude a convention as the sole effective means of bringing into force the rules which it had drafted, it would, in effect, be making a categorical pronouncement both on the manner in which international law was formed and acquired binding force, and on the extent to which various types of international instrument were binding on States. According to article 38 of the Statute of the International Court of Justice, international custom was as much a source of international law as international conventions, and resolutions adopted by international conference might well constitute in future an element of such international custom. The Commission would, therefore, be wise to avoid raising so delicate a problem. He accordingly proposed that it adopt Sir Gerald Fitzmaurice's suggestion[4] and amend the first sentence of paragraph 2 on the following lines: " In these circumstances, the obvious way of giving practical effect to these provisions is to convene a diplomatic conference to adopt a convention or other appropriate instrument. " The remainder of paragraph 21 would then be deleted, and the wording of subsequent paragraphs adjusted in accordance with the decision.

The Chairman's proposal was adopted.

31. The CHAIRMAN invited the members of the Commission to take a decision with regard to paragraph 26.[5]

[4] See para. 16, above.

[5] Para. 32 in final report (A/3159).

32. After some discussion, *it was agreed*, on the proposal of Mr. Edmonds, to delete the sentence " They do not pre-judge the rights of belligerents in time of war ", at the end of sub-paragraph 1.

33. The CHAIRMAN then invited the Commission to take up part II of chapter II in its draft report (A/CN. 4/L.68/Add.3).

Part II: The high seas

Article 1: Definition of the high seas

34. The CHAIRMAN considered that paragraph 2 of article 1 which read: "For the definition of the territorial seas see Part I, above ", as inappropriate in an article and should be transferred to a footnote.

35. Mr. ZOUREK explained that paragraphs 2 and 3 had been added because the definition contained in the text of article 1 as adopted at the seventh session was a definition by exclusion and had been incomplete since internal waters had not been defined.

36. Sir Gerald FITZMAURICE suggested that the Chairman's point, which was purely one of form, could be met by the deletion of paragraph 2 and the insertion of the words " as defined in part I above " in parenthesis after the words " the territorial sea " in paragraph 1.

Sir Gerald Fitzmaurice's amendment was adopted.

37. In reply to a question by Mr. AMADO as to the meaning of the last sentence in the second paragraph of the comment, Mr. KRYLOV explained that it referred solely to the special cases mentioned in that paragraph.

38. Sir Gerald FITZMAURICE questioned whether the whole of the second paragraph in the comment, which was confusing and might have far-reaching implications, should be adopted without further discussion and definition.

39. Mr. FRANÇOIS, Rapporteur, shared Sir Gerald Fitzmaurice's doubts. He had inserted the paragraph at the request of one member but felt that as its subject was not of great importance it could be omitted.

40. Mr. ZOUREK observed that without that paragraph, article 1, which in certain cases could not apply for geographical reasons, would be too categorical.

41. Mr. KRYLOV, while agreeing with the Rapporteur that the paragraph was not vitally important, considered that it served a purpose in making clear the status of landlocked seas.

42. The CHAIRMAN saw no serious objection to retaining the paragraph.

43. Sir Gerald FITZMAURICE asked whether the statement contained in the third sentence of the paragraph was in fact correct. He was uncertain whether wide stretches of water communicating with the high seas by a narrow strait should be regarded as internal seas. The question required careful examination so as to establish what was the existing law on the subject.

44. Mr. FRANÇOIS, Rapporteur, pointed out that the rule set forth in the paragraph was to be found in textbooks of international law.

45. Mr. KRYLOV, agreeing with the Rapporteur, referred Sir Gerald Fitzmaurice to Oppenheim's *International Law*. The rule had been defended by the United Kingdom delegation to the Montreux Conference of 1936. When asking the Rapporteur to insert a passage on internal seas, he had had in mind such cases as the Sea of Azov which, together with its strait, lay entirely within Soviet territory.

46. Mr. PAL, pointing out that no mention of internal seas had been made elsewhere in the draft, expressed the hope that they were not being assimilated to internal waters.

47. The CHAIRMAN observed that, although the status of internal seas as such was not dealt with in the draft, the right of passage through internal seas was now referred to in the new text of article 5, in the part relating to the territorial sea.

48. Mr. SANDSTRÖM believed that, though the paragraph might not be strictly necessary, it could have value in clarifying the position of such waters as the Caspian and Black Seas.

49. Mr. SPIROPOULOS said that the legal status of internal waters and internal seal was identical. The distinction between lakes and internal seas was established according to whether the water was fresh or salt.

50. Mr. KRYLOV, observing that definitions generally created difficulties, said that he himself was uncertain as to the precise implication of the reference in certain treaties to the Caspian as the Russo-Iranian Sea.

51. Sir Gerald FITZMAURICE remarked that, according to the second paragraph in the comment, since there were two coastal States on the Caspian, that sea would count as high seas.

52. Mr. KRYLOV considered that conclusion to be highly controversial.

53. Faris Bey el-KHOURI asked what was the status of the Great Lakes on the border between Canada and the United States.

54. Sir Gerald FITZMAURICE observed that it might be deduced from the third sentence in the paragraph that rivers were " internal seas "—a further instance of the kind of confusion to which such a passage might give rise.

55. Mr. EDMONDS questioned the wisdom of retaining a statement which had raised doubts in the minds of certain members and which did not appear to be strictly necessary. He therefore formally proposed the deletion of the second paragraph in the comment.

Mr. Edmonds' proposal was rejected by 4 votes to 2, with 6 abstentions.

Article 2: Freedom of the high seas

56. Mr. ZOUREK, referring to the French text of article 2, considered it essential to insert the word " légitimement " after the word " prétendre "; otherwise there would be no limit to the claims which States might make.

57. Sir Gerald FITZMAURICE pointed out that there was a slight difference between the meanings of the French word " prétendre " and the English word " purport ". Though the English text already implied that no State could validly purport to subject any part of the high seas to its sovereignty he would have no objection to inserting the word " validly " if, with that change, the French text would be more acceptable.

58. Mr. KRYLOV did not think any modification necessary, since Mr. Zourek's point was already implicitly met in the text as it stood.

59. Mr. SANDSTRÖM, on grounds of redundancy, proposed the deletion of the word " proper " from the phrase " the law of the sea proper " at the end of the first paragraph of the comment.

It was so agreed.

60. Mr. SALAMANCA said the Commission should suspend judgment as to whether or not there was a freedom to conduct nuclear weapon tests on the high seas. In rejecting Mr. Pal's proposal,[6] no decision had been taken on that point pending the publication of the findings of the scientific committee established by the General Assembly in its resolution 913 (X) concerning the effects of atomic radiation.

61. Mr. ZOUREK considered that the comment accurately reflected the course followed by the Commission and that no change was required.

62. Sir Gerald FITZMAURICE expressed strong objection to the passages contained in the second sentence of the second paragraph and the first sentence in the third paragraph because they might give the impression that the Commission was denying the existence of the freedom to conduct ordinary scientific research. In view of the decisions taken by the Commission at the present session, he failed to understand on what grounds the Rapporteur had omitted to mention that freedom.

63. Mr. KRYLOV endorsed Sir Gerald Fitzmaurice's objections.

64. Mr. SALAMANCA said that a clear distinction should be made in the comment between scientific research and nuclear weapon tests, because for political reasons the Commission had declined to make any express pronouncement on the latter.

65. Mr. FRANÇOIS, Rapporteur, pointed out that up to the present nuclear weapon tests had been considered part of scientific research.

66. Mr. SALAMANCA saw no reason why the Commission should not take into account the new development which had supervened in the form of a new committee to study the effects of atomic radiation.

67. The CHAIRMAN suggested that the freedom to carry out scientific research might be mentioned in the comment among the freedoms of the high seas, together with a statement that the Commission had made no express pronouncement as to whether or not States were entitled to conduct nuclear weapon tests on the high seas.

[6] A/CN.4/SR.335, para. 36.

68. Mr. PAL considered it essential that the proviso contained in the third sentence of the first paragraph should apply specifically to nuclear weapon tests.

69. The CHAIRMAN said that that limitation was already made explicit in the text.

70. Mr. SANDSTRÖM suggested that Mr. Pal's preoccupation might be met if the reference to the freedom to undertake scientific research were transposed from the third to the second paragraph.

71. Mr. FRANÇOIS, Rapporteur, had no objection to such an amendment.

72. Mr. PAL said that the modification would not give him entire satisfaction because it would still not be clear that the freedom to conduct scientific research was subject to the general principle enunciated in the third sentence of the first paragraph.

73. Mr. ZOUREK said that the difficulty was due to the position occupied in the text by the principle that States were " bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States ". Perhaps that statement could be transferred so as to make clear that it governed the exercise of any of the freedoms of the high seas.

The Rapporteur was requested to make the modification suggested by Mr. Zourek.

The meeting rose at 1.10 p.m.

376th MEETING

Wednesday, 27 June 1956, at 10 a.m.

CONTENTS

Chairman: Mr. Jaroslav ZOUREK,
First Vice-Chairman of the Commission;
Later: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS.

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the Sea

Part II. The High Seas (A/CN.4/L.68/Add.3) (continued)

In the absence of the Chairman, *Mr. Zourek, first Vice-Chairman, took the chair.*

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II, part II, of its draft report.

Article 3: Right of navigation

2. There were no observations on article 3 or the comment thereto.

Article 4: Nationality of ships

3. The CHAIRMAN, observing that article 4 had already been approved by the Commission, explained that the Drafting Committee had only made a slight change in paragraph 2. Since, according to paragraph 1, nationality was clearly linked with the right to fly a flag, the Drafting Committee had deemed it enough for paragraph 2 to refer solely ot the right to fly a flag, which would be automatic proof of nationality.

4. Sir Gerald FITZMAURICE reaffirmed his view that the correct principle for the recognition of nationality was that of effective control. Consequently he would have preferred the third sentence in paragraph 1 to have read: " Nevertheless, for the national character of the ship to be recognized by other States, the flag State must be in a position to exercise effective control over the ship. "

5. Mr. FRANÇOIS, Rapporteur, said that he had sought to meet Sir Gerald Fitzmaurice's point in the last sentence of the third paragraph of the comment.

6. Mr. EDMONDS questioned the use of the word " established " in paragraph 2; a ship's right to fly a flag was established not by documents, but by rules of law. He therefore proposed the substitution of the word " evidenced " for the word " established ".

Mr. Edmonds' amendment was adopted.

7. Mr. FRANÇOIS, Rapporteur, said that he had sought to explain in the comment the considerable changes introduced by the Commission in the text of the article. He had also inserted, at the Commission's

request, the four conclusions of his report[1] concerning the right of international organizations to sail vessels under their flags. The Commission had not expressed its decision on those conclusions.

8. Faris Bey el-KHOURI said that he would have favoured a provision stating that a ship's documents were open for examination for purposes of establishing its nationality.

9. The CHAIRMAN pointed out that an amendment in that sense could not be discussed unless a motion to reconsider the article, which had already been approved, were carried.

10. Sir Gerald FITZMAURICE wondered whether the fourth paragraph of the comment reading: " The second paragraph has been added in order to enable ships at any time to prove their right to the flag they are flying ", conveyed the main purpose of paragraph 2 of the article, which was that the right to fly a flag could be verified from a ship's documents.

11. The CHAIRMAN, speaking as a member of the Commission, said that it would be desirable to indicate that the Commission had discussed the Special Rapporteur's proposals concerning the right of international organizations to sail vessels under their flags. He therefore proposed the insertion of the words " After some discussion " at the beginning of the last paragraph of the comment.

It was so agreed.

Article 5: Status of ships

12. The CHAIRMAN stated that some members of the Drafting Committee had objected to the second sentence of article 5, which read: " A ship may not change its flag during a voyage or while in a port of call ", on the ground that it imposed too rigid a prohibition, however, as the Commission had already approved the text, it was felt that discussion could not be reopened on what was a point of substance.

13. Mr. FRANÇOIS, Rapporteur, said that he had experienced some difficulty in explaining the purpose of that sentence. It had been proposed by Mr. Scelle who, for reasons of health, had unfortunately not been able to attend meetings of the Drafting Committee and was again absent for the same reason, so that there had been no opportunity of asking him to elaborate his views further. For his own part he doubted the wisdom of such a provision, the full implications of which were not entirely clear to him.

14. Sir Gerald FITZMAURICE shared the Rapporteur's doubts. He understood the principal reasons underlying Mr. Scelle's proposal, but the second sentence of article 5, as at present worded, would prevent genuine and valid changes of flag, and should therefore either be omitted or amplified by an express statement that fraudulent changes of flag were inadmissible.

15. Mr. FRANÇOIS, Rapporteur, objected to such an addition because it was self-evident.

16. Mr. AMADO said that he was always opposed to undue pessimism and to attributing the worst motives both to individuals and States. He therefore considered that the second sentence of article 5 should be deleted.

17. Mr. LIANG, Secretary to the Commission, agreed with the objections to that sentence and suggested that it might be replaced by the last paragraph in the comment.

18. Sir Gerald FITZMAURICE doubted whether such a substitution would in fact satisfy Mr. Scelle, whose concern was to prevent a ship, on the instructions of its owner, from changing its flag during a voyage or in a port of call for nefarious purposes, without any genuine transfer of ownership—which was perfectly permissible—having taken place. If the solution suggested by the Secretary were adopted, the words " except as a result of a genuine transfer of ownership " should be substituted for the words " in order thereby to evade the law of the flag State on the transfer of ships " in the last paragraph of the comment, but the question was so complex that he would personally support the course advocated by Mr. Amado.

At the CHAIRMAN's suggestion it was agreed to postpone a decision until Mr. Scelle's return.

19. Mr. SANDSTRÖM observed that the French text of the Italian Government's comments (A/CN. 4/99/Add.8), some of which related to article 5, had just been circulated.

20. Mr. FRANÇOIS, Rapporteur, said that he had not yet had an opportunity of studying the Italian Government's comments and that the English and Spanish translations were not yet available. Furthermore, the observations on article 5 related to the text adopted at the previous session, which had since been very much modified.

21. Mr. KRYLOV did not think that the Commission could at the present juncture re-open discussion on article 5 in order to take into account the Italian Government's views.

22. Mr. FRANÇOIS, Rapporteur, said that although from the procedural point of view he agreed with Mr. Krylov, he would draw the Commission's attention to any new considerations raised by the Italian Government after he had had an opportunity of examining its observations in detail.

23. Sir Gerald FITZMAURICE, referring to the second sentence in the first paragraph of the comment, said that in English it would be preferable to refer to " the flag of *some* State " rather than to " the flag of *a* State ".

24. Mr. SANDSTRÖM did not find the French text satisfactory and proposed the insertion of the word " seul " after the words " le pavillon d'un ".

Mr. Sandström's amendment was adopted.

25. Sir Gerald FITZMAURICE considered that the last sentence in the first paragraph of the comment, which read: " Ships without nationality or with forged certificates of registry cannot be placed under the jurisdiction of any State ", was misleading because it suggested that such ships would be free from all control. The real point

[1] A/CN.4/103.

was that they could not claim the protection of any State.

26. Mr. PAL believed it was unnecessary to refer to forged certificates because, if they were not genuine, the ship was not in fact registered.

27. Mr. SPIROPOULOS proposed the deletion of the last sentence of the first paragraph of the comment.

28. Mr. FRANÇOIS, Rapporteur, had no objection to that amendment.

Mr. Spiropoulos' amendment was adopted.

Article 6: Ships sailing under two flags

29. Mr. PAL found the first sentence of the comment unsatisfactory because the word " need " implied something that was genuinely necessary, and so was entirely inappropriate in the context.

30. Sir Gerald FITZMAURICE agreed, and suggested the substitution of the words " its convenience " for the word " need ".

31. Mr. LIANG, Secretary to the Commission, considered that the first sentence of the comment failed to make clear that it was the use of more than one nationality that constituted an abuse.

32. Mr. FRANÇOIS, Rapporteur, did not altogether agree with the Secretary because it was conceivable that, without necessarily using them both, a ship might have two nationalities as a result of not giving up the first when acquiring the second.

33. Mr. PAL suggested that the meaning would be rendered more clearly if the words " by a ship using " were substituted for the word " where " in the first sentence of the comment.

Mr. Pal's amendment was adopted.

Article 7: Immunity of warships

34. There were no observations on the substance of article 7 or the comment thereto.

Article 8: Immunity of other state ships

35. Mr. SANDSTRÖM proposed the deletion from the text of article 8 of the words " government yachts . . . supply ships and other " because that enumeration had been rendered redundant by the insertion of the words " whether commercial or non-commercial ".

36. Mr. LIANG, Secretary to the Commission, thought that the inclusion of those words might even be dangerous; the ships listed were more or less of the same category, so that the words " other craft " might be interpreted to mean craft of the same type. He therefore believed that Mr. Sandström's amendment would be consistent with the Commission's intention when it had revised the text of Article 8.

37. Sir Gerald FITZMAURICE considered that the list was a useful indication of some of the main types of vessels envisaged and that the phrase " whether commercial or non-commercial " showed that vessels of a different class were also included. However, though he believed that the text should be maintained, he would not oppose Mr. Sandström's amendment.

38. Mr. EDMONDS said that it was not apparent from the summary record [2] that the Commission had decided to mention commercial State ships in the article, there being some doubt as to whether they could enjoy the same immunity as warships.

39. Mr. KRYLOV did not think it a matter of great moment whether the list, which was purely illustrative, was placed in the article or in the comment, but as he disliked last-minute changes, he would on the whole prefer the text of the article to remain as it stood.

40. Mr. FRANÇOIS, Rapporteur, said that the text approved at the seventh session had been identical with that contained in the draft report except that the words " whether commercial or non-commercial " had not figured in it. Now that those words had been included, he agreed that the enumeration should be omitted, for the reasons indicated by Mr. Sandström and the Secretary.

Mr. Sandström's amendment to delete the words " government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other " was adopted by 4 votes to 3 with 3 abstentions.

41. Replying to an observation by Mr. KRYLOV and Mr. PAL, Mr. SANDSTRÖM pointed out that a two-thirds majority was not required for such a vote because the text had only been approved at the present session subject to revision by the Drafting Committee.

42. With regard to the last paragraph of the comment, Sir Gerald FITZMAURICE felt that the text could bring out more clearly the purpose of the paragraph, which was to make it plain that State ships covered by article 8 could not claim immunity from verification of their status unless they bore the external marks referred to.

43. Mr. FRANÇOIS, Rapporteur, agreed that that was the purpose of the paragraph but felt it was essential to indicate, as he had sought to indicate, that the system established by the article in that respect was a new departure which would entail the conclusion of a new international agreement. He would, however, be prepared to modify the paragraph so as to make its purpose clearer, as suggested by Sir Gerald Fitzmaurice.

It was so agreed.

Article 9: Safety of navigation

44. The CHAIRMAN said that the Drafting Committee had made certain changes in the article designed to render it simpler and more precise.

45. Mr. FRANÇOIS, Rapporteur, said that in the comment he had sought to explain why the Commission had felt it necessary to extend the scope of the article; he had also pointed out that the Commission had now agreed to use a simpler and more general expression than in the 1955 draft to describe the standard to which safety regulations should conform.

[2] A/CN.4/SR.342, paras. 24-54.

46. Mr. KRYLOV asked whether the Rapporteur felt it was really necessary to retain the last sentence but one in the first paragraph of the comment, reading as follows: " The absence of such regulations or of effective control over their observation has strengthened objections to the transfer of ships to another flag ". The meaning was far from clear.

47. Mr. SANDSTRÖM agreed that the sentence could well be deleted, since it would have to be considerably expanded in order to make clear precisely what was meant.

48. Mr. FRANÇOIS, Rapporteur, said that although the sentence was not perhaps absolutely necessary, it was in his view useful and an accurate statement of fact. The nature of the objections referred to, and the reasons why the absence of safety regulations had strengthened them, were surely sufficiently well known.

49. Mr. KRYLOV and Mr. SANDSTRÖM said they would not press the point, the former however adding that he hoped the Rapporteur might be prepared to reconsider the matter when he came to read through the comments again.

Mr. García-Amador resumed the chair.

Article 10: Penal jurisdiction in matters of collision

50. Mr. ZOUREK said that, in the light of various observations made by Mr. Pal and other members of the Commission during its previous consideration of article 10 at the present session,[3] the Drafting Committee had omitted from the text approved at the previous session the words " involved in the collision " and had also replaced the words " the State of which the ship on which they were serving was flying the flag " by " the flag State ".

51. Mr. FRANÇOIS, Rapporteur, drew attention to the last sentence of the first paragraph of the comment, which was new. There had been recent cases, one in South Africa and one in Argentina, where the State had withdrawn certificates issued to foreign seamen by another State, and those cases had caused serious concern in maritime circles. The former case had been the subject of an appeal to the Probate, Admiralty and Divorce Division of the United Kingdom High Court which had declared the withdrawal of the certificate invalid; in Argentina, however, the State's action had been upheld by the competent court of appeal. The International Labour Organisation had been asked to give an opinion on whether the practice of the two States in question had been in accordance with established law. Both it and Professor Gidel, whose advice it had sought in the matter, had, as might have been expected, found that the practice was quite unwarranted, the latter pointing out that it was tantamount to unjustifiably prolonging the State's jurisdiction over foreign craft after they had left the area in which it could properly exercise jurisdiction, and that it was moreover contrary to the principle of the mutual independence of States. Since the fully agreed with that point of view, he had thought it only right in the circumstances to insert a sentence to the effect that the power to withdraw certificates rested solely with the State which had issued them.

52. Sir Gerald FITZMAURICE said that he had no objection to the new sentence in the comment. He merely wished to place on record his view that, even if a State compelled a foreign seaman to surrender a certificate issued to him by another State, the loss of that piece of paper, which merely served to attest to the fact that he was duly certified, in no way affected the fact itself.

Article 11: Duty to render assistance

53. Replying to a question by Mr. EDMONDS concerning sub-paragraph (*b*), Mr. FRANÇOIS, Rapporteur, said that the words " if informed of their need for assistance " and " in so far as action may reasonably be expected of him " were taken from existing conventions.

Article 12: Slave trade

There were no observations on article 12 or the comment thereto.

Articles 13-20: Piracy

54. Mr. KRYLOV said that although he realized that his observation was being made too late to be taken into account, he would draw the Commission's attention to the fact that, in devoting eight of the thirty-eight articles on the high seas to the question of piracy, it appeared to be attaching undue importance to that subject.

Article 13

55. There were no observations on article 13 or the comment thereto.

Article 14

56. Mr. ZOUREK said that he maintained his previous reservations [4] with regard to article 14 and the comment thereto.

Article 15

There were no observations on article 15 or the comment thereto.

Article 16

57. Mr. SANDSTRÖM thought it should be made clear that the first and second sentences of the article referred to different cases: the first, to a ship or aircraft intended for piratic use and the second to a ship or aircraft seized and put to piratic use.

58. After some discussion,

It was agreed, on the proposal of Mr. ZOUREK, to emphasize the difference between the two cases in the comment.

59. Mr. SANDSTRÖM said that since the purpose of the article, according to the first sentence of the comment, was to define the terms " pirate ship " and " pirate aircraft ", the article should figure earlier in the set of articles on piracy.

[3] A/CN.4/SR.343, paras. 2-9.

[4] A/CN.4/SR.321, para. 4 and A/CN.4/SR.343, paras. 37 and 49.

It was agreed to request the Special Rapporteur to place the article at a more appropriate point in the set of articles on piracy.

60. Mr. KRYLOV pointed out that previous versions of the draft were already in the hands of the public. The numbering of the articles should accordingly be changed as little as possible, in order to avoid confusion.

Article 17

There were no observations on article 17 or on the comment thereto.

Article 18

There were no observations on article 18 or on the comment thereto.

Article 19

61. Mr. SANDSTRÖM did not like the order of words in the French text of the beginning of the article and asked that the phrases " sans motif suffisant " and " pour cause de suspicion de piraterie " should be transposed, as they were in the English text, which was better.

It was so agreed.

Article 20

62. Sir Gerald FITZMAURICE, referring to the first sentence in the second paragraph of the comment, pointed out that though a merchant ship might hand a pirate ship over to a warship or to the authorities after overpowering it, it did no necessarily overpower it with that end in view.

It was *agreed* to amend the comment on the article accordingly.

Article 21: Right of visit

63. There were no observations on the article or on the comment thereto.

Article 22: Right of hot pursuit

64. Mr. ZOUREK, speaking as Chairman of the Drafting Committee, drew attention to the changes to the article made in pursuance of the Commission's decisions.

65. Mr KRYLOV, referring to the second sentence of paragraph 4 of the comment, questioned the need to refer to " constructive presence ", a term which appeared to be confined to Anglo-Saxon jurists.

After some discussion, *it was agreed* to delete the sentence in question.

66. Mr. AMADO, referring to the paragraph 4 (1) of the comment, recalled that he was one of the members of the Commission who were of the opinion that no pursuit commenced when the ship is already in a contiguous zone can be recognized.

67. Sir Gerald FITZMAURICE, supported by Mr. ZOUREK, proposed that it be made clear in paragraph 4 (3) of the comment that a second ship arresting the ship pursued must have actually joined in its pursuit and not merely intercepted it.

It was agreed to add the words " provided that it has joined in the pursuit and not merely effected an interception " after the words " which began the pursuit " in the first sentence of the paragraph.

Article 23: Pollution of the high seas

68. Sir Gerald FITZMAURICE pointed out that the effect of radioactive waste on the suitability of fish for eating was still a matter of controversy.

It was agreed to substitute the words " which may be particularly dangerous " for the words " which is particularly dangerous " in the third paragraph of the comment on the article.

Sub-Section B: Fishing

Article 24: Right to fish

69. Mr. ZOUREK proposed that paragraphs 1 and 2 of the article be made separate articles. Paragraph 1, under the heading " Right to fish " would then constitute article 24, as it had done in the draft adopted by the Commission at its seventh session, while paragraph 2 containing the definition of the expression " conservation of the living resources of the high seas ", would form the introduction to the set of articles on fishing.

It was so agreed.

70. Mr. SPIROPOULOS, referring to the second paragraph of the comment, said that the explanation of the term " nationals " still did not make it sufficiently clear that the term referred not to physical persons but to ships. Furthermore, as it stood, the sentence did not cover small craft which did not fly a flag.

After some discussion, *it was agreed*, on the proposal of Sir Gerald FITZMAURICE and Mr. SPIROPOULOS, to state that: " the term nationals denotes fishing boats having the nationality of the State concerned, irrespective of the nationality of the members of their crews ".

The meeting rose at 1.05 p.m.

377th MEETING

Thursday, 28 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea

Part II: The high seas (A/CN.4/2.68/Add.3) *(continued)*

Conservation of the living resources of the high seas

Introduction

1. The CHAIRMAN invited the members of the Commission to resume consideration of their report at the introductory comment on the articles on the conservation of the living resources of the high seas.

2. Mr. SANDSTRÖM, referring to the third sentence in the eleventh paragraph, pointed out that, in summarizing the provisions of article 29 as adopted by the Commission at its seventh session, it quoted only one of the qualifications on the right of the coastal State to adopt measures of conservation unilaterally, namely, the proviso that negotiations with the other States concerned had not led to an agreement within a reasonable period of time. In his opinion the summary would be incomplete without the addition of requirement (*a*) contained in paragraph 2 of the article to the effect that there must be an imperative and urgent need for the measures of conservation.

3. The CHAIRMAN suggested going farther and referring to all the conditions set forth in the article, not necessarily in full, but by the addition of a clause such as "... provided that the conditions set forth in the article be fulfilled".

4. Mr. SANDSTRÖM said that he could accept that suggestion, although the conditions to which he had referred related to the reasons for adopting the measures of conservation unilaterally, whereas requirements (*b*) and (*c*) concerned the validity of those measures for other States.

5. Mr. PAL said that he did not see any need to change the sentence, which reproduced paragraph 1 of the article almost word for word. Paragraph 1 dealt with the reasons why measures of conservation might be adopted unilaterally, whereas paragraph 2 was concerned with the question of whether the measures should be binding on other States.

6. Mr. FRANÇOIS, Rapporteur, agreed with Mr. Sandström that the sentence as drafted might give an inadequate impression of the article. He was also willing to accept the Chairman's suggestion. He could not see why Mr. Pal should object to reproducing the article in as complete a form as possible.

7. The CHAIRMAN pointed out that the Rapporteur, in tracing the history of articles 28 and 29, had already given a complete summary of the first of the articles. If the second article were not treated in the same way, the impression might be conveyed that the Commission had adopted no more than what was reproduced.

8. Mr. PAL said that he had not raised any objection to reproducing the article in full. Undoubtedly, if the Commission thought it necessary to give a complete summary of articles in the introductory comment, despite the fact that the text of the article was given some pages farther on, the sentence in question should be amended on the lines proposed.

9. On the proposal of Mr. SANDSTRÖM *it was agreed* to add the following words at the end of the third sentence of the eleventh paragraph of the introductory comment: "and provided that such measures be maintained only under the conditions specified".

10. Mr. PAL said that the principle of the special interest of the coastal State appeared to be somewhat heavily watered down in the last two sentences of the thirteenth paragraph of the introductory comment. He wondered whether the text accurately reflected the turn the discussion had taken.

11. Mr. ZOUREK said that, to his recollection, the Commission had merely agreed on the fact that the special interest of the coastal State was not an exclusive interest. The last sentence in the thirteenth paragraph might be said to qualify the special interest of the coastal State almost out of existence. He thought that it should be deleted.

12. Faris Bey el-KHOURI said that he understood the Commission merely to have agreed that the special interest of the coastal State did not preclude other States from having an interest too.

13. Mr. FRANÇOIS, Rapporteur, said that he distinctly recalled that Sir Gerald Fitzmaurice, Mr. Padilla Nervo and he, himself, had expressed or agreed with the views reflected in the two sentences.[1]

14. Sir Gerald FITZMAURICE agreed with the Rapporteur that the two sentences accurately reflected the turn taken by the discussion. The view had been taken that the coastal State automatically had a special interest in the maintenance of the productivity of the living resources in the high seas contiguous to its coasts by the very reason of their contiguity, but that there was no reason why its special interest should have precedence over that of other States which had fished in the area for some time. He was anxious to keep the last sentence in the paragraph, though perhaps in a somewhat amended form. It would, he thought, help to influence the opinion of non-coastal States in favour of the set of articles.

15. Mr. SANDSTRÖM agreed that the sentences were a fairly exact reflection of the consensus of opinion in the Commission. The last sentence in the paragraph would require some amendment, however, as the special interest of the coastal State was based not on its command of the coasts, but on the fact that the waters were contiguous

[1] A/CN.4/SR.351.

to its coasts and of economic importance to it. Furthermore, the words " and has not *ipso facto* a higher standing than the other interests involved " in the last sentence were merely a repetition in different terms of what had been said in the previous sentence.

16. Mr. AMADO proposed substituting the words " by reason of the sole fact of the geographical situation of the State " for the words " solely by reason of the fact that the State commands the coasts ".

It was so agreed.

17. The CHAIRMAN explained that, whereas, in the draft articles 28 and 29 adopted by the Commission at its seventh session it had merely let it be presumed that the coastal State had a special interest, the two articles in their revised form implied that the coastal State necessarily had a special interest. It having been pointed out, by him in particular, that there were cases in which other States which had fished from time immemorial in an area of the high seas adjacent to the territorial sea of a coastal State had a greater interest in the maintenance of the productivity of the living resources in that area than the coastal State, the Commission had felt it essential to include the qualification contained in the two sentences under discussion.

18. Mr. ZOUREK said that he still doubted whether the text was an accurate reflection of the Commission's views. According to article 29, which gave the coastal State alone the right to adopt unilateral measures of conservation subject to certain conditions, the special character of the coastal State's interest certainly appeared to give it more rights than those enjoyed by the other States concerned. He was accordingly in favour of deleting the phrase beginning " and has not *ipso facto* ".

19. After further discussion, *it was agreed*, on the proposal of the RAPPORTEUR, that the two sentences should be transposed and re-drafted on the following lines:

The special character of the interest of the coastal State should be interpreted in the sense that the interest exists solely by reason of the fact of the geographical situation of the coastal State. The Commission did not wish to imply that the "special" interest of the coastal State would take precedence *per se* over the interests of the other States concerned.

20. Mr. ZOUREK said that he could not accept the second of the two proposed sentences. Moreover, the last sentence in the sixteenth paragraph reading: " Other members wished . . . or other peaceful means " was incomplete and required the insertion of the words " of differences arising out of the application of these articles " after the words " to seek a settlement ".

21. Mr. FRANÇOIS, Rapporteur, said such a modification would be acceptable.

22. Sir Gerald FITZMAURICE observed that the whole sentence was a little misleading because the real point under discussion had been that under the proposed draft no fresh or more extensive obligations would be accepted for the pacific settlement of disputes, beyond those contained in the United Nations Charter under which States were not bound to come to any final solution by means of the various methods enumerated in article 33. The sentence in question suggested that some members would have been willing to support a definite obligation to effect a settlement, but that would not be the effect of the draft as it stood at present, which was precisely the reason why other members had felt that there was need to provide for compulsory arbitration.

23. While not opposing Mr. Zourek's amendment, he would prefer the sentence to read: " Other members thought that it would be sufficient to rely on existing provisions for the settlement of disputes by negotiation etc."

Sir Gerald Fitzmaurice's wording was adopted.

24. Mr. EDMONDS said that he had some misgivings regarding the second sentence of the seventeenth paragraph. From the words " it felt that " onwards, it gave the impression that the Commission regarded itself as exercising permanent supervision over the application of the general rules it had formulated. Moreover, the phrase " the smooth working of the general rules " was not a happy one; the system established by the general rules might be said to " work " but not the rules themselves.

25. Sir Gerald FITZMAURICE said that he had similar misgivings regarding the same sentence. It was inappropriate to speak of the Commission " giving States rights over the high seas "; perhaps " recognizing " or " proposing " would be more suitable. The reference to " rights which were not yet confirmed by existing international law " might give the impression that their confirmation was merely a matter of time. He proposed substituting the words " going beyond " for the words " which were not yet confirmed by ", and " due functioning " for " smooth working ".

26. Mr. EDMONDS said that, although he would prefer the deletion of the whole phrase beginning " which were not yet confirmed " down to " the peaceful settlement of disputes but ", with the exception of the words " the Commission ", he did not wish to press the point.

After some further discussion *it was agreed to retain the sentence, subject to the drafting changes proposed by Sir Gerald Fitzmaurice.*

27. The CHAIRMAN, referring to the last paragraph of the introductory comment, proposed the insertion after the words " exaggerated claims in regard to the extension of the territorial sea " of the words " or to other claims to jurisdiction over areas of the high seas ".

It was so agreed.

28. Sir Gerald FITZMAURICE proposed the insertion of the words " fail in an important part of their purpose if they do not " between the word " will " and the words " help to smooth " in the same paragraph.

It was so agreed.

Article 25

29. Mr. SANDSTRÖM considered that the Rapporteur should explain in the comment why the Commission had modified the text adopted at the previous session

by making the provision contained in article 25 mandatory instead of optional.

30. Mr. FRANÇOIS, Rapporteur, said that though he had not made an explicit reference to that change in the comment, he had sought to interpret its effect in the second paragraph; that would perhaps suffice.

31. Sir Gerald FITZMAURICE disagreed with the Rapporteur; it would be very desirable to draw attention to the change made in the article.

32. Mr. FRANÇOIS, Rapporteur, undertook to draft an appropriate passage.

33. Mr. KRYLOV proposed the deletion of the first sentence of the comment on article 25 and of the first paragraph of the comment on article 26 because references to earlier texts adopted by the Commission served little purpose and would be confusing to the ordinary reader.

Mr. Krylov's amendment was adopted.

34. Sir Gerald FITZMAURICE, referring to the last sentence in the first paragraph of the comment, which read: " Nevertheless, the existence of such regulations issued by States engaged in fishing does not prevent the coastal State from invoking article 28 or itself adopting conservation measures in pursuance of article 29 under the conditions laid down in these articles", said that he had never understood the Commission to have decided that the existence of regulations by States other than the coastal State did not prevent the coastal State from adopting conservation measures in pursuance of article 29. His assumption had always been that the coastal State could make use of the faculty granted to it under article 29 only, when there were no conservation measures in force for the area in question. Absolute precision on that point was obviously very important; otherwise two different sets of regulations might be promulgated, the first applicable to the nationals of a State fishing in the area, and the second emanating from the coastal State, which would claim that they were valid for anyone fishing in the area. He had supposed that if conservation measures already existed, the coastal State was bound by the provisions of article 27, its position being adequately safeguarded because the measures could be challenged before an arbitral tribunal.

35. Mr. FRANÇOIS, Rapporteur, drawing attention to the second paragraph of the comment on article 29, expressed the view that the Commission had not intended to go beyond requiring the coastal State, if conservation measures already existed, to initiate negotiations with the other States concerned before adopting unilateral measures of its own in the event of failure to reach agreement. He did not believe that the Commission had contemplated preventing the coastal State from adopting unilateral measures.

36. Sir Gerald FITZMAURICE said that the second paragraph of the comment on article 29 was inaccurate because that article imposed an express obligation on the coastal State to try to reach agreement with the other States concerned before enacting unilateral measures. The article did not merely suggest that it would be desirable for the coastal State to do so.

37. Mr. ZOUREK, endorsing the Rapporteur's interpretation of article 29, pointed out that if a coastal State found conservation measures to be urgently necessary, it could take unilateral action even if others already existed, though he recognized that that might lead to a difference which would have to be submitted for settlement by the means provided for in the draft.

38. Sir Gerald FITZMAURICE emphasized that the coastal State could act unilaterally only after it had attempted and failed to reach agreement with the other States concerned.

39. His point would be met if the last sentence in the first paragraph of the comment to article 25 were worded as follows: " Nevertheless, the existence of such regulations issued by States engaged in fishing does not prevent the coastal State from invoking article 28 or 29."

Sir Gerald Fitzmaurice's amendment was adopted.

40. Sir Gerald FITZMAURICE proposed the substitution of the word " conservation " for the word " fishing " in the first sentence of the second paragraph of the comment, because fishing regulations need not necessarily have anything to do with conservation.

Sir Gerald Fitzmaurice's amendment was adopted.

41. Mr. FRANÇOIS, Rapporteur, observed that in accordance with the Commission's decision at its previous meeting to consign article 24, paragraph 2, to a separate article, the comment on the definition of conservation would be transposed from the comment on article 25 to follow the new article.

Article 26

42. Sir Gerald FITZMAURICE pointed out that, to be consistent with other articles, article 26, paragraph 1, should refer to " the stock or stocks of fish or other marine resources " and not to " the living resources of the high seas ".

43. Turning to what had now become the first paragraph of the comment, he suggested that the word " regularly " was open to misconstruction because it might not be understood to include fishing at longer intervals than one year.

44. Mr. FRANÇOIS, Rapporteur, undertook to insert the necessary explanation in the comment.

45. Mr. ZOUREK said that it would have been preferable for the sake of consistency and accuracy to substitute the word " casually " for the word " occasionally " in the first sentence of the comment.

Article 27

46. The CHAIRMAN asked whether, as he had suggested during the discussion,[2] the Rapporteur could explain in the comment that the provisions of article 27 did not apply to nationals of another State starting to fish in an area where conservation measures were already in force, if their activities were only on a small scale.

47. Mr. FRANÇOIS, Rapporteur, said that he would comply with the Chairman's request.

[2] A/CN.4/SR.356, para. 92.

48. He then proposed that the last paragraph of the comment on article 27 should be replaced by the following text:

The Commission's attention had also been directed to a proposal that where a nation is primarily dependent on the coastal fisheries for its livelihood, the State concerned should have the right to exercise exclusive jurisdiction over fisheries up to a reasonable distance from the coast in view of relevant local considerations when this is necessary for the conservation of these fisheries as means of subsistence for the population. It was proposed that in such cases the territorial sea might be extended or a special zone established for the above-mentioned purpose.

After some discussion of these problems the Commission realized that it was not in the position to examine fully their implications and the elements of exclusive use involved therein. The Commission recognized, however, that the proposal regarding abstention, with the objective of providing incentives for building up and restoring the productivity of resources, like the proposal based on the concept of vital economic necessity, may reflect problems and interests which deserve recognition in international law. However, lacking competence in the fields of biological science and economics adequately to study these exceptional situations, the Commission, while drawing attention to the problems, has refrained from making any concrete proposals.

49. The CHAIRMAN said that, although the principle of abstention was directly related to article 27, as the new text proposed by the Rapporteur referred to other considerations as well, its proper place was perhaps at the end of the draft articles on conservation.

50. Mr. PAL believed it would be preferable to insert the new text in the introductory comment so as to explain why the Commission had not dealt with certain problems in its draft.

51. Mr. FRANÇOIS, Rapporteur, did not favour Mr. Pal's suggestion for the reason that, by placing the new text in the introductory comment, too much emphasis would be given to an exceptional case.

52. Mr. KRYLOV could not see to which article the proposed new passage could be attached; he was therefore inclined to support Mr. Pal.

53. Mr. SANDSTRÖM agreed with the Chairman that the new text should be inserted at the end of the draft articles on conservation, because it dealt with problems only recently referred to the Commission and about which it had made no definite proposals.

It was agreed to insert the two new paragraphs proposed by the Rapporteur at the end of the draft articles on conservation under a separate sub-title.

54. Sir Gerald FITZMAURICE proposed the deletion of the words " and consistent with general legal principles " from the first sentence of the comment. The statement was not correct, because, the high seas being *res communis*, where States possessed jurisdiction only over their own nationals, in the absence of a general agreement the requirement laid down would not be consistent with general legal principles.

55. Mr. FRANÇOIS, Rapporteur, observed that those words had already appeared in the comment approved at the previous session. However, he had no objection to their deletion.

Sir Gerald Fitzmaurice's amendment was adopted.

Article 28

There were no observations on the substance of article 28 or the comment thereto.

Article 29

56. Sir Gerald FITZMAURICE hoped that, in the light of what had been said earlier in the meeting during discussion of the introductory comment on the articles relating to conservation of the living resources of the high seas, the Rapporteur would agree that the last sentence of the second paragraph of the comment on article 29 did not properly reflect the intention of paragraph 1 of the article itself. He suggested that the sentence be amended to read:

If the case is so urgent that article 28 cannot be applied, it will nevertheless be *necessary* for the State not to take unilateral action until it has consulted the other State concerned *and tried to reach agreement.*

Sir Gerald Fitzmaurice's amendment was adopted.

57. Sir Gerald FITZMAURICE observed that the third paragraph of the comment dealt with the case where, as for example in the Eastern Mediterranean, the configuration of the coastline was such that a particular area of the high seas adjoined the territorial seas of more than one coastal State. Did the last sentence of that paragraph, which read " In that case prior agreement between the various States is necessary ", mean that in such a case it would not be open to any of the States concerned to take unilateral measures under article 29, and that prior agreement between them would have to be reached before any conservation measures could be taken ?

58. Mr. FRANÇOIS, Rapporteur, said he had not wished to convey the impression that prior agreement was absolutely necessary, but only that it was desirable. If agreement was not reached, for example, the matter could be submitted to arbitration in accordance with paragraph 31; but it would, of course, be preferable for agreement to be reached.

59. Mr. SANDSTRÖM thought that in the case in point there could be no question of conservation measures being taken without prior agreement between the States concerned.

60. Sir Gerald FITZMAURICE agreed with the Rapporteur that under article 29, paragraph 3, it was in theory open to any of the coastal States concerned to challenge, in the arbitral commission provided for in article 31, any conservation measures taken unilaterally by another of the coastal States concerned. The objection to allowing that to happen, however, was that the measures taken would remain in force until and unless the arbitral commission pronounced against them, with the result that fishermen might be subject to a number of conflicting regulations, all supposedly in force. On the other hand, he appreciated the fact that there were

objections to excluding the cases in point from the provisions of article 29, as would be done if the present wording of the third paragraph of the comment were retained.

61. The CHAIRMAN, speaking as a member of the Commission, felt that article 29 could not apply in the case of an area of the high seas adjacent to the territorial sea of more than one coastal State. Such cases would have to be settled by prior agreement between the States concerned, and he saw no reason why the Commission should not frankly say so.

62. Mr. AMADO suggested that the second sentence of the third paragraph of the comment on article 29 be amended to read: " In that case, application of the measures envisaged will depend on prior agreement between the various States."

63. Mr. PAL pointed out that the agreement between the States concerned might be an agreement to divide up the area in question so that each of them could take unilateral conservation measures in one part of it.

64. The CHAIRMAN pointed out that the wording proposed by Mr. Amado would also cover such an eventuality.

Mr. Amado's amendment was adopted.

65. The CHAIRMAN, speaking as a member of the Commission, drew attention to the comment by certain governments to the effect that unilateral measures of conservation should not be applied until the arbitral commission had decided that they were valid. In his opinion that comment was a reasonable one, taking into account the damage which could be caused to non-coastal States in cases where the measures envisaged were either arbitrary or inappropriate. As the present text had been approved by a large majority of the Commission, however, he was prepared to accept it.

Article 30

There were no observations on article 30 or the comment thereto.

Article 31

66. Mr. ZOUREK thought that, as the text of article 31 had been completely re-drafted by the Drafting Committee in order to take account of proposals submitted by Mr. Edmonds, the Commission should perhaps vote on it.

67. Replying to observations by Mr. PAL and Mr. SPIROPOULOS, he confirmed that the words "composed of seven members " had seen omitted in error after the words " to an arbitral commission " in paragraph 1.

68. Mr. KRYLOV felt that the effect of the words " in case of absolute necessity " in paragraph 5 was almost comical. Surely, the words " in case of need " would suffice.

69. Sir Gerald FITZMAURICE said that the Drafting Committee had wished to take into account the fact that as long as arbitration continued many fishermen might be prevented from earning their living as a result of the measures which had been taken; it had therefore felt it right to lay some stress on the fact that the time limit for rendering an arbitral award should not be extended except " in case of real necessity ". Perhaps Mr. Krylov would be satisfied if those words were substituted for those to which he objected.

70. Mr. AMADO felt that the arbitral commission would not fail to bear in mind the effects of delay in rendering its award. It would certainly not decide to exceed the time limit laid down unless there was a " real " or " absolute necessity " for it to do so. Any such phrase as " in case of absolute necessity " could therefore, in his view, be omitted.

71. Mr. PAL agreed. If the Commission was willing to give the arbitral commission power to decide disputes, it could surely have confidence in it to take the interests of all parties to the dispute into account.

72. Mr. SPIROPOULOS agreed with Mr. Amado and Mr. Pal. The words in question added nothing to the text, since the arbitral commission would have no choice but to continue its deliberations if it found that the period allotted to it was insufficient.

73. Mr. EDMONDS said that, although he would not insist on the words in question being retained, increasing attention was being paid, in the United States of America at least, to ways of preventing the settlement of disputes from dragging on too long. From his own experience he knew that a restriction such as it was now proposed to omit from the text could have a very salutary effect.

74. Mr. SPIROPOULOS said it was not only the words " in case of absolute necessity " which were unrealistic, but the whole paragraph. Every member of the Commission knew that, by the time the parties had prepared and presented their oral pleadings and called expert witnesses, it was most unlikely that the arbitral commission would be in a position to render its award within three months of being constituted. It would therefore be preferable to omit from the article itself all mention of a time limit within which the award should be rendered and to say in the comment that, for the reasons adduced by Sir Gerald Fitzmaurice, it was to be hoped that the award would be rendered as quickly as possible.

75. Mr. SANDSTRÖM felt that a statement to that effect in the comment would be the expression of a pious hope at best. If the Commission wished any attention to be paid to the point, it must refer to it in the article. He agreed, however, that it was quite unrealistic to expect the arbitral commission to complete its work within three months. The period should be extended, but otherwise the text should remain as it was.

76. Mr. ZOUREK agreed that it was unduly optimistic to expect the arbitral commission to render its award within three months. The sense of urgency which that implied, moreover, accorded ill with the proposal to allow as much as five months for the commission's constitution. The least the Commission could do was to reduce, to three months the period allowed for constituting the commission and to increase to five months the period within which the award must be rendered.

77. Sir Gerald FITZMAURICE felt that the text must

be viewed as a whole. The present text was based on expert fisheries opinion which the Commission had received to the effect that, if too much time were allowed to elapse between the date when the unilateral measures were put into effect and the date when the arbitral commission rendered its award, one, or in some cases even two, entire fishing seasons might be lost, with disastrous consequences for fishermen. The constitution of the Commission might well entail considerable consultation and correspondence, but there was no reason why the parties should not be preparing their cases meantime so as to be ready to submit them to the commission as soon as it was constituted. The important thing was that the total period to which he had referred should not be extended, and in order to meet the objections made to the present text of paragraph 5 he suggested that the words " five " and " three " be transposed and that the word " absolute " be deleted before the word " necessity ".

Sir Gerald Fitzmaurice's amendment was adopted, with a corresponding change in the comment.

78. Replying to a question by the CHAIRMAN, Mr. ZOUREK said that he did not insist on a vote on the revised text of article 31, but that he maintained his opposition to it, for the reasons which he had already indicated.[3]

79. Mr. KRYLOV said that he was also opposed to the revised text of article 31, for the same reasons as had led him to the former text.[4]

Article 32

80. Mr. KRYLOV said that in general he saw little point in referring in the comment to proposals on which the Commission had for one reason or another taken no action. In the case of article 32, he recalled that Mr. Edmonds had submitted proposals which, though of great interest in themselves, had been considered by the Commission to be too detailed for inclusion in the article itself. Those proposals now appeared in the comment on the article, where they were set out at considerable length. Since the Commission had not adopted those proposals, or even examined them in detail, he did not understand why it was felt necessary to incorporate them in the comment.

81. Mr. FRANÇOIS, Rapporteur, and Mr. EDMONDS recalled that the Commission had formally decided[5] that Mr. Edmonds should prepare a text of his proposals for inclusion in the comment, and the CHAIRMAN added that that had been done on his proposal, because he had felt it was desirable to illustrate the criteria listed in article 29.

82. Mr. KRYLOV said that the fact remained that according to the comment " the Commission wished to state " certain principles which in fact it had neither examined in detail nor approved. He did not, however, wish to press the matter further.

83. Replying to observations by Mr. ZOUREK and Mr. SANDSTRÖM, Mr. FRANÇOIS, Rapporteur, agreed that the intention of paragraph 4 of the comment could perhaps be expressed more clearly both in the English original and in the French translation. He suggested that he revise the wording with Mr. Edmonds.

It was so agreed.

Article 33

There were no observations on article 33 or the comment thereto.

The meeting rose at 1.05 p.m.

[3] A/CN.4/SR.352 paras. 72-74 and A/CN.4/SR.353, paras. 2 and 3.

[4] A/CN.4/SR.352, paras. 42-45.

[5] A/CN.4/SR.357, para. 18.

378th MEETING

Friday, 29 June 1956

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea

Part II: The high seas (A/CN.4/L.68/Add.3) (continued)

Article 33 A: Fisheries conducted by means of equipment embedded in the floor of the sea

1. The CHAIRMAN invited the Commission to continue its consideration of the part of the report on the law of the sea dealing with the high seas.

2. Replying to questions by Sir Gerald FITZMAURICE and Mr. KRYLOV, Mr. FRANÇOIS, Rapporteur, pointed out that the text of the article and the third

and fourth paragraphs of the comment had been taken from the draft articles on the continental shelf and related subjects adopted by the Commission at its third session.[1] As he had already pointed out at the 359th meeting,[2] the article had been omitted from the draft articles approved at the seventh session, in consequence of the decision to substitute the words " natural resources " for " mineral resources " in the draft articles on the continental shelf; at the time the Commission had thought that that change made retention of an article on sedentary fisheries unnecessary. In the observations to which the text had given rise, however, it had been pointed out that sedentary fisheries were of two kinds, those where the species caught were attached to the bed of the sea and those where the equipment used was embedded in the floor of the sea, and that the second type was not covered by the 1955 draft. As he regarded that observation as justified, he had proposed, and the Commission had agreed,[3] that the article which had appeared in the draft articles adopted at the third session should be re-inserted in the text, its scope, however, being limited to fisheries which were sedentary by virtue of the equipment used.

3. Sir Gerald FITZMAURICE suggested that it should be briefly indicated in the comment that the text had already been approved, in a slightly different form, at the Commission's third session. He also suggested the addition of the following words at the end of the article itself: " and must not interfere with other fisheries ".

4. Mr. FRANÇOIS, Rapporteur, said that although he had no objection to the suggested addition to the comment, the suggested addition to the text of the article raised the question whether it was right that other fisheries should, as it were, be placed in a privileged position *vis-à-vis* the fisheries referred to in article 33 A.

5. Sir Gerald FITZMAURICE felt that the Rapporteur had misunderstood his suggestion, the sole purpose of which was to make plain that although a State could regulate fisheries conducted by means of equipment embedded in the floor of the sea in an area of the high seas adjacent to its territorial sea, in doing so it could not enact any measures which would have the effect of regulating other fisheries in the same area.

6. Mr. PAL suggested that article 33 A should contain the same kind of provision as article 27, whereby States whose nationals had not previously engaged in sedentary fisheries of the type referred to in a particular area, but wished to do so after the coastal State had enacted regulations governing that type of fisheries in the area, could if they wished appeal against such measures to the arbitral commission provided for in article 31.

7. Mr. FRANÇOIS, Rapporteur, said that the aim of article 33 A was to codify an existing situation. Fisheries of the type referred to were mainly confined to the North African littoral. They were engaged in almost exclusively by the local population, and the eventuality envisaged by Mr. Pal seemed most unlikely ever to arise. To provide for it was in his view unnecessary; moreover, to give non-coastal States the right suggested might be said to run counter to the historic rights of the coastal State.

8. Mr. ZOUREK presumed that by the phrase " the regulation of fisheries ", the Rapporteur was not in article 33 A referring simply to conservation measures, since otherwise articles 25 to 33 of the draft would have sufficed.

9. Mr. FRANÇOIS, Rapporteur, agreed that he had more than conservation measures in mind. The purpose of the regulations might, for example, be to maintain order in the area.

10. Mr. AMADO wondered whether the article was really necessary in view of the fact that it would apply in only a very few special cases; it could well be deleted.

11. Mr. SANDSTRÖM, referring to Sir Gerald Fitzmaurice's suggestion that the words " and must not interfere with other fisheries " be added at the end of the article, warned the Commission against taking away with one hand what it gave with the other. Sedentary fisheries of the type referred to would inevitably interfere with other fisheries, and to say that they must not was tantamount to banning them altogether.

12. Sir Gerald FITZMAURICE said that Mr. Sandström's remarks made him fear that unless some proviso such as he suggested were added, other types of fishery might be totally eliminated from the areas in question, which, even if few in number, were often considerable in extent. The proviso that non-nationals should be permitted to participate in the fisheries on an equal footing with nationals was without any practical value, since by the nature of the case non-nationals were unlikely to engage in fisheries conducted by means of equipment which had to be embedded in the floor of the sea.

13. Mr. SANDSTRÖM said that whatever regulations were enacted by the coastal State, they could not help interfering with other fisheries from the mere fact of their permitting sedentary fisheries of the type referred to. In the territorial sea off southern Sweden, for example, posts were embedded in the floor of the sea as part of the equipment used for catching eels; there were regulations governing the minimum distance between such posts and so on, but whatever regulations were enacted could not alter the fact that the placing of such posts made it impossible to carry out trawling in the area, for fear of damage to the nets.

14. Sir Gerald FITZMAURICE said that his concern was only increased by what Mr. Sandström had said. It was true that in the cases referred to the area concerned was part of the territorial sea, but adoption of the text which the Commission was now considering could, it seemed, clearly result in trawling being made impossible over what were, as he had already pointed out, quite considerable areas of the high seas.

15. Mr. SANDSTRÖM said that if the Commission recognized the coastal States' historic right to regulate

[1] *Official Records of the General Assembly, sixth session, Supplement No. 9* (A/1858), chapter VII and annex.
[2] A/CN.4/SR.359, paras. 61 to 77.
[3] A/CN.4/SR.359, paras. 69 and 77.

sedentary fisheries in the areas in question it must accept the consequences which derived therefrom.

16. Sir Gerald FITZMAURICE agreed that where there was a genuine historic right the Commission could only recognize it and accept the consequences therefrom. His fears would be considerably lessened if he could be sure that the article would never be used as the basis for claiming a new right, on the pretext of thirty or forty years' practice.

17. Mr. KRYLOV drew attention to the word " long " in the phrase " where such fisheries have long been maintained and conducted by its nationals ".

18. Sir Gerald FITZMAURICE withdrew his suggestion, but requested that the Rapporteur insert in the comment a statement to the effect that the article applied only in the case of a genuine, long-established historic right.

19. Mr. FRANÇOIS, Rapporteur, agreed to make such an insertion. With regard to Mr. Amado's suggestion that the whole article could be deleted, he pointed out that writers devoted a good deal of attention to the question, which was of some importance.

20. At the request of Mr. ZOUREK, the CHAIRMAN put article 33 A to the vote, as the text had not yet been approved at the present session.

Article 33 A was adopted by 10 votes to none, with 2 abstentions.

Sub-section C: Submarine cables and pipelines (articles 34-38)

Article 34

There were no observations on article 34 or on the comment thereto.

Articles 35-37

There were no observations on these articles or on the comments thereto.

Article 38

21. Mr. ZOUREK and Mr. KRYLOV proposed deletion from the comment of the words " although perhaps superfluous ".

22. Mr. FRANÇOIS, Rapporteur, said he had no objection to deleting them, as he had merely inserted the words in question in an attempt to reflect the fact that although the Commission had apparently approved the inclusion of the phrase, it had done so without enthusiasm and many members had expressed the view that the phrase was superfluous.

The proposal to delete the words " although perhaps superfluous " was adopted.

Article 39: Contiguous zone

23. The CHAIRMAN, speaking as a member of the Commission and referring to paragraph 2 of the article, pointed out that the contiguous zone was recognized for the purpose of preventing or punishing infringements of the law within the territorial sea. That being so, the internal limit of the contiguous zone should logically be the external limit of the territorial sea. In view of the fact that the rights conferred on the coastal State in the contiguous zone were very limited, he did not think there could be any valid objection to amending article 39, paragraph 2, in the interests of logic, to read as follows: " The contiguous zone may not extend beyond twelve miles from the outer limit of the territorial sea." Although he had no wish to reopen the whole discussion on the contiguous zone, he recalled that the question of its maximum breadth had been reserved in the Commission and discussed only in the Drafting Committee.

24. Faris Bey el-KHOURI pointed out that the Commission had, however, agreed that the total breadth of the territorial sea and the contiguous zone should not exceed twelve miles. Adoption of the text suggested by the Chairman would open the way, in present circumstances, to exactly doubling that figure.

25. Mr. SPIROPOULOS agreed that some Member States would probably criticize article 39, paragraph 2, for the reason mentioned by Mr. García-Amador. That paragraph, however, was by no means the only one in the draft which would provoke criticism and comment. Such criticisms and comments could be made, and answered, in the proposed diplomatic conference. As far as the Commission was concerned, it would, in his view, be extremely undesirable to reopen discussion of the contiguous zone.

26. Mr. ZOUREK felt that in logic there was much to be said for the Chairman's suggestion. The information contained in the Special Rapporteur's previous reports on the subject showed that many States already claimed a contiguous zone extending more than twelve miles from the inner limit of the territorial sea.

27. Sir Gerald FITZMAURICE said that although he appreciated the logic of the Chairman's remarks, another, and in his view higher, logic pointed the other way. The whole concept of the contiguous zone had derived from and was bound up with the three-mile limit, which some States had felt was insufficient for certain special purposes. If a State claimed a breadth of territorial sea exceeding three miles, it seemed logical to argue that it no longer needed a contiguous zone at all.

28. Mr. PAL pointed out that governments had already had an opportunity to comment on the clause to which the Chairman objected, since it had figured in the Commission's report on its fifth session, but that none of them had in fact commented.

29. The CHAIRMAN said that he appreciated the force of all that had been said and would therefore not press his suggestion. He had only wished to draw the Commission's attention to the fact that the paragraph was, in his view, certain to come in for serious criticism.

30. Mr. ZOUREK referred to the last two sentences of the fourth paragraph of the comment, which read as follows: " In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, it is clear that the right to take protective measures belongs to States *ipso jure*, not only in the

contiguous zone, but also outside it. These rights of self-defence have been generally recognized in the United Nations Charter; it would be unnecessary and even undesirable to grant them specially for the contiguous zone." He pointed out that the United Nations Charter referred only to the right of self-defence in the event of armed attack and said nothing about the much more difficult question of the right of self-defence against other forms of aggression. Moreover, a mere threat to the security of the State did not authorize resort to force. To contend the contrary would mean approving preventive war and would be a breach of the Charter. In any event, that question did not fall within the Commission's programme, but was rather one for the special committee for a definition of aggression. He accordingly suggested that the two sentences in question be omitted.

31. Mr. KRYLOV supported Mr. Zourek's suggestion.

32. The CHAIRMAN agreed that the specific reference to the United Nations Charter was perhaps inappropriate, but felt the Commission would be justified in saying that the right in question was generally recognized by international law.

33. Mr. SALAMANCA said he would have no objection to deleting the two sentences, although he was not convinced that the reference to the Charter was inappropriate. Article 51 was not the only one which was relevant.

34. Mr. SPIROPOULOS suggested that the last two sentences of the fourth paragraph of the comment be replaced by a single sentence reading as follows:

In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the principles of the United Nations Charter.

35. Mr. ZOUREK said he could accept that text, in favour of which he withdrew his suggestion. What he could not accept was the idea that a State could attack another State on the mere ground that its security was threatened. The measures taken must be proportionate to the threat.

Mr. Spiropoulos' amendment was adopted.

36. Mr. ZOUREK, referring to the second sentence in the eleventh paragraph of the comment on the article, said that he saw no reason for the explanation it contained. It was quite clear from the article that the breadth of the contiguous zone was to be measured from the low-water line when the coastal State adopted that as its baseline, and from the line drawn by the straight baseline method when the coastal State had adopted that method. There was no need to say any more.

37. Mr. FRANÇOIS, Rapporteur, said that he had been asked to include some such statement in order to prevent the articles from being misunderstood by persons who automatically associated the term " baseline " with " straight baselines ". He could express the idea differently, if Mr. Zourek wished.

38. Mr. SANDSTRÖM pointed out that he had interpreted the sentence in quite another sense.

It was agreed to delete the second sentence of the eleventh paragraph of the comment.

Section III: The continental shelf

39. Mr. SALAMANCA, referring to the second paragraph of the introductory comment, said that he found the words " and it rejected any claim to sovereignty or jurisdiction over the superjacent waters " far too categorical. If a State established installations for the exploitation of the mineral resources of the continental shelf, it would clearly have to take some measures to ensure their safety and to keep order. He proposed the deletion of the clause in question.

40. The CHAIRMAN pointed out that the limited rights which the coastal State must enjoy in order to protect its installations were adequately safeguarded by article 6. The words to which Mr. Salamanca objected were included to make it quite clear that the Commission rejected all general claims to sovereignty and jurisdiction over the so-called " epi-continental sea ".

41. After some further discussion Mr. SALAMANCA said that he would not press his proposal.

42. Mr. EDMONDS, referring to the third sentence in the fourth paragraph of the introductory comment, said that the existing wording did not sufficiently emphasize the fundamental importance importance of the freedom of the seas to the international community.

43. *It was agreed,* on the proposal of Mr. SPIROPOULOS, to substitute the words " is of paramount importance " for the words " is one of the principles whose maintenance is of the greatest value ", in the last part of the sentence.

Article 40

44. The CHAIRMAN, speaking as a member of the Commission, proposed the inclusion in the fourth paragraph of the comment of a reference to the fact that the Inter-American Specialized Conference on Conservation of Natural Resources, held during the period between the Commission's seventh and eighth sessions, had reached the same conclusions as those reached by the Commission at its third session regarding the delimitation of the submarine areas over which the State enjoyed exclusive jurisdiction and control for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil. He did not of course intend the reference to imply that the Conference's decision had led the Commission to revert to its former views. If his proposal were accepted, he would submit a brief draft text.

It was so agreed.

45. Mr. EDMONDS, referring to the text of the article and to the fifth paragraph of the comment, wondered whether the words " 200 metres " were really preferable to the words " 100 fathoms ". Since it was unlikely that the text would be read by persons not familiar with the nautical term" fathom ", the reason given by the Commission for its choice was hardly valid.

46. Mr. FRANÇOIS, Rapporteur, pointed out that 100 fathoms being only 182.9 metres, the two terms were

not strictly speaking interchangeable. While the limit of 100 fathoms had the advantage of being already marked on marine charts, the limit of 200 metres had the advantage of being the depth accepted by geologists as that at which the slope from the continental shelf into deep waters generally began.

47. Mr. SANDSTRÖM, supported by Sir Gerald FITZMAURICE, pointed out that the United Kingdom in its comments had expressed a preference for the term " fathom " because the 100-fathom line and not the 200-metre line was the one already marked on the ocean charts of those countries that produced charts covering the whole world.

48. Mr. EDMONDS proposed that the text of the article be amended to read : " to a depth of 200 metres (approximately 100 fathoms) ".

49. Mr. SPIROPOULOS said that since 100 fathoms was the shorter measurement of the two, he would prefer that the text of the article be amended to read " to a depth of 100 fathoms (approximately 200 metres) ". He did not, however, wish to make a formal proposal.

Mr. Edmonds' proposal was adopted.

50. Sir Gerald FITZMAURICE, referring to the first sentence in the tenth paragraph of the comment, suggested the insertion, before the words " the Commission ", of the words: " and also in view of the inclusion of exploitable areas beyond a depth of 200 metres ", as an additional reason why the Commission, at its eighth session, had considered the possibility of adopting a term other than " continental shelf ".

51. Mr. FRANÇOIS, Rapporteur, pointed out that the text as it stood had already been included in the comments on the draft articles in the Commission's report covering the work of its fifth session.[4] At that time it had been the decision that shallow submarine areas were not excluded from the concept of the continental shelf, rather than the idea of including exploitable areas beyond a depth of 200 metres, that had caused the Commission to consider the possibility of adopting another term.

Sir Gerald Fitzmaurice's proposal was adopted.

52. The CHAIRMAN, referring to the second sentence in the same paragraph, proposed the inclusion of a reference to the use of the term " submarine areas " in national laws and some international instruments, in addition to the existing reference to the opinion expressed in certain scientific works.

It was so agreed.

Article 41

53. Mr. AMADO, referring to the last sentence in the second paragraph of the comment, wondered whether there was any justification for its inclusion. The sentence read: " There is no reason to fear that, as a consequence, rich mineral deposits, the exploitation of which is technically possible and economically justified, will remain unexploited; a State which has not the means to carry out the exploitation itself may be expected to grant concessions for others to do so under its control."

54. Mr. FRANÇOIS, Rapporteur, said that he had included the sentence because the Commission had been reproached with showing undue favour to coastal States, it having been argued by Mr. Scelle in particular that, under the provisions of the article, rich oil deposits might lie unexploited, simply because the coastal State was unable to carry out the exploitation itself.

55. Mr. Ceccato, a remarkable young Brazilian jurist, had also commented unfavourably on the article, saying that he was not sure whether, in order to retain its sovereign right to exploit the natural resources of the continental shelf, a coastal State might not be obliged actually to exploit those resources.

56. Mr. SALAMANCA remarked that the Commission could take only the comments of governments into account. In his opinion, the sentence was quite out of tune with the strictly juristic nature of the rest of the comment. He proposed that the sentence be deleted.

57. Mr. SPIROPOULOS pointed out that the idea conveyed in the last sentence of the paragraph was already implicit in the previous sentence. It might perhaps meet Mr. Amado's and Mr. Salamanca's objections if the last sentence were deleted and the previous sentence amended to read:

> The rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, another State may do so only with its consent.

Mr. Spiropoulos' proposal was adopted.

58. The CHAIRMAN urged that the penultimate sentence in the third paragraph of the comment, which read " This question should be settled later in the light of expert opinion on the subject ", be deleted. He could not recall the Commission's having decided that the question of defining natural resources other than mineral resources of the sea-bed and subsoil of the continental shelf be settled later in the light of expert opinion. Since such a statement represented a change of attitude on the part of the Commission, it was in direct contradiction with the assertion in the previous sentence that the Commission had decided not to amend the text of the article or of the comment.

59. Mr. FRANÇOIS, Rapporteur, said that he had understood Mr. Padilla-Nervo to have suggested that the matter be settled later by experts. Deletion of the sentence in question would give the impression that the Commission accepted no qualification whatsoever of the condition that the resources must be permanently attached to the bottom. He had not interpreted the discussion in that sense.

60. Sir Gerald FITZMAURICE said that Mr. Padilla-Nervo had made a number of suggestions in his statement but, so far as he could remember, had concluded by saying that, since the question was a controversial one which could probably only be settled by experts, it would be better to leave the article unchanged. He could recall

[4] *Official Records of the General Assembly, eighth session, Supplement No. 9* (A/2456), p. 13, para. 65.

no decision of the Commission that the matter should be settled by experts.

61. Mr. KRYLOV observed that such discussions pointed to the desirability of taking formal decisions more often. In his opinion, the text was a fair reflection of the attitude taken by the Commission.

62. The CHAIRMAN recalled that he had made a proposal [5] which was tantamount to including a portion of the comment in the article itself. He had later withdrawn that proposal [6] on the understanding that the text of the article and the comment would remain unchanged.

63. Mr. SALAMANCA thought that the difficulty could be overcome by deleting the sentence to which the Chairman objected and introducing the previous sentence by a statement on the following lines: " While some members of the Commission believed it possible in the present state of knowledge to draw a distinction between marine flora and fauna permanently attached to the bottom and those attached to the bottom for part of their life cycle only, other members took the opposite view. The Commission accordingly decided not to amend—— ".

64. The CHAIRMAN and Mr. KRYLOV supported Mr. Salamanca's proposal.

Mr. Salamanca's proposal was adopted.

Mr. Zourek, First Vice-Chairman, took the chair.

65. Sir Gerald FITZMAURICE pointed out an omission from the first sentence of the last paragraph of the comment, in which the words " and on the shelf itself " should be inserted after the words " above continental shelves ".

Articles 42 and 43

66. Sir Gerald FITZMAURICE proposed that articles 42 and 43 be combined to read: " 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."

Sir Gerald Fitzmaurice's proposal was adopted.

Article 44

There were no observations on the substance of article 44 or on the comment thereto.

Article 45

67. Mr. KRYLOV suggested that some more easily comprehensible term might be found to replace the words " fish production " in paragraph 1 of the article.

68. Mr. FRANÇOIS, Rapporteur, pointing out that the term had also been used in the text adopted at the fifth session, explained that the object was to ensure that the exploration of the continental shelf and the exploitation of its natural resources did not destroy stocks of fish.

69. Mr. SANDSTRÖM proposed the substitution of the words " conservation of living resources " for the words " fish production ".

Mr. Sandström's amendment was adopted.

Article 46

There were no observations on the substance of article 46 or the comment thereto.

Article 47

There were no observations on the substance of article 47 or the comment thereto.

70. The CHAIRMAN announced that, apart from the points left in abeyance, consideration of chapter II, part II, of the draft report was concluded.

Chapter II: Introduction (A/CN.4/L.68/Add.1) (resumed from the 375th meeting)

71. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace paragraphs 20 to 24 in the introduction to chapter II of the draft report. The new text read as follows:

20. In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the very clear distinction established in the Statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on a "recognized principle of international law", have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.

21. In these circumstances the Commission takes the view that the proposed provisions should be sanctioned by international treaty.

22. The Commission recommends, in conformity with article 23, paragraph 1 (*d*) of its Statute, that the General Assembly should summon a diplomatic conference to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

23. The Commission is of the opinion that the diplomatic conference should deal with the various parts of the law of the sea covered by this report. Judging from its own experience, the Commission considers—and the comments of governments have confirmed this opinion—that the various sections of the law of the sea hang together, and are so closely interrelated that it would be extremely difficult to deal with only one part and leave the others aside.

24. The Commission considers that such a conference has been adequately prepared by the work the Commission has done. The fact that there have been . . . etc.

72. Mr. LIANG, Secretary to the Commission, observed that the words " very clear " in the first sentence of the new text for paragraph 20 were not strictly accurate, since the Statute failed to draw any sharp distinction between the codification and the progressive development of international law.

[5] A/CN.4/SR.358, para. 78.

[6] A/CN.4/SR.359, para. 34.

It was agreed to delete the words " very clear " from the first sentence of paragraph 20.

73. Sir Gerald FITZMAURICE proposed the deletion of paragraph 21, which was open to certain objections. Paragraph 22, with the insertion of the word " accordingly " before the word " recommends " would follow logically from paragraph 20.

74. The CHAIRMAN, speaking as a member of the Commission, was uncertain whether paragraph 21 could be omitted without loss, since nothing was said in paragraph 22 about the character of the Commission's proposals.

75. Sir Gerald FITZMAURICE argued that once the point had been made in paragraph 20 that the Commission had been unable to decide to which categories the various articles belonged, it was then enough to pass to the recommendation concerning a diplomatic conference.

76. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice.

77. Mr. FRANÇOIS, Rapporteur, failed to understand Sir Gerald Fitzmaurice's objection to paragraph 21.

Mr. García-Amador resumed the chair.

78. Sir Gerald FITZMAURICE said that his main objection to paragraph 21 was that, in fact, it did not express the Commission's view, since each member had reservations about certain provisions in the draft and would be unwilling to see them embodied in an international treaty.

79. In his opinion, the articles on conservation and the continental shelf apart, the extent to which the whole draft put forward new rules of international law had been exaggerated, and the paragraph in question was misleading because it gave the impression that no customary law existed in the field covered by the draft.

80. Mr. LIANG, Secretary to the Commission, suggested that the meaning of paragraph 21 was that, since the proposed provisions contained many new elements, it was not enough for States merely to take note of them, but they would have to decide whether the proposal should be incorporated in an international treaty. Though there were grounds for objecting to the word " sanctioned ", he suggested that if the paragraph were deleted altogether there would be no link between paragraphs 20 and 22.

81. Mr. SALAMANCA wondered whether Sir Gerald Fitzmaurice's point might be met by modifying paragraphs 21 and 22 so as to indicate that the Commission considered that it had completed its work on the law of the sea, and referring to the desirability of summoning a diplomatic conference on the matter. Since the outcome of such a conference was uncertain, there was no need to mention the possibility of a treaty being drawn up.

82. Mr. ZOUREK considered that paragraphs 21 and 22 were a logical consequence of paragraph 20. While appreciating Sir Gerald Fitzmaurice's objection to the word " sanctioned ", he did not think that paragraph 21 could be interpreted to mean that all the provisions of the Commission's draft had to be incorporated in a treaty.

83. Mr. FRANÇOIS, Rapporteur, said that Mr. Zourek had correctly understood his intention.

84. Mr. SPIROPOULOS, although he agreed with Sir Gerald Fitzmaurice that paragraph 21 should be deleted, suggested that a compromise might be achieved by substituting the words " would have to take the form of an international treaty " for the words " should be sanctioned by international treaty ". His amendment took into account the fact that some of the rules contained in the Commission's draft were already part of customary international law.

85. The CHAIRMAN pointed out that international law was not created by treaties alone, as witness the declaration made at the Inter-American conference held at Mexico City in 1945.

86. Mr. AMADO pointed out that customary law was created by some rule being accepted and observed. In order to acquire the status of rules of international law, the new elements contained in the Commission's draft would have to be embodied in an international treaty.

87. He drew attention to article 15 of the Commission's statute, which he had helped to draft, and said that he was not aware of any sources of international law other than those traditionnally accepted.

88. Mr. SALAMANCA, unlike the Chairman, considered that international obligations could be imposed only by treaties.

89. Mr. KRYLOV thought it quite unnecessary to mention sources of international law other than treaties.

90. The CHAIRMAN pointed out that governments abided by the resolutions and declarations emanating from an international conference. The Statute of the International Court of Justice took into account such sources of international law.

91. Mr. SANDSTRÖM proposed that paragraph 21 read: " In these circumstances it will be necessary to resort to conventional means to give effect to the draft as a whole."

92. Sir Gerald FITZMAURICE said that Mr. Sandström's text was an improvement because it did not exclude instruments other than treaties.

93. Mr. AMADO found Mr. Sandström's amendment acceptable.

94. Mr. SPIROPOULOS said that the words " conventional means " meant treaties, so that the purport of Mr. Sandstrom's text was exactly the same as the Rapporteur's.

95. The CHAIRMAN welcomed Mr. Sandström's proposal as it would make paragraph 21 consistent with the final words of paragraph 22. The expression " conventional means ", which had already been used in the Spanish text, comprised any instrument by which a State accepted a new rule of international law or assumed international obligations.

Mr. Sandström's proposal was adopted.

The Rapporteur's new text to replace paragraphs 20 to 24 in the introduction to chapter II of the draft report was adopted, as amended.

The meeting rose at 1.05 p.m.

379th MEETING

Monday, 2 July 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Tribute to the memory of Mr. Hsu Mo

1. Sir Gerald FITZMAURICE said that members would be shocked to hear of the untimely death of Mr. Hsu Mo, who, as one of the judges of the International Court of Justice since its creation, had commanded the universal respect of his colleagues as an unfailing upholder of its highest traditions. He proposed that the Commission convey to Mr. Hsu Mo's wife and family its profound sympathy.

2. Mr. LIANG, Secretary to the Commission, said that he had been deeply grieved to learn of the death of an eminent international jurist with whom he had worked in the past. Mr. Hsu Mo had acted as rapporteur of the Committee which had drafted chapter VI of the United Nations Charter, concerning the pacific settlement of disputes. He had made an outstanding contribution to the jurisprudence of the International Court and would be remembered for his notable separate opinion in the Anglo-Norwegian Fisheries case. He had always followed the Commission's work with the closest interest.

3. Mr. KRYLOV, paying tribute to his former colleague at the International Court, said that Mr. Hsu Mo was an outstanding lawyer and a man of independent judgment, who approached problems without partiality.

4. Mr. SCELLE, associating himself with the previous speakers, referred to Mr. Hsu Mo's energetic and disinterested help in the work of the Academy of International Law at the Hague.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea

Part I: The territorial sea (A/CN.4/L.68/Add.2)

5. The CHAIRMAN invited the Commission to consider chapter II, part 1, of its draft report containing the draft articles on the territorial sea and the comments thereto.

Article 1: Juridical status of the territorial sea

6. There were no observations on the substance of article 1 or on the comment thereto.

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

7. Sir Gerald FITZMAURICE proposed the deletion of the somewhat cryptic last sentence of the comment, the full implications of which had not been fully discussed. The last sentence read as follows: " Consequently, the provisions of the articles concerning passage which follow are not applicable to air navigation."

8. Mr. PAL agreed with Sir Gerald Fitzmaurice. The last sentence of the comment seemed to suggest that the Commission had taken a decision concerning the right of passage of aircraft in the air space above the territorial sea, whereas in fact, as stated in the second sentence of the comment, that question had been reserved.

Sir Gerald Fitzmaurice's amendment was adopted.

Article 3: Breadth of the territorial sea

9. Mr. EDMONDS reaffirmed his opposition to article 3. In respect of that article the Commission had failed in its task, which was not only to state universally recognized rules of international law, but also to codify those upheld by the majority.

10. Mr. SANDSTRÖM suggested that, as article 3 differed from the others in more than form, it should be prefaced by a statement to the effect that the Commission had failed to reach agreement about the breadth of the territorial sea and that the text which had secured a majority simply enunciated the one principle that international law did not permit extensions of the territorial sea beyond twelve miles and recommended that the breadth within that limit should be fixed by an international conference.

11. Mr. FRANÇOIS, Rapporteur, was opposed to emphasizing the fact that the Commission had not reached agreement about any fixed limit between three and twelve miles, because that would overshadow the other positive results achieved. Furthermore, it was undesirable to give the impression that failure in that respect would make it futile to convene a diplomatic conference. He would not therefore favour Mr. Sandström's proposal, though he could agree to amplifying the sixth paragraph of the comment.

12. Mr. SANDSTRÖM believed that it would disarm criticism, at least in part, if the Commission were to make a frank admission of its failure to reach agreement on the breadth of the territorial sea.

13. Mr. AMADO did not consider that the Commission need reproach itself for having been defeated by an impossible task. In the circumstances it could not have done more than state in the article what was the present position, and give an account in the comment of the course taken by the discussion.

14. Mr. SPIROPOULOS saw no advantage in Mr. Sandström's proposal, the substance of which already appeared in the comment. On the other hand, he could have agreed to transferring to the comment the whole of the text of the article which, paragraph 2 apart, did not enunciate any principle of international law.

15. Mr. SCELLE still deplored the fact that the task of fixing the breadth of the territorial sea had not been assigned to the International Court of Justice and that article 3 should give the impression that States were entitled, within a maximum of twelve miles, to fix the limit as they pleased without any reference to their actual needs, which many authorities held to be one of the criteria.

16. Mr. PAL considered that the points made in Mr. Sandström's proposal were already adequately covered in the comment. If any amplification were required, the proper place would be in the sixth paragraph of the comment.

17. Faris Bey el-KHOURI considered that, as the Commission had reached agreement about the minimum and the maximum breadth of the territorial sea, it should at least recommend a fixed limit of six miles to the international conference so that the issue would not have been altogether left in the air.

18. Mr. SANDSTRÖM said that he had been concerned merely with the question of presentation, but in view of the objections his proposal had raised, he would withdraw it.

19. Sir Gerald FITZMAURICE presumed that when the Commission came to adopt its draft report as a whole, members would have an opportunity of stating their position on individual articles. He therefore proposed to confine himself at the present stage to making clear that he had agreed to article 3 as a compromise solution which did not entail any final stand on the part of the Commission, and to pointing out that the text was defective because it failed to register at least one point on which there was general agreement, namely, that a three-mile limit constituted a minimum which, if claimed, could not be contested. That point had been clearly brought out in the text adopted at the previous session.

20. Mr. SPIROPOULOS, in reply to Sir Gerald Fitzmaurice, explained that he had omitted the word " traditional " from his proposal[1] for article 3, because it seemed to create a presumption in favour of the three-mile limit.

21. Sir Gerald FITZMAURICE objected to the low position in the fifth paragraph of the comment assigned to the principle of the three-mile limit and also to its being described as a proposal; it was undoubtedly the fundamental rule and it was departures from it which should be designated as proposals.

22. He also thought it would have been more accurate in the sentence in question, opening with the words " According to a fifth opinion ", to refer to " historic rights " rather than to " customary law ".

23. In the sixth paragraph he suggested the substitution of the word " views for the word " proposals ".

24. In the second sentence of the eighth paragraph, in order to avoid ambiguity, the words " up to " should be inserted before the words " twelve miles ".

25. Finally, the penultimate sentence of the ninth paragraph did not give a strictly accurate account of the position and should be deleted.

26. Mr. FRANÇOIS, Rapporteur, said in reply to Sir Gerald Fitzmaurice's first objection that in the fifth paragraph he had summarized the different proposals before the Commission in the order in which they had been voted.

27. He could not agree to replacing the words " customary law " by the words " historic rights " in the passage mentioned by Sir Gerald, because he was uncertain of the precise scope of the latter expression.

28. He could accept Sir Gerald Fitzmaurice's amendments to the eighth and ninth paragraphs.

29. Sir Gerald FITZMAURICE said that his first objection would be met if it were made clear at the beginning of the fifth paragraph that the proposals were being summarized in the order in which they had been voted.

30. Mr. FRANÇOIS, Rapporteur, undertook to make that clear.

31. Mr. LIANG, Secretary to the Commission, suggested that because it had acquired a political connotation, the expression " diplomatic conference " used in the comment on article 3 and in paragraph 22 of the introduction to chapter II of the draft report was perhaps a misnomer for a conference which would have to consist largely of technical experts. " An intergovernmental conference " might be a better description.

32. Mr. SPIROPOULOS considered that the term " international conference ", which was very general, would be preferable.

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[1] A/CN.4/SR.362, para. 66.

33. Mr. AMADO preferred the term " intergovernmental conference " because the words " international conference " did not necessarily imply the presence of plenipotentiaries.

34. Mr. FRANÇOIS, Rapporteur, said that the term " international conference " was altogether too imprecise. It was essential in the present instance to make clear that apart from technical experts the conference would be attended by government representatives. He therefore proposed substituting for the expression " diplomatic conference ", wherever it occurred, the words " international conference of plenipotentiaries " which would be consistent with the wording used in General Assembly resolution 429 (V).

The Rapporteur's proposal was adopted.

Article 4: Normal baseline

There were no observations on article 4 or on the comment thereto.

Article 5: Straight baselines

35. Mr. SANDSTRÖM wondered whether paragraph 3 should not be transferred to article 15, which defined the right of innocent passage.

36. Sir Gerald FITZMAURICE considered that paragraph 3 was in its proper place but suggested that Mr. Sandström's preoccupation would be met by the insertion after the words " innocent passage " in that paragraph, of the words " as defined in article 15 ".

Sir Gerald Fitzmaurice's amendment was adopted.

37. The CHAIRMAN, speaking as a member of the Commission, suggested that a more precise reference be made in the first paragraph of the comment to the Fisheries Case between Norway and the United Kingdom, since it was the first mention of it.

It was so agreed.

38. Sir Gerald FITZMAURICE objected to the use in the first paragraph of the comment of the word " archipelago ", which was a group of islands fairly compact and isolated, to describe the *Skjaergaard*, and suggested that it be replaced by the expression " island formations " used by the Court in its judgment.

Sir Gerald Fitzmaurice's amendment was adopted.

39. Mr. ZOUREK regretted that the Rapporteur should have emphasized only the special case where straight baselines were admissible owing to the particular configuration of the Norwegian coast; it would obscure the more general application of the principle admitted by the Court in the Fisheries Case.

40. With regard to the antepenultimate paragraph of the comment, he recalled that the Special Rapporteur had made it clear [2] that paragraph 3 of the article applied only to future cases where a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle and that cases where a State had already made a fresh delimitation were not affected by it. That interpretation of paragraph 3 was in accordance with the International Court of Justice's decision in the Fisheries Case. To make the point quite clear, he proposed that the words " in future " be inserted in the antepenultimate paragraph of the comment after the words " The Commission was however prepared to recognize that if a State ".

41. Mr. FRANÇOIS, Rapporteur, said he had no objection to the addition proposed by Mr. Zourek, although he thought it was already obvious from the existing text that the paragraph was intended to apply to future cases only.

42. Sir Gerald FITZMAURICE said he would be obliged to register his strong objections to such a change, since in his view paragraph 3 of the article laid down a general principle, which must by its very nature be applicable to all cases. He saw no ground on which an exception should be made in favour of certain States just because they happened to have staked their claim before the Commission's draft was adopted or entered into force, and he was sure that the majority of States other than those which were thus privileged would have similar objections. The addition proposed by Mr. Zourek was, in his view, wrong in principle and quite unjustified, although he would not insist on a vote if the majority of the Commission were prepared to accept it.

43. Mr. KRYLOV could not agree that any important point of principle was involved in paragraph 3; on the contrary, the paragraph was in the nature of an exception to the general rule, designed to cover certain special cases which the Commission had felt should be covered. The Rapporteur had just confirmed his own understanding that in inserting the paragraph in question, the Commission's intention had been that it should apply to future cases only. Of course, that was only the Rapporteur's opinion, but as Special Rapporteur for the topic his opinion should carry weight. And in the case in point, it appeared to coincide with that of several other members, for he (Mr. Krylov) for one would not have voted for the paragraph if he had not understood that it referred to future cases only.

44. Mr. PAL recalled that there had been two separate occasions on which the Commission had discussed the question whether an area of the high seas or of the territorial sea could or could not become internal waters by virtue of the operation of article 5, paragraph 1. On the first occasion [3] Sir Gerald Fitzmaurice had claimed that that eventuality could arise as a result of the Court's decision in the Fisheries Case and that paragraph 3 was therefore necessary. He (Mr. Pal) had argued that the Court's decision involved no change in the status of the waters in question, since they had always been internal waters. And Mr. Sandström had on that occasion apparently agreed. On the second occasion [4] Sir Gerald Fitzmaurice had submitted certain proposals part of which, by implication, again suggested that there had been some change in the status of the waters in question. He (Mr. Pal) had suggested that that part

[2] A/CN.4/SR.365, paras. 8 and 23.

[3] A/CN.4/SR.335, paras. 1-32.

[4] A/CN.4/SR.364, para. 40, and A/CN.4/SR.365, paras. 7-34.

of the proposals be omitted for the reasons he had previously given; there had been some discussion of his suggestion, and in the end he had not pressed it. It had clearly emerged from the discussion, however, that the proposed paragraph 3 was intended to apply only to cases where the State wished to make a new delimitation of its territorial sea according to the straight baseline principle. As the Rapporteur had rightly pointed out, it could thus apply to future cases only and the present text of the comment appeared to reflect the position exactly without the need for any addition.

45. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Gerald Fitzmaurice that it would be neither consistent nor just to say that there had been no right of innocent passage through such waters before 1956 or before the date when the Commission's draft came into force or whatever was the *terminus a quo*. Mr. Zourek now proposed that the provisions of paragraph 3 should become effective, but only after that date. It was solely on the understanding that the paragraph applied to all cases that he had been in favour of it.

46. Mr. FRANÇOIS, Rapporteur, pointed out that so far very few States applied the straight baseline system. The Commission had agreed that as far as the Scandinavian States were concerned, it could not retrospectively create a right of innocent passage through the waters in question and that it was in any case unnecessary for it to do so. What Sir Gerald had at the time appeared to be most concerned about was the likelihood that other States would in future adopt the straight baseline principle and so include in their internal waters parts of the high seas or of the territorial sea which were at present used by international shipping. The question which the Commission was at present discussing was therefore purely academic. It certainly had not been the Commission's intention to draw any very sharp distinction between cases which arose before and after a certain date, so he would request Mr. Zourek not to insist on his amendment which was in any case unnecessary.

47. Mr. ZOUREK said that on consulting the summary records he had found that the Rapporteur's interpretation of the purpose of paragraph 3 was perfectly correct. There had in the past been no right of innocent passage through internal waters. The Commission was introducing that right, *de lege ferenda*, in respect of certain categories of internal waters. Since the Commission could not legislate with retrospective effect, the paragraph could clearly apply to future cases only. That being so, and in view of the fact that the Rapporteur's remarks would be placed on record, he agreed that it was perhaps unnecessary to maintain his proposal, which he accordingly withdrew.

48. Mr. KRYLOV said that for the reason given by Mr. Zourek he did not wish to insist on the addition of the words " in future " either, but would merely place on record his view that under no circumstances could article 5, paragraph 3, apply to Norway.

49. Sir Gerald FITZMAURICE said he was grateful to Mr. Zourek and Mr. Krylov for not insisting on the proposal to add the words " in future ", the adoption of which would have given a definitely false impression of the Commission's intentions. The Rapporteur's interpretation was completely accurate in that respect and he had no objection to the present text as an indication of what the Commission had decided, although for the reasons he had already indicated, he did not regard the resulting situation as sound in principle.

50. He felt it important to clarify one point with regard to Mr. Pal's comments on the results of the Court's decision in the Fisheries Case. Mr. Pal had argued as though the Court had recognized that certain baselines had always existed. It had, in fact, done nothing of the kind, but had merely stated that Norway had always had the right to establish such baselines. At the time of the dispute, Norway had only exercised that right in respect of a small part of its coastline in the north. Until a State exercised its right to establish straight baselines, the low water mark remained the baseline and the waters in front of the baseline were territorial sea, through which it was quite possible that the right of innocent passage might be exercised; once the State exercised its right, however, the status of part of such waters indubitably changed, since they became internal waters. It was to safeguard the right of innocent passage through such waters that he had proposed paragraph 3, which was only new in that it sought to apply an existing principle to the new circumstances brought about by the Court's decision.

51. Mr. PAL said that although he was not convinced by what Sir Gerald Fitzmaurice had said, he felt it would be inappropriate to pursue the matter at the present stage. The only purpose of his previous statement had been to throw light on what the Commission had decided.

52. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of the words " in a bay or " in the seventh paragraph of the comment because he did not think it necessary to refer to the question of baselines drawn in a bay in connexion with article 5.

Mr. García Amador's amendment was adopted.

53. Sir Gerald FITZMAURICE felt that the last sentence of the last paragraph of the comment diverted attention from the real reason why straight baselines might not be drawn to drying rocks and drying shoals, which was that the terminal points of the baseline must always be visible in order that mariners might not unwittingly trespass on internal waters.

54. Mr. FRANÇOIS, Rapporteur, agreed to amend the paragraph in the light of Sir Gerald's remarks.

Article 6: Outer limit of the territorial sea

There were no observations on article 6 or the comment thereto.

Article 7: Bays

55. Mr. ZOUREK requested that, in the third paragraph of the comment, among the criteria which the Commission had rejected for the purpose of determining the

conditions under which the waters of a bay could be regarded as internal waters, mention should also be made of economic interests.

It was so agreed.

Article 8: Ports

56. Mr. ZOUREK proposed the deletion of the last sentence of the first paragraph of the comment, reading as follows: " This important question will have to be examined at a later stage in the Commission's work".

Mr. Zourek's proposal was adopted.

Article 9: Roadsteads

There were no observations on article 9 or the comment thereto.

Article 10: Islands

57. Referring to the third paragraph of the comment, Mr. ZOUREK wondered whether it was really necessary or even desirable in view of the eight years in which the Commission could have obtained expert advice on the subject, to refer to the lack of such advice as a reason for the Commission's failure to include an article on groups of islands. The main reason had surely been its inability to agree on the breadth of the territorial sea, and the lack of expert advice had been at most a subsidiary reason.

After some discussion, *it was agreed to replace the words " by the lack of expert advice on the subject " by the words " by lack of the necessary scientific and technical data ".*

58. Mr. FRANÇOIS, Rapporteur, pointed out, with regard to the last paragraph of the comment, that the comment on the draft adopted at the seventh session had contained the further words: " while the general rules will normally apply to other islands forming a group ". He had deliberately omitted those words, which appeared to be plainly misleading. The question whether the general rules applied to a particular group of islands was precisely the question which would have to be examined in each particular case.

Article 11: Drying rocks and drying shoals

59. With reference to a point raised by Mr. AMADO and Mr. FRANÇOIS, Rapporteur, concerning the words " for further extending the territorial sea " in the article itself, Sir Gerald FITZMAURICE felt that the present text should be retained since it did indicate as clearly as perhaps could be indicated within the compass of a single sentence that drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leapfrogging, as it were, from one rock or shoal to another. The most that could be done was to delete the word " further " if so desired.

It was agreed that that word should be deleted.

The meeting rose at 6.25 p.m.

380th MEETING

Tuesday, 3 July 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea

Part I: The territorial sea (A/CN.4/L.68/Add.2) (continued)

1. The CHAIRMAN invited the Commission to resume its consideration of Chapter II, Part I, of its report.

Article 12: Delimitation of the territorial sea off opposite coasts

2. Sir Gerald FITZMAURICE suggested that it should be explained in the comment that articles 12 and 14 of the draft adopted at the previous session had now been fused to form the present article 12, and that the new text covered the delimitation of the territorial sea in straits. That would be done by substituting the words " in straits or off other " for the word " off " in the title.

Sir Gerald Fitzmaurice's suggestions were adopted.

3. Mr. SANDSTRÖM said that the last sentence in the first paragraph of the comment gave the impression that the Commission had adopted the system of the median line for all cases, whereas exceptions were permitted in special circumstances, under paragraph 1 of the article. He therefore proposed the insertion of the words " as a general rule " after the words " to adopt " in the last sentence of the first paragraph of the comment.

Mr. Sandström's amendment was adopted.

4. In answer to a question by Mr. KRYLOV, Mr. FRANÇOIS, Rapporteur, explained that the case envisaged in the third sentence of the fifth paragraph of the comment was the Black Sea.

Article 13: Delimitation of the territorial sea at the mouth of a river

There were no observations on the substance of article 13 or the comment thereto.

Article 14: Delimitation of the territorial sea of two adjacent States

There were no observations on the substance of article 14 or the comment thereto.

Section III: Right of innocent passage

Sub-section A: General

Article 15: Meaning of the right of innocent passage

There were no observations on the substance of article 15 or the comment thereto.

Article 16: Duties of the coastal State

There were no observations on the substance of article 16 or the comment thereto.

Article 17: Rights of protection of the coastal State

5. Mr. ZOUREK considered that, in order to achieve the proper emphasis on the primary criterion, the words " servant normalement à la navigation internationale " should be transferred to the end of paragraph 4 of the French text of article 17. The English text could be left unchanged.

6. Mr. FRANÇOIS, Rapporteur, had no objection to that transposition but suggested that in order to keep the French text in line with the English the phrase in question should read " servent normalement à la navigation internationale ".

It was so agreed.

7. Mr. ZOUREK thought it should be made clear in the comment that the coastal State could erect permanent installations for the exploitation of the sea-bed and subsoil of the territorial sea, provided they did not hamper the passage of vessels on international sea routes.

8. Mr. FRANÇOIS, Rapporteur, explained that the point was covered in the second paragraph of the comment on article 16, which was the proper place for such an explanation.

Article 18: Duties of foreign ships during their passage

9. Mr. ZOUREK, referring to the Commission's decision not to include a provision prohibiting discrimination between foreign vessels of different nationalities, asked whether the statement made in the second sentence of the last paragraph of the comment did not go too far.

10. Mr. FRANÇOIS, Rapporteur, said that the passage in question had been inserted last year in order to meet the special position of Mr. Salamanca's country, and in the absence of that member he would prefer to maintain the text as it stood.

It was so agreed.

Sub-section B: Merchant ships

Article 19: Charges to be levied upon foreign ships

11. Sir Gerald FITZMAURICE suggested that the statement made in the penultimate sentence of the last paragraph of the comment was too categorical. The words " may be entitled " should be substituted for the words " will be entitled ".

12. Mr. ZOUREK, agreeing with Sir Gerald Fitzmaurice, said that if his amendment were not accepted, it should at least be made clear that any unjustifiable interference with a vessel passing through straits, coming from or making for a port, must be avoided.

13. Mr. FRANÇOIS, Rapporteur, said that a modification on the lines suggested by Mr. Zourek would be too restrictive. On the other hand, he could accept Sir Gerald Fitzmaurice's amendment, though he would have thought that the point was already covered by the words " in certain circumstances " and by the safeguard contained in the last sentence of the comment.

Sir Gerald Fitzmaurice's amendment was adopted.

Article 20: Arrest on board a foreign ship

14. Mr. LIANG, Secretary to the Commission, suggested that the last sentence in the fourth paragraph of the comment, which read " The Commission had not yet had an opportunity to study this question ", was not strictly accurate, since the Commission had, in a general way, studied the question of conflicts of jurisdiction between the coastal State and the flag State in the field of criminal law, but had decided not to deal with it.

It was agreed to delete the last sentence of the fourth paragraph of the comment.

15. Sir Gerald FITZMAURICE considered that the penultimate paragraph of the comment was not sufficiently clear. He could not see where the exception to

sub-paragraph (*a*) arose, if it was a crime extending only to the territory of the flag State.

16. Mr. FRANÇOIS, Rapporteur, explained that in cases when the consequences of a crime committed on board a ship during passage through a territorial sea made themselves felt only in the flag State, it might be in the interests of the flag State to allow the coastal State to intervene.

17. Sir Gerald FITZMAURICE doubted whether the Commission's intention had been clearly conveyed. The Commission had refused to make an exception to the rule in sub-paragraph (*a*) by allowing the coastal State the right to intervene, even if it were desirable, in those cases where the consequences of the crime did not extend beyond the ship. His point would be met by the insertion of the words " though extending beyond the ship " after the words " consequences of the crime " in the fifth paragraph of the comment.

Sir Gerald Fitzmaurice's amendment was adopted.

Article 21: Arrest of ships for the purpose of exercising civil jurisdiction

18. Mr. ZOUREK reminded the Commission that it had omitted the stipulation contained in the second sentence of paragraph 1 of Article 24 adopted at the sixth session [1] which was the article corresponding to the present article 21. In view of the powers conferred on the coastal State in the present paragraph 2, paragraphs 2 and 3 of the article adopted at the seventh session [2] having been deleted owing to the objections of certain governments, that omission had thrown the whole article out of balance. He accordingly proposed that the provision be reinstated by adding at the end of paragraph 1 the following text:

A coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

19. Mr. FRANÇOIS, Rapporteur, said that some governments had objected to a provision borrowed from the Hague Conference for the Codification of International Law of 1930 because it might have become out of date now that rules concerning the exercise of civil jurisdiction had been further developed in the 1952 International Convention relating to the Arrest of Sea-going Ships, prepared by experts in maritime law. Though there might be grounds for thinking that those experts, being particularly concerned with the arrest of foreign vessels in ports and inland waters, had neglected the interests of navigation in the territorial sea, the Commission did not at present dispose of the necessary material to establish the reason why they had rejected the system adopted at the Hague Conference. As it was undesirable to have two divergent sets of rules, which would be the effect of Mr. Zourek's proposal, he believed that it would be wiser to retain the text of article 21 as it stood.

20. Sir Gerald FITZMAURICE pointed out that there was, however, some lack of concordance between the present two paragraphs of article 21. Whereas paragraph 1 referred only to a person on board the ship and not to the ship itself, paragraph 2 was in more general terms and seemed to envisage proceedings against the ship rather than against a person on board.

21. Mr. SANDSTRÖM said that, although he had initially been sympathetic to Mr. Zourek's proposal, he had been convinced by the Rapporteur that the wisest course in the circumstances was to leave the question in abeyance. With regard to what Sir Gerald Fitzmaurice had said, however, he agreed that the opening words of paragraph 2, namely " The provisions of the previous paragraph ", were no longer appropriate, now that paragraphs 2 and 3 of the draft adopted at the seventh session had been omitted.

22. Mr. ZOUREK said that the text adopted by the Commission should be of general scope. The 1952 Brussels Convention had been signed by only eleven States and ratified by only three. Consequently, even if it covered the case of ships which were merely passing through the territorial sea—which he doubted—the Commission should not feel bound by it. The fact that the Commission adopted draft articles on a particular subject in no way prevented certain States from adopting other, more far-reaching, rules by means of an international convention, if they so desired.

23. Sir Gerald FITZMAURICE and Mr. KRYLOV said that they would support Mr. Zourek's proposal, which would in their view improve and clarify the text.

Mr. Zourek's proposal was adopted by 6 votes to 3, with 1 abstention.

24. Mr. FRANÇOIS, Rapporteur, said he would prepare a revised draft of the comment for consideration at the next meeting.

Sub-section C: Government ships other than warships

Article 22: Government ships operated for commercial purposes

25. Mr. KRYLOV proposed that for the reasons which he had already indicated at the previous [3] as well as at the present session,[4] article 22 should be amended to read:

The question of the application of the rules contained in sub-sections A and B to government ships operated for commercial purposes is left in abeyance.

26. Mr. FRANÇOIS, Rapporteur, pointed out that the Commission had taken a formal decision to follow the rules of the 1926 Brussels Convention so far as the immunity of government ships in the territorial sea was concerned. Under the Commission's rules of procedure, a two-thirds majority vote would be required to go back on that decision.

[1] *Official Records of the General Assembly, Ninth session, Supplement No. 9* (A/2693), p. 20.

[2] *Ibid., Tenth session, Supplement No. 9* (A/2934), p. 21.

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

[4] A/CN.4/SR.367, para. 81.

27. Mr. ZOUREK moved that the question be reconsidered. The Commission had already agreed to leave a number of questions in abeyance with a view to their discussion at the proposed diplomatic conference. If any question should be dealt with in that way, it was surely one so closely bound up with the principle of State immunity as that dealt with in article 22. In the various cases which had arisen in that connexion, settlement had always been reached by means of a convention, and the rules laid down by the coastal State had in point of fact always been accepted. No practical difficulties were therefore likely to arise from leaving the question in abeyance, and the fact that that was the only appropriate course was clear from the existence of the 1926 Brussels Convention itself, for if the principle of State immunity had not been recognized as valid in that connexion, there would have been no need to conclude a Convention.

28. The CHAIRMAN put to the vote Mr. ZOUREK's motion for reconsideration of article 22.

Mr. Zourek's motion was rejected by 5 votes to 2, with 5 abstentions.

Article 23: Government ships operated for non-commercial purposes

29. Replying to a question by Mr. FRANÇOIS, Rapporteur, Mr. Zourek, speaking as Chairman of the Drafting Committee, said that all members of the Committee had agreed that the rules contained in sub-section A should apply to government ships operated for non-commercial purposes. The question had been raised, however, whether such ships should be assimilated to warships as regards the right of passage. The Drafting Committee had felt unable to decide that question and had unanimously agreed to recommend that it be left in abeyance.

30. Speaking as a member of the Commission, he felt that all government ships operated for non-commercial purposes, with the sole exception of hospital ships, should be assimilated to warships as regards the right of passage, subject to the provisions of other conventions in force.

31. Sir Gerald FITZMAURICE said that, leaving aside the substance of the matter, he wished merely to suggest that from every point of view the statement that the question of the application of sub-section D had been left in abeyance should be transferred from the article to the comment.

It was so agreed.

Sub-section D: Warships

Article 24: Passage

32. Mr. KRYLOV proposed the deletion of article 24, paragraph 2, since the provision was already contained in article 17, paragraph 4. Article 24, paragraph 1, moreover, made specific reference to article 17, so that paragraph 2 was doubly unnecessary.

33. Mr. SPIROPOULOS feared that unless paragraph 2 were retained, it might be presumed that the passage of warships through straits normally used for international navigation between two parts of the high seas could be made subject to prior authorization or notification, since it would not be clear that paragraph 4 of article 17 had to be observed as well as the other paragraphs of that article.

34. Mr. ZOUREK suggested that that difficulty could be met by making article 17, paragraph 4, a separate article, to which reference could be made in article 24, paragraph 1, as well as to articles 17 and 18.

35. Mr. KRYLOV suggested that an alternative way of meeting the difficulty would be to indicate in the comment on article 24 that the reference to " the provisions of articles 17 and 18 " covered article 17, paragraph 4.

36. Mr. SANDSTRÖM felt that the danger of deleting paragraph 2 lay mainly in the use of the word " normally " in the second sentence of paragraph 1, which read " Normally, it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18 ". If paragraph 2 were deleted, it would follow that the coastal State could on occasion waive the provisions of article 17, paragraph 4.

37. Sir Gerald FITZMAURICE agreed that it would be unwise to delete paragraph 2. He pointed out, however, that the second sentence of paragraph 1 did not refer to obligations imposed on a coastal State by articles 17 and 18—for there were none—but to the rights conferred on it by those articles.

38. Mr. PAL, on the other hand, felt that paragraph 4 was the only paragraph of article 17 to which any question of observance could possibly apply. He therefore agreed that paragraph 2 of article 24 could well be deleted.

39. Mr. SCELLE agreed with the view expressed by Mr. Pal.

40. After some further discussion, Mr. ZOUREK expressed the view that there was general agreement in principle and that the question was purely one of drafting. The question was whether, having inserted a particular provision in a part of the draft which laid down general rules concerning the right of innocent passage, the Commission was obliged to repeat it in a sub-section dealing with a special category of ship. If so, there were many other provisions in the general rules which would have to be repeated under each of the sub-sections dealing with special categories.

41. Mr. SPIROPOULOS agreed with Mr. Krylov that the best course would be to delete paragraph 2 of article 24 and indicate in the comment that the provisions of article 17, paragraph 4, applied also to warships.

42. Sir Gerald FITZMAURICE felt that that would not be entirely satisfactory. He was at a loss to understand why the proposal should be pressed unless the intention was to make less clear than it was at present that warships enjoyed the right of innocent passage through straits normally used for international navigation. If that were so, he must deplore the fact. The whole purpose of article 24 was to give coastal States the right to refuse warships innocent passage through the territorial sea in certain cases. The Commission had, however, wished to make an absolute exception to that

rule—which was itself an exception—in respect of straits normally used for international navigation. The deletion of paragraph 2 would therefore raise an important question of substance, and since the text had already been approved at the present session, a two-thirds majority vote would be required for the Commission to reconsider it.

43. Mr. SPIROPOULOS said that it was quite clear from their statements that Mr. Zourek and Mr. Krylov did not contest the application of article 17, paragraph 4, to article 24. He could see no objection to transferring the substance of paragraph 2 of article 24 to the comment, which, once it had been adopted by the Commission, represented an authoritative interpretation of the text.

44. Mr. FRANÇOIS, Rapporteur, suggested that he draft a text for inclusion in the comment, as suggested by Mr. Spiropoulos and Mr. Krylov. The Commission could then consider the text at its next meeting.

45. Sir Gerald FITZMAURICE said he would be quite prepared to consider any text submitted by the Rapporteur, although he did not regard the suggested procedure as satisfactory in principle. There appeared to be a fundamental misunderstanding in the Commission concerning the second sentence of paragraph 1 in article 24. It was, as he had already tried to point out, the innocent passage which was " subject to the observance of the provisions of articles 17 and 18 ", not the coastal States's grant of passage. The fact that that did not appear to be generally recognized was an added reason for retaining paragraph 2.

46. The CHAIRMAN said that the Commission would be able to consider the matter further at its next meeting when it had before it the text which the Rapporteur had promised to draft for inclusion in the comment.

Article 25: Non-observance of the regulations

There were no observations on article 25 or on the comment thereto.

Part II. The high seas (A/CN.4/L.68/Add.3) (resumed from the 377th meeting)

Article 5: Status of ships (resumed from the 376th meeting)

47. Mr. FRANÇOIS, Rapporteur, recalled that the Drafting Committee had reserved for subsequent consideration the last seven words of the sentence reading: " A ship may not change its flag during a voyage or while in a port of call ". In the absence of Mr. Scelle it had been unwilling to revert to the matter, but one suggestion that had been made was that the word " fraudulently " should be added to the sentence. In his opinion, the sentence thus worded would simply state what was obvious.

48. Mr. SCELLE pointed out that the majority of frauds occurred while a ship was on the high seas or in a port of call. He thought it most desirable, therefore, that the ship should only change its flag in its home port (*port d'attache*) and then only in the presence of authorities competent to ensure that the change was made properly. That would clearly be quite impossible on the high seas, and although it was conceivable that such authorities might sometimes be found in a port of call, the fact remained that ports of call were very convenient places in which to commit a fraud.

49. Mr. SPIROPOULOS said that all members of the Commission were equally desirous of preventing any fraud or abuse of the rules they had drafted. In the present instance, however, all they need be concerned with was to ensure that ships sailed under one flag only and did not change from one flag to another and back again at their masters' or their owners' convenience. He saw no reason why a ship should not change its flag while in a port of call, and all States would be under strong pressure from their shipping interests to refuse to accept a provision such as that suggested by Mr. Scelle. Ships were often away from their home ports for years at a time, and their owners did not always wish to wait until they had returned there before selling them.

50. Mr. AMADO agreed with Mr. Spiropoulos. Any foreign vessels which visited Rio de Janeiro and were obliged to remain there for anything more than minor repairs were normally bought by Brazil, which was anxious to build up its merchant fleet.

51. Mr. SCELLE pointed out that, if the Commission deleted the words " or while in a port of call ", there would be nothing to prevent an owner who intended to commit a fraud acquiring a second or even a third flag beforehand, committing the fraud and hoisting a new flag as soon as he reached a port of call.

52. Mr. SANDSTRÖM felt that the Commission was faced with the age-old problem of devising measures to entrap or restrain the guilty without causing suffering or inconvenience to the innocent. He understood Mr. Scelle's point of view, but the solution which he suggested was in many cases impracticable. Norwegian tramps, to take an instance, often worked three or four years in the Pacific before returning to Norway. Did Mr. Scelle contend that they should not be sold in the interval?

53. Mr. SCELLE said that the only entirely satisfactory way out of the difficulty would be to lay down that the change of flag was void in the event of a decision by the courts that fraud had been committed. He recognized, however, that the courts of one country could not be required to annul a decision by the courts of another country, unless there was a convention between them. He appreciated the practical difficulties, but if the words " or while in a port of call " were deleted, the whole purpose of article 5 would be defeated.

54. Sir Gerald FITZMAURICE suggested that a way round the difficulties which had been referred to would be to retain the second sentence of article 5 as it stood, but to add the words " save in the case of a genuine transfer of ownership or change of registry ". It did not require the vessel's presence in port for ownership to be transferred or registry changed.

55. Mr. SCELLE said that although the text, thus amended, would not entirely exclude the possibility of fraud, it would certainly place a further obstacle in its way. He therefore supported Sir Gerald's suggestion.

56. Faris Bey el-KHOURI also supported that suggestion. If it were borne in mind that the ship had to carry a certificate of registry, which was not made out by the master but by the competent authorities, the amended text did, in his view, appear to provide complete protection against the possibility of fraud.

Sir Gerald Fitzmaurice's suggestion was adopted, and it was agreed that the Rapporteur should prepare an appropriate redraft of the comment for consideration at the next meeting.

Articles relating to the continental shelf (articles 40-47) (resumed from the 378th meeting)

Article 41 (resumed from the 378th meeting)

57. Mr. FRANÇOIS, Rapporteur, proposed the following new text to replace the passage underlined in the third paragraph of the comment on article 41:

At the eighth session it was proposed that the condition of permanent attachment to the sea-bed should be mentioned in the article itself. At the same time the opinion was expressed that the condition should be made less strict; it would be sufficient that the marine fauna and flora in question should live in constant physical and biological relationship with the sea-bed and the continental shelf; examination of the scientific aspects of that question should be left to the experts. The Commission decided, however, to leave the text of the article and the commentary as they stood.

The Rapporteur's proposal was adopted.

Chapter IV: Other decisions of the Commission (A/CN.4/L.68/Add.5)

There were no observations on Chapter IV.

Chapter III: Progress of work on other subjects under study by the Commission (A/CN.4/L.68/Add.4)

There were no observations on the substance of Chapter III.

Chapter I: Organization of the session (A/CN.4/L.68)

There were no observations on Chapter I.

The meeting rose at 1.30 p.m.

381st MEETING

Wednesday, 4 July 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*concluded*)

Chapter II: Law of the sea
Part II. The high seas (A/CN.4/L.68/Add.3)

Article 5: Status of ships (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace the last paragraph of the comment on article 5, which had been amended at the previous meeting by the insertion at the end of the article of the words " save in the case of real transfer of ownership or change of registry ". The last paragraph would now read:

The Commission is aware that changes of flag during a voyage are calculated to encourage the abuses stigmatized by this article. The Commission also realizes that the interests of navigation are opposed to total prohibition of change of flag during a voyage or while in a port of call. In adopting the second sentence of this article the Commission intended to condemn any change of flag which cannot be regarded as a *bona fide* transaction.

The Rapporteur's new text was adopted.

Article 32 : Conservation

2. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace sub-paragraphs 3 and 4 of the comment on article 32. The new text read as follows:

3. In the case of article 30, the State requesting the fishing State to take necessary measures of conservation would be a non-adjacent and non-fishing State. Such a State would be concerned only with the continued productivity of the resources. Therefore, the determination involved would be the adequacy of the overall conservation programme.

4. Article 29 contains a criterion which is not included in the other articles: that of the urgency of action. Recourse to unilateral regulation by the coastal State prior to arbitration of the dispute can only be regarded as justified when the delay caused by arbitration would seriously threaten the continued productivity of the resources.

3. Mr. FRANÇOIS, Rapporteur, said that he had modified the original text in order to meet Mr. Sandström's objection that the statement in sub-paragraph 4 to the effect that article 29 included a unique criterion was not true. The modifications he had proposed involved no change of substance.

The Rapporteur's new text was adopted.

4. Mr. ZOUREK said that before the Commission concluded its consideration of chapter II, part II, of its draft report he would like to suggest that, in sub-section B of section 1, in the thirteenth paragraph of the introductory comment on the draft articles on conservation, the penultimate sentence, which read "In thus recasting them the Commission did not wish to imply that the ' special ' interest of the coastal State would take precedence *per se* over the other States concerned." be modified so as to reflect more accurately the Commission's intention. The Commission's intention was to imply that the special interest of the coastal State would not exclude the interests of the other States concerned. That did not mean that the coastal State's special interest could not, in certain conditions, override the interests of the other States concerned. He favoured some wording which would avoid balancing the two sets of interests against each other. He proposed that the sentence in question be modified to read: " In thus recasting them, the Commission did not wish to imply that the special interest of the coastal State would exclude the interests of the other States concerned."

5. Mr. FRANÇOIS, Rapporteur, doubted whether such a modification would be justified.

6. Mr. SCELLE said that it was possible to argue that the special interest of the coastal State might potentially take precedence in every case. Mr Zourek's preoccupation might be met by stating that in certain circumstances that interest would take precedence.

7. Mr. KRYLOV observed that Mr. Scelle's suggestion would be consistent with the thesis defended by Mr. Padilla-Nervo.

8. Though there might be some objection to the words " *per se* ", he did not believe that in the present context they carried much weight or excluded the interests of other States.

9. Sir Gerald FITZMAURICE said that it was obvious that the special interest of the coastal State did not exclude the interests of other States, but a change on the lines suggested by Mr. Zourek would suggest that the former interest took precedence, and for that he could see no justification since the coastal State might not be engaged in fishing at all in the area concerned and its special interest was only recognized by reason of its geographical position. In such cases the coastal State could not do more than expect to be treated on a footing of equality.

10. Mr. ZOUREK said that, since the coastal State had other interests than those resulting from proximity, his suggested change would bring the comment closer into line with the text of article 28 as well as with the draft adopted at the previous session.

11. He appreciated Sir Gerald Fitzmaurice's point concerning those cases where the coastal State was not engaged in fishing at all but he (Mr. Zourek) had not suggested that in such very special instances the coastal State's interest was always the preponderant one.

12. Sir Gerald FITZMAURICE pointed out that at its previous session the Commission had not recognized that the coastal State necessarily had a special interest, whereas at the present session the Commission had decided that that was invariably the case, and that other States had to demonstrate their interest. That change of position seemed to him to be faithfully reflected in the Rapporteur's text. However, he would be prepared to accept the substitution of the word " exclude " for the words " take precedence over ", provided the words " whether or not " were inserted after the word " imply ".

13. Mr. ZOUREK found Sir Gerald Fitzmaurice's suggestion acceptable.

14. The CHAIRMAN put to the vote Mr. Zourek's amendment as modified by Sir Gerald Fitzmaurice.

Mr. Zourek's modified amendment was not adopted, 3 votes being cast in favour and 3 against, with 5 abstentions.

Part I : The territorial sea (A/CN.4/L.68/Add.2) (resumed from the previous meeting)

Article 21: Arrest of ship or the purpose of exercising ctvil juridiction

15. The CHAIRMAN invited the Commission to consider the Rapporteur's proposed new text to replace the last three sentences in the penultimate paragraph and the concluding paragraph of the comment on article 21. The text read as follows:

The majority of the Commission were of opinion that the 1954 text should be restored. They did not feel it advisable to leave the question in abeyance, as certain members had suggested, for they considered that the proposed rules would then be marred by a gap detrimental to international navigation. Even admitting that the authors of the 1952 Brussels Convention had wished to increase the number of cases in which the coastal State is entitled to exercise its civil jurisdiction over foreign ships merely passing through the territorial sea without entering a port, the existence of divergent rules on this point could hardly be regarded as a bar to the adoption of the above-mentioned provision, since the Brussels Convention would bind only the Contracting Parties in their mutual relations.

If, on the other hand, a foreign vessel lies in the territorial sea or passes through it after leaving the internal waters, the coastal State has far wider powers. It is then entitled, in accordance with its laws, to levy execution against or to arrest the ship for the purpose of any civil proceedings.

16. Mr. FRANÇOIS, Rapporteur, said that his new text was designed to explain the change made in paragraph 1 of the article by the adoption at the previous meeting of Mr. Zourek's proposal.

The Rapporteur's new text was adopted.

Article 24: Passage of warships

17. The CHAIRMAN invited the Commission to consider the new text proposed by the Rapporteur to replace the penultimate paragraph of the comment on article 24. The text read as follows:

The Commission relied on that judgment of the Court when inserting in the 1955 draft a second paragraph worded as follows:

"It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas."

It was pointed out at the eighth session that this second paragraph was unnecessary, as the fourth paragraph of

article 17, which forms part of sub-section A entitled "General Rules", was applicable to warships. The majority of the Commission supported the view that the second paragraph of the article included in 1955 was not strictly necessary. In deleting this paragraph the Commission, in order to avoid any misunderstanding on the subject, nevertheless wishes to state that article 24, in conjunction with paragraph 4 of article 17, must be interpreted to mean that the coastal State may not interfere in any way with the innocent passage of warships through straits normally used for international navigation between two parts of the high seas; hence the coastal State may not make the passage of warships through such straits subject to any previous authorization or notification.

18. Mr. FRANÇOIS, Rapporteur, said that he had submitted his new text in response to Mr. Krylov's proposal at the previous meeting [1] to delete paragraph 2 of article 24 on the grounds that it was superfluous and to incorporate the necessary explanation in the comment.

19. Sir Gerald FITZMAURICE said that the text proposed by the Rapporteur would be acceptable as a passage in the comment but it demonstrated more clearly than ever that the omission of paragraph 2 of article 24 would be pointless, because the comment was now even more explicit than the paragraph itself. He could not agree that the proposal to delete that paragraph had been solely inspired by drafting considerations, and an objective examination of paragraph 1 in the article would show clearly that without paragraph 2 the former could give rise to considerable doubts, and particularly that the meaning and effect of the second sentence in paragraph 1 would be open to question. Since, as far as he knew, that fact was generally admitted, he failed to see the object of deleting paragraph 2 and of inserting a very long and explicit explanation in the comment, a procedure which could only serve to render the article more unacceptable than ever to naval opinion.

20. Mr. KRYLOV regretted that Sir Gerald Fitzmaurice was unable to see that he had proposed the deletion of paragraph 2 in article 24 purely for reasons of drafting, in the belief that it was inadmissible to say the same thing twice over in a legislative text.

21. Sir Gerald FITZMAURICE said that he would not insist upon the Rapporteur's new text being put to the vote.

The Rapporteur's text was adopted.

22. The CHAIRMAN, declaring that the Commission had concluded its consideration of the draft report, said that during the past seven sessions it had done intensive work on the law of the sea and its aim had been to reconcile all the interests involved. He believed that when the report came to be examined in the General Assembly, and perhaps eventually in an international conference, it would be recognized that the Commission, particularly in the draft articles relating to the conservation of the living resources of the sea, had not only taken into account the special interest of coastal States but had also adequately safeguarded the interests of other States. He then put to the vote the draft report covering the work of the Commission's eighth session (A/CN.4/L.68 and addenda thereto).

The draft report was adopted unanimously.

23. Mr. PAL said it was clear from the vote that members found that the report gave an accurate account of the Commission's work and of the views of the majority. He would have therefore thought it unnecessary for members to enter reservations to particular articles.

24. The CHAIRMAN said that nevertheless members might wish to do so. A note of any reservations they might wish to have included in the report could be handed in to the Secretariat.

Closure of the session

25. The CHAIRMAN, on behalf of the Commission, thanked the Rapporteur for his valuable and exhaustive work on the law of the sea. He also thanked members for their collaboration throughout the session.

26. Mr. SCELLE thanked the Chairman and the Rapporteur for all that they had done to make it possible for the Commission to accomplish its task at the present session.

27. Faris Bey el-KHOURI applauded the Chairman's able conduct of the discussions and expressed admiration for the way in which the Rapporteur had elaborated the final report on a difficult and intricate subject.

28. Sir Gerald FITZMAURICE, after stating that he would communicate to the Secretariat for inclusion in the report his abstentions and dissent concerning certain articles, paid tribute to the successful way in which the Chairman had discharged his functions and to the outstanding work of Mr. François as Special Rapporteur.

29. Mr. EDMONDS said that he had learned to appreciate more and more the Special Rapporteur's patience, perseverance and high intellectual integrity. What the Commission had accomplished was in large measure due to his scholarship, guidance and capacity to reconcile different views. He also thanked the Chairman for the friendly spirit in which the discussions had been conducted.

30. Mr. PAL, associating himself with the remarks of Mr. Scelle and Mr. Edmonds, said that he had greatly benefited from working with his learned colleagues. It was a matter of particular satisfaction to him that in the Commission, unlike some other international gatherings, national interests were not pushed to the fore.

31. Mr. KRYLOV joined other members in paying tribute to the Chairman and in expressing admiration for the Special Rapporteur's work.

32. Mr. SANDSTRÖM thanked the Chairman for his successful efforts to bring about agreement, and the Special Rapporteur for everything he had done to facilitate the Commission's task.

33. Mr. AMADO said that coming from the Latin American continent, he had been particularly gratified by the Commission's election as its Chairman of a young jurist from Cuba who, in that high office, had given further proof of his ability. He agreed with Mr. Edmonds

[1] A/CN.4/SR.380, para. 32.

that intellectual integrity and the disinterested pursuit of learning were among Mr. François' outstanding qualities.

34. Mr. FRANÇOIS, Rapporteur, thanking members for their kind words, said that it was a pleasure and a privilege to work for the Commission where there existed a rare spirit of friendship, collaboration and good will. He also wished to thank the Secretariat for its valuable help, without which he could not have carried out his task.

35. Mr. ZOUREK joined with other members in expressing his gratitude to the Chairman and the Special Rapporteur.

36. The CHAIRMAN declared the Commission's eighth session closed.

The meeting rose at 11.40 a.m.

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The article numbers given in this index are those of the various drafts considered by the Commission, and not those of the consolidated articles concerning the law of the sea as finally published in the Commission's report covering the work of its eighth session (*Official Records of the General Assembly, Eleventh Session, Supplement No. 9* (A/3159)).

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