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Summary record of the 195th meeting

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195th MEETING

Tuesday, 16 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS;

later: Mr. Gilberto AMADO, *First Vice-Chairman.*

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Mr. Zourek's proposal concerning provision for the expression of dissenting opinions in the Commission's final report on the work of each session (additional item) (A/CN.4/L.42, A/CN.4/L.43 and A/CN.4/L.44)

1. The CHAIRMAN invited the Commission to take up Mr. Zourek's proposal (A/CN.4/L.42)[1] concerning the expression of dissenting opinions in the Commission's reports, which it had been decided at the 184th meeting should be added to the agenda for the present session.[2] Two related proposals had also been submitted by Mr. Lauterpacht (A/CN.4/L.43)[3] and Mr. Pal (A/CN.4/L.44).[4]

2. Referring to the fourth paragraph of Mr. Zourek's note, he said that he was unable to understand the meaning of the assertion that it was essential to settle "once and for all" the manner in which dissenting members could express their opinions. At its third session, the Commission had adopted a rule applicable to the report on that and future sessions.[5] The decision had been challenged at the fourth session, but had been upheld.[6] If Mr. Zourek's intention was that the Commission should, just before the expiry of its members' term of office, take a decision which would be binding upon the new members to be elected, he must first explain why the earlier decision should no longer be regarded as valid.

3. Mr. ZOUREK said that he was not unaware of the decision taken by the Commission at its third session. Unless he was mistaken, however, that decision as formulated during the Commission's discussion only referred to cases in which a member of the Commission disapproved of a particular passage in the final report and not to cases in which a member wished to submit comments on complete drafts of international conventions. The words in his proposal referred to by the Chairman meant that the decision taken should remain in effect as long as no change was dictated by practical considerations. Since the Commission was a permanent body, its decisions must be binding upon future members unless they decided otherwise.

4. The need to express dissenting opinions in the final report which the Commission submitted annually to the General Assembly on the work done at each session had made itself felt since the beginning of the Commission's work. Each year, there were lengthy discussions on the question whether, and in what form, dissenting opinions should be expressed in the final report. The question arose in a particularly acute form in connexion with the preparation of draft rules of international law and votes

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[1] Document A/CN.4/L.42 read as follows:

"PROVISION FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE COMMISSION'S FINAL REPORT ON THE WORK OF EACH SESSION

"*Explanatory Note*

"There are several reasons why it is necessary for the Commission's final report on the work of each session to include all the views of its members, particularly those on draft rules of international law and on questions of primary importance. In the first place, the Commission was set up as an auxiliary organ of the United Nations General Assembly and its members, while elected by the General Assembly in a personal capacity, should represent the main forms of civilization and the principal legal systems of the world (General Assembly resolution No. 174 (II) of 21 November 1947). It is therefore important that the opinions of members of the Commission, if not expressed in a decision, should find expression in its final report whenever they concern draft rules of international law or questions of principle. Moreover, the particular nature of the Commission's work makes it necessary to give a complete account of the opinions expressed and the arguments put forward in the Commission. The decisions taken by the Commission are, in fact, only proposals which in certain cases must be published as Commission documents (article 16, paragraph (g) of the Statute of the Commission) and must in all cases be presented to governments (article 16, paragraph (h) and article 21) and submitted to the General Assembly for a decision (article 16, paragraph (j), article 18, paragraph 2, article 20 and article 22). Finally, when preparing drafts on the codification of international law, the Commission is required, under its Statute, to submit with the draft articles, *inter alia*, conclusions relevant to: 'the extent of agreement on each point in the practice of States and in doctrine' and 'divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution' (article 20, paragraph (b)).

"It appears from the foregoing that the views of members of the Commission who are unable to concur in the majority opinion when a vote is taken should be expressed in the

on questions of principle. For the sake of convenience he used that expression to mean any question concerning a controversial point of international law or any question of procedure likely to be of decisive importance for the progress of the Commission's work.

5. He went on to explain why the question of dissenting opinions arose in the Commission each year in such an acute form. It was, first, because of the purpose and special nature of the work of the Commission, which had been set up to encourage the progressive development of international law and its codification. That type of work required long and careful preparation, including the collection and comparison of all opinions expressed in international doctrine and practice. It was for that reason, also, that the Statute of the Commission prescribed consultation with governments, with the organs of the United Nations and even with non-governmental organizations.

6. The composition of the Commission also explained the need for allowing dissenting opinions. The Commission was made up, not of government representatives, but of persons elected by the General Assembly for their competence in international law and representing, as a whole, the main forms of civilization and the principal legal systems of the world. The Commission was thus a scientific body as well as a subsidiary organ of the General Assembly.

7. The expression of dissenting opinions in the final report was further justified by the Commission's method of work. The drafts prepared by the Commission and the decisions taken by it were not final. The drafts had to be published as Commission documents, submitted to governments (article 16 (*h*) and article 21 of the Statute), reconsidered in the light of the comments of governments (article 16 (*i*) and article 22) and submitted to the General Assembly for a decision (article 16 (*j*), article 18, paragraph 2, article 20 and article 22 of the Statute). The decision on such drafts rested with the General Assembly. If it did not consider that it could recommend a draft to members with a view to the conclusion of a convention, it was free to convoke an international conference for that purpose and might also refer the draft back to the Commission for reconsideration or redrafting. That being so, it was of the highest importance that governments, the General Assembly and all other parties concerned should have at their disposal reports giving a complete and faithful account of the opinions expressed in the Commission.

8. Lastly, under its own Statute the International Law Commission was required to express dissenting opinions in certain cases, precisely because of the special nature of the work of codification. When the Commission prepared draft articles for submission to the General Assembly it was required, under article 20 of its Statute, to submit such articles with conclusions relevant to "the extent of agreement on each point in the practice of States and in doctrine" and "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution". That provision could in no way be interpreted as rendering the expression of dissenting opinions unnecessary. It applied only to draft rules of international law and then only to drafts submitted to the General Assembly. Even if the provisions of article 20 were observed, it might easily happen that a member of the Commission did not consider the account of disagreements and arguments to be sufficiently complete or accurate.

9. The need to express dissenting opinions being sufficiently justified, the next question was how the opinions of those who had been unable to support the majority view should be expressed. He proposed, as the only practical means of settling the question, that the Commission should recognize:

(*a*) That every member had the right to attach a statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if all or part of that decision did not express the unanimous opinion of members of the Commission;

(*b*) That every dissenting member had the right to give a brief explanation of his views in a footnote if, in cases other than those he had referred to, a decision had been taken on a question of principle.

10. In the case of draft rules of international law, dissenting opinions should be attached to the text. In the case of decisions on questions of principle affecting the Commission's work, a brief explanatory footnote

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final report, which should give a complete and accurate account of the debate. Thus, it is only necessary to work out an appropriate procedure for including dissenting opinions in the final report.

"Unlike the International Court of Justice, in which the question of dissenting and individual opinions has been settled and appears to present no difficulty, the International Law Commission has not yet found a satisfactory solution for the same problem. With a few rare exceptions, the practice followed so far has been to include in the final report on each session only the majority decision and the arguments in favour of it, while almost entirely omitting the arguments of other members, many of whom have often been unable to concur in the majority opinion.

"To meet the need described above, it is essential to settle, once and for all, by a formal provision, the manner in which dissenting members can express their opinions on the whole or part of a draft prepared by the Commission or on a question of principle examined by it.

"How then can this object be achieved? Considerations arising from the scientific and special character of the Commission's work, as well as practical arguments, militate in favour of recognizing the right of members who dissent from the Commission's decision in the cases mentioned above:

"(*a*) To attach a statement of their dissenting opinion on a draft rule of international law if the whole or part of the Commission's decision does not express the unanimous opinion of members;

"(*b*) To give a brief explanation of their views in a footnote if, in cases other than those referred to above, a decision has been taken on a question of principle affecting the Commission's work.

"The proposed solution would have undoubted advantages, for the expression of dissenting opinions by those who hold them would in no way commit the Commission as such, since the dissenting opinions could be attached as an annex. Furthermore, such a procedure would:

"(1) Be much more consistent with the Commission's aims;

would be sufficient. It was for purely practical reasons that he suggested using two different systems. In the case of well defined and separate questions it was much more convenient for the reader to be able to refer to footnotes, rather than be obliged to look for the dissenting opinion in another part of the report.

11. He reminded the Commission that the right to attach dissenting opinions had been fully recognized in international law on arbitration. Examples were provided by the provisions to that effect contained in Article 57 of the Statute of the International Court of Justice and in Articles 74, paragraph 2, and 84, paragraph 2, of the Rules of the Court. The Commission itself had just adopted article 25 of the draft on Arbitral Procedure, authorizing any member of an arbitral tribunal to attach a separate or dissenting opinion. He referred to arbitration in that connexion, although well aware that the activities were entirely different, because the history of international arbitration provided many lessons on that very point. There, too, there had been some hesitation, which was understandable when it was considered that the arbitral award was obligatory and must provide a final settlement of an international dispute. Thus article 52, paragraph 2, of the Convention of 1899 on the Pacific Settlement of International Disputes provided that members of a tribunal who were in the minority might record their dissent. On the other hand, there was no such provision in the Convention of 1907 on the same subject or in the conventions on arbitration and prize courts. It had been maintained at the time that the expression of dissenting opinions should not be permitted, so as not to raise doubts on the merits of the award or undermine the confidence of nations in arbitration.

12. The same hesitation had been noticeable in the preparation of the Statute of the Permanent Court of International Justice. The drafting committee of the Advisory Committee of Jurists had made provision for the insertion of dissenting opinions with reasons, except those held by judges of the same nationality as the parties. The Advisory Committee itself, not wishing to create inequality between the judges, had provided in its draft only for the possibility of recording opposition and reservations but without any explanation. The League of Nations Council had amended the draft, however, giving judges the right to attach their dissenting opinions to the decision and the first Assembly of the League of Nations had retained the text adopted by the Council. Later, when advisory functions had been assigned to the Court, dissenting opinions had also been permitted under the procedure adopted.

13. The main argument which had brought about that change of attitude after the initial hesitations, in spite of the solid arguments advanced against the admission of dissenting opinions in arbitration, had been the great

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" (2) Facilitate the examination of drafts by governments and by the Assembly;

" (3) Obviate the need for useless and sometimes laborious discussions in future;

" (4) Enhance the scientific value of the Commission's final reports, and lastly,

" (5) Conform to the provisions of the Commission's Statute which require it to give an account, in its commentaries, of the divergencies and disagreements which exist in the practice of States and in doctrine, as well as arguments invoked in favour of one or another solution (Article 20, paragraph (b) of the Commission's Statute).

" In view of the foregoing, it is proposed that the resolution annexed hereto be adopted.

" ANNEX

" PROVISION FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE FINAL REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF EACH SESSION

" *The International Law Commission,*

" *Considering* that it was set up with the object of promoting the progressive development of international law and its codification (article 1 of the Statute of the Commission);

" *Considering* that it is composed of legal experts selected to represent the chief forms of civilization and the basic legal systems of the world;

" *Considering* it essential that documents submitted to governments by the Commission should give a complete and accurate account of the various views expressed in the Commission and the main arguments invoked in favour of one or another solution;

" *Considering* that the General Assembly, to which drafts are submitted for examination and decision, is entitled to be informed of the divergencies and disagreements which exist in the Commission and of the arguments invoked on either side;

" *Considering*, therefore, that the final report submitted to the General Assembly on the work of each session should express the views of all members, particularly with regard to draft rules of international law and questions of principle;

" *Recognizes*

" (*a*) that any member of the Commission may attach a statement of his dissenting opinion to any decision by the Commission, on draft rules of international law, if the whole or part of the said decision does not express the unanimous opinion of the members of the Commission;

" (*b*) that any dissenting member may briefly explain his views in a footnote if, in cases other than those covered by sub-paragraph (a) above, a decision has been taken on a question of principle affecting the work of the Commission."

[2] See *supra*, 184th meeting, paras. 34-41.

[3] Document A/CN.4/L.43 read as follows:

" *Proposal by Mr. Lauterpacht*

" Members of the Commission are entitled to record, in footnote, their dissent from any report adopted by the Commission or any part thereof. They are also entitled to append to their dissent a brief statement of reasons at a length agreed to by the President of the Commission. They may appeal from the decision of the President to the Bureau whose decision shall be final."

[4] Document A/CN.4/L.44 read as follows:

" *Proposal by Mr. Pal*

" Members of the Commission are entitled to append to the report adopted by the Commission their dissent, if any, with a brief statement of reasons therefor."

[5] See *Yearbook of the International Law Commission, 1951*, vol. I, 128th meeting, para. 56.

[6] See *Yearbook of the International Law Commission, 1952*, vol. I, 181st meeting, paras. 62 and 85.

importance of such opinions in the development of international law.

14. While emphasizing that there was an essential difference in nature and function between the Commission, on the one hand, and arbitral tribunals and the International Court of Justice on the other hand, he also affirmed that all the arguments which had secured the admission of dissenting opinions in arbitration militated *a fortiori* in favour of a similar practice by the International Law Commission. In addition, the example of international arbitration proved that the proposed course was not unknown or unexplored, but a course which had been considered most useful for the development of international law.

15. The practice so far adopted by the Commission had many disadvantages. It often created the false impression that a particular decision of the Commission represented the unanimous opinion of its members. It also had the disadvantage that members found themselves associated with decisions which their scientific convictions would compel them to reject. It was a practice which caused useless discussion and delayed the Commission's work since members, being unable to annex a complete statement of their dissenting opinions to the report, were obliged to explain themselves at length during meetings, so that those explanations could subsequently be referred to in the report.

16. Finally, the practice caused inequality among members of the Commission, since the opinions of dissenting members, who were often very numerous, were not expressed in the final report. The result was, in fact, that members of the Commission were refused the right of freedom of expression.

17. The advantages of the system he recommended were undeniable. First, the dissenting opinions would commit only their authors and could be annexed to the final report. Secondly, the reports would thus be more consistent with the object and functions of the Commission and with the scientific nature of its work. The proposed practice would considerably increase the scientific value of the Commission's final report and would appreciably shorten the discussions. Lastly, it would greatly facilitate not only the examination of drafts by governments and by the General Assembly, but also revision by the Commission itself and would contribute, in general, to the development of international law.

18. Mr. LAUTERPACHT said that Mr. Zourek had indeed raised a question of principle, with which he was in general agreement, provided it could be made workable. He did not propose to join in a theoretical discussion on the wider issue of reconciling the fundamental right of freedom of expression with the necessity of preventing its abuse. Neither would he express any opinion on the relevance of the analogy drawn by Mr. Zourek between the Commission and the International Court of Justice. As the substantive issue had already been discussed at considerable length by the Commission at previous sessions, he formally moved that on the present occasion no member should speak more than once.

19. As he had stated at the fourth session, he found the existing rule about dissenting opinions disturbing.[7] A year's reflection had confirmed his conviction that it was intolerable to deny the right of freedom of expression to any member of the Commission. It was mere evasion to argue that all opinions expressed during the discussions were to be found in the summary records, since it was common knowledge that copies of those documents were not readily available to the general reader. Neither could it be assumed that governments read them carefully and regularly. Statements of dissent, if expressed at reasonable length, should, as a matter of form, receive the same kind of prominence as the views of the majority. Indeed, the authority of the latter would thereby be strengthened.

20. He was perfectly aware that steps should be taken to prevent abuse. Leaving aside the questions of distortion, inaccuracy or self-advertisement, he would deal solely with the practical problem of length. He entirely agreed with Mr. Pal's qualification on that point. Unless dissenting opinions were kept brief, the minority might well be in a position to abuse its rights. There remained the question of who was to decide whether the statement of reasons was sufficiently brief, and as members would note, he had suggested that the decision should lie with the Chairman or, in the event of disagreement, with the officers of the Commission acting corporately. He was not, however, finally committed to that proposal, and was prepared to consider other alternatives, such as conferring the task upon the general rapporteur.

21. He wished to modify his proposal (A/CN.4/L.43) by substituting the words "in a note following the report" for the words "in footnote", as he believed that the insertion of dissenting opinions in a footnote was inconsistent with their importance.

22. The CHAIRMAN suggested that even if Mr. Lauterpacht's motion, that no member of the Commission should speak more than once on the present occasion, were carried, Mr. Zourek should be allowed to reply to comments on his proposal.

23. Mr. LAUTERPACHT considered that Mr. Zourek had already fully deployed all his arguments.

24. Mr. ZOUREK said that he would not ask to speak unless absolutely necessary.

25. Mr. KOZHEVNIKOV said that he would have no objection to Mr. Lauterpacht's motion.

Mr. Lauterpacht's motion was carried.

26. Mr. PAL, observing that he had not attended the third session, at which the Commission had taken its decision about dissenting opinions, expressed the view that as the Commission was a continuing body its decisions must be regarded as final. It would be useless to re-open discussion on them at every session.

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[7] *Ibid.*, para. 82.

27. He found Mr. Lauterpacht's proposal acceptable, but felt that members could be trusted to be brief in expressing their dissenting opinions.

28. Mr. ALFARO recalled that, after long discussion, the Commission had at the third session adopted the rule that when a member wished his dissenting opinion to be recorded in the report, that should be done by means of a statement to the effect that he had voted against a certain passage for the reasons given in the relevant summary record, to which due reference should be made.

29. Mr. Zourek's arguments seemed to be based on a false analogy between the Commission and a court or an arbitral tribunal. The latter had to settle grave matters, sometimes involving human life, and their members had therefore to enjoy the right to express dissenting opinions. It was not the Commission's task, however, to present to the world the personal views of its members, but to discuss certain questions and to submit agreed texts or decisions thereon to the General Assembly. To allow a statement, however brief, of dissenting views could only give rise to friction, dissatisfaction and loss of time. He could not therefore support the third preambular paragraph of Mr. Zourek's proposal, since the General Assembly was not concerned to ascertain either from the documents submitted to governments by the Commission or from the Commission's own reports, the views held by individual members. For that, reference should be made to the summary records, for which, for that particular purpose, no substitute could be devised. It was quite impossible to state briefly and adequately the reasons for a dissenting opinion. Mr. Zourek's own proposal would therefore fail to fulfil the purpose he had in mind.

30. Though he agreed with the principle enunciated by Mr. Lauterpacht so far as tribunals and judicial bodies were concerned, he had the gravest doubts whether it applied to a technical body like the Commission. For the sake of efficiency and harmony, therefore, the Commission should confirm the decision taken at the third session.

31. Mr. HSU said that he would vote against all three proposals for the reasons adduced by Mr. Alfaro. The rule adopted at the third session met all requirements. Members who wished to express views contrary to those held by the majority had every opportunity of doing so during the discussions.

32. Mr. YEPES said that, being a partisan of free and untrammelled discussion, and considering that the General Assembly should be fully informed about the Commission's work, he found Mr. Lauterpacht's text acceptable, provided it were amended to read as follows:

> "Members of the Commission are entitled to record, in footnotes to the report to the General Assembly, their dissent from all or part of the principles adopted by the Commission and to add, if they so desire, the shortest possible summary of their reasons. Such footnotes shall be submitted to the Commission for approval at a plenary meeting. They may not exceed twenty lines in length."

33. Mr. Zourek's proposal would not give him entire satisfaction. There were other arguments, in addition to those adduced by Mr. Zourek, in favour of recording dissenting opinions. For instance, had the Commission's report covering the work of its third session (A/1858) been more explicit in conveying the views of those who had not voted with the majority concerning reservations to multilateral conventions, the General Assembly might have taken a very different decision, because it would have been able to consider the legal arguments put forward by the minority against the draft. Mr. Lauterpacht, in his report on the law of treaties, was mistaken in thinking that the Commission's decision on that issue had been unanimous; in actual fact, strong reasons had been adduced against the arguments of the majority.

34. Mr. KOZHEVNIKOV said that Mr. Zourek's proposal on what was an extremely important issue was entirely acceptable to him, both from the point of view of substance and from that of method. It would ensure equal treatment for all members of the Commission — a principle which was violated by the decision taken at the third session. It would also contribute to the objectivity and accuracy of the Commission's reports, thereby facilitating the work of the General Assembly and governments. At present, the reports did not give a faithful picture of its discussions. Finally, the scientific value of the report would be enhanced.

35. He had been surprised to hear it suggested that the right to express dissenting opinions might be abused.

36. Mr. AMADO said that when the draft on arbitral procedure was finally prepared for submission to the General Assembly, he would ask for the insertion of footnotes of some four lines each stating why he had voted against a number of articles. It would be impossible for him to express subtle shades of meaning in a brief statement. Though he had sympathy and respect for Mr. Zourek's views, he agreed with Mr. Alfaro as to what the Commission was authorized to do under its Statute. Members expressed their opinions during the discussion in order to enlighten, and if possible convince, others, and with a view to reaching general agreement. The results were recorded in reports submitted to the General Assembly, which was not interested in the views of individual members. Although he had little confidence in the summary records — in which speakers were not reported in full detail, but were to some extent interpreted — he would be entirely satisfied with a brief footnote of the kind he had mentioned, and would accordingly oppose all three proposals before the Commission.

37. Mr. SCELLE endorsed Mr. Alfaro's remarks. The draft on arbitral procedure would be accompanied by the General Rapporteur's commentary, in which the disagreement of certain members could be recorded with appropriate references to the summary records. As dissenting opinions often required far more space than the final decision, it would be impossible to accept, as

proposed by Mr. Zourek, long statements at the mere request of individual members.

38. Mr. SPIROPOULOS, from the practical standpoint, considered that the decision taken at the third session should be upheld for the reasons so ably expounded by Mr. Alfaro. It was perfectly true that judges of the International Court of Justice had the right to append to the Court's decisions a dissenting opinion, but it must be remembered that the deliberations there took place in private, and that no records were kept. The Commission was not a judicial body, but an assembly of jurists preparing texts that were usually intended for incorparation in a convention. Surely no precedent existed for annexing dissenting opinions to the draft of an international convention.

39. If Mr. Yepes' amendment to Mr. Lauterpacht's proposal were accepted, the annex containing dissenting opinions would be longer than the body of the report. As for Mr. Yepes' claim that the General Assembly's decision concerning reservations to multilateral treaties might have been different had it been more fully informed about the views held by individual members of the Commission, surely he realized that that decision had been inspired by political considerations alone.

40. He had been the only member of the Commission to support the request made by Mr. Koretsky at the first session that a statement of his dissenting opinion be inserted in the report.[8] Subsequent experience had taught him prudence, and he saw no reason for abandoning the rule adopted at the third session. Anyone who wished to know in detail what views had been expressed during the discussion need only refer to the summary records.

41. Mr. SANDSTRÖM also supported Mr. Alfaro's views.

42. Faris Bey el-KHOURI said that the Commission was simply a subordinate organ of the General Assembly, and directly related to its Sixth Committee. As to dissenting opinions, they were either right or wrong. If they were wrong, surely no honour attached to expressing them; if they were right, then the holder had obviously failed to convince his colleagues. At the previous session[9] he had suggested that in order to meet the views of certain members the Commission's report should give the detailed figures of the votes. In his opinion, that would amply suffice, since the opinions of individuals were in themselves of no interest to anyone.

43. Mr. LIANG (Secretary to the Commission) commenting on Mr. Yepes' observations on the Commission's report covering the work of its third session (A/1858), said that that report had dealt with several questions, which had been presented differently. On the subject of reservations, the report embodied the Commission's reasoned conclusions. On the subject of the definition of aggression, on the other hand, it had described the course taken by the discussions. Thus the report as a whole contained heterogeneous parts, one part presenting the reasoned conclusions of the Commission, and another part presenting an account of the course taken by the debate. With regard to future reports, if the Commission so wished it would be feasible in each case to add a summary of the discussions to the statement of conclusions, and such a summary could include a statement of dissenting opinions.

44. Mr. ZOUREK did not consider that any valid arguments had been adduced against his proposal. Reference had been made to practical difficulties, and to the possible length of the dissenting opinions. He would submit that the criterion must be content, not length. Nor could he see to what kind of abuse his proposal would open the door. After all, only the author of the dissenting opinion would be committed, and there was no good reason why the exact form in which such opinions were expressed should be prescribed.

45. It had been argued that the Commission was neither a court of justice nor an arbitral tribunal. He had himself been careful to emphasize the essential difference between the Commission and arbitral tribunals, but he had also stressed that all the arguments which had secured the admission of dissenting opinions in international arbitration applied *a fortiori* to adoption of the same practice by a codification commission. He observed that no one had advanced any argument against that thesis.

46. Mr. Alfaro had said that arbitral tribunals dealt with very serious issues. He (Mr. Zourek) thought that arbitral tribunals dealt with specific cases which might often be of extraordinary gravity, but in preparing drafts of collective conventions or general rules the Commission was doing work that was even more important for the development of international law. He was not convinced that dissenting opinions were of no general interest, as various members maintained. It was possible that the General Assembly was not interested in such opinions, but that might be doubted so long as the Assembly itself had not taken any position on the matter. Even if such were the case, however, it did not in any way imply that governments and scientific bodies were not interested either.

47. He was grateful to Mr. Scelle for admitting that the Commission's report covering the work of its fourth session had failed to reflect adequately the divergencies that had existed then in the Commission. That was far from being so with the reports submitted to the General Assembly by its Committees. The reports of the Sixth Committee, with which he was familiar, faithfully reflected all currents of opinion expressed in the Committee.

48. The Commission could not be compared with a diplomatic conference, which was a body which had to take a decision in one sense or another; moreover, since the participating governments had the faculty of

[8] See, however, *Yearbook of the International Law Commission, 1949*, 37th meeting, para. 29.

[9] See *Yearbook of the International Law Commission, 1952*, vol. I, 181st meeting, para. 72.

entering reservations, the issue of dissenting opinions did not arise. Faris Bey el-Khouri had implied that minority opinions were not worth expressing. He must beg to differ on that score. The Commission was engaged on long-term work, and opinions which failed to win acceptance at one stage might prove convincing at a later one, or might find favour with other organs or other people.

49. As to the summary records, he would merely point out that they were not generally accessible, and were too succinct to display all the arguments adequately.

50. The decision adopted at the third session did not cover all cases. Moreover, if memory served him aright, it had been adopted only by seven votes to five, three members being absent.

51. It was hardly enough to pay lip-service to the principle, or to stress unduly the dangers of its implementation. As he had already said, no valid argument had been advanced against the adoption of the principle that dissenting opinions should be recorded in the Commission's reports.

52. The CHAIRMAN informed the Commission that Mr. Lauterpacht and Mr. Pal had agreed on a joint text, which read as follows:

> "Members of the Commission are entitled to append to the report adopted by the Commission their dissent, if any, with a brief statement of reasons therefor, at a length agreed to by the President of the Commission. They may appeal from the decision of the President to the Bureau, whose decision shall be final."

53. He would put the three proposals to the vote in order of their submission: Mr. Zourek's (A/CN.4/L.42), Mr. Yepes' (see *supra*, para. 32) and finally, the proposal submitted jointly by Mr. Lauterpacht and Mr. Pal.

Mr. Zourek's proposal (A/CN.4/L.42) was rejected by 7 votes to 3, with 3 abstentions.

Mr. Yepes' proposal was rejected by 6 votes to 2, with 5 abstentions.

The joint proposal was rejected, 6 votes being cast in favour and 6 against, with 1 abstention.

54. Replying to Mr. ALFARO, the CHAIRMAN confirmed that the Commission's decision taken at its third session remained in force.

Régime of the high seas (item 2 of the agenda) (A/CN.4/60)

Mr. Amado, First Vice-Chairman, took the Chair.

55. The CHAIRMAN said that his first task in taking the Chair must be to pay tribute to the admirable work done by Mr. François as Special Rapporteur on the régime of the high seas. His fourth report on that subject (A/CN.4/60) was devoted to the continental shelf and related subjects, and revealed vast knowledge and impartiality. He would call on the Special Rapporteur to introduce the item.

56. Mr. FRANÇOIS (Special Rapporteur) thanked the Chairman for his tribute, and recalled that at its fourth session the Commission had decided to invite those governments which had not yet submitted their comments on the "Draft Articles on the Continental Shelf and Related Subjects" to do so within a reasonable time (A/2163, para. 46). By 4 August 1952 replies had been received from fourteen governments, and as a result of the Commission's appeal four more governments had sent in replies. The replies of the Belgian and Egyptian Governments, which had not arrived at the date of his report, would be found in document A/CN.4/70.

57. The fourth report on the régime of the high seas was divided into four chapters, Chapter III contained his conclusions and Chapter IV the revised draft articles on the continental shelf and related subjects. Suggested modifications in the text were underlined.

58. He would suggest that the simplest way of tackling the problem would be for the Commission to take Chapter III as the basis for its discussion, examining his conclusions paragraph by paragraph.

59. Mr. YEPES also wished to express his appreciation of the Special Rapporteur's work, which offered the Commission a digest of the opinions expressed by governments and a number of publicists on the draft prepared at previous sessions.

60. As to the procedure to be followed, he would suggest that the Commission study the draft articles *seriatim*, taking the Special Rapporteur's conclusions into account in each case.

61. Mr. KOZHEVNIKOV considered that there should first be a general discussion.

62. Mr. FRANÇOIS was prepared to accept Mr. Yepes' proposal. As to Mr. Kozhevnikov's proposal, he would remind him that in the case of the draft on arbitral procedure, the Commission had decided not to start with a general discussion, but to consider general questions in connexion with the specific article to which each related.

63. Mr. KOZHEVNIKOV, while not suggesting that his memory was infallible, said he seemed to recall that at the fourth session the Commission had begun its work on the régime of the high seas by a general exchange of views.

64. The CHAIRMAN said that, since Mr. Kozhevnikov seemed willing not to press his proposal, he would take it that the Commission favoured the procedure suggested by Mr. Yepes.

It was so agreed.

CHAPTER IV: REVISED DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS. PART I: CONTINENTAL SHELF

Article 1

65. Mr. FRANÇOIS drew attention to the words "*the* territorial *sea to a depth of 200 metres*" underlined in article 1. At the fourth session, the Commission had

decided to use the term "the territorial sea" instead of "territorial waters". The inclusion of the words "to a depth of 200 metres" was a more important change. The Commission's definition of the "continental shelf" had been widely criticized for not laying down a fixed limit, and the view had been expressed that a depth of 200 metres should be adopted. (*cf.* paras. 5 and 6 of comments). That was why he had proposed the modification.

66. Mr. YEPES said he had originally favoured a geological definition of the continental shelf, but had finally come round to the view that a juridical definition was preferable. The reasons for his change were in part stated in paragraphs 1 and 2 of the comment on article 1. Furthermore, a number of governments had expressed their approval of the Commission's attitude, namely, those of the Netherlands, the Philippines and the United States of America. He accordingly suggested that exploitability should be retained as the criterion for determining the width of the continental shelf and not depth.

66a. It would be most unsatisfactory for the Commission to reverse its earlier decision and to revert to a geological difinition, as now proposed by the Special Rapporteur.

67. Mr. FRANÇOIS said that Mr. Yepes was mistaken in thinking that the proposed modification to article 1 was equivalent to substituting a geological definition for a juridical one. It was simply a case of fixing the limits of the exploitation of the natural resources of the sea bed and sub-soil by a flexible or a rigid criterion.

68. Mr. HSU supported Mr. François. A limit of 200 metres was sufficiently liberal, and could always be extended should future circumstances warrant it.

69. He wished, however, to raise another point with regard to article 1. Why had the term "continental shelf" been preferred to the simple and easily comprehensible term "submarine areas", which also figured in the text of article 1?

70. The CHAIRMAN noted that Mr. Kozhevnikov had gauged the feelings of the Commission correctly in proposing that there should first be a general discussion. Since no such discussion was in fact being held, he must request members to restrict their comments to the modification proposed to article 1.

71. Mr. SANDSTRÖM considered that the text of article 1 adopted by the Commission at the fourth session should be retained. A dangerous tendency was prevalent gradually to extend the rights enjoyed by riparian states in the territorial sea. The Commission had given a rational definition of the right of exploitation of the natural resources. He was opposed to the specification of a limit.

72. Mr. YEPES drew attention to the definition of the continental shelf adopted by the Commission at the fourth session in paragraph 5 of the commentary on article 1, whereby all States were granted equal treatment. If a geological definition were now adopted, States like Chile and Peru, which had no continental shelf in the geological sense of the word, would be placed at a serious disadvantage.

73. Mr. SCELLE was also opposed to fixing a limit. How would it be possible to prevent a State from continuing its exploitations once it had reached a depth of 200 metres? Indeed, from his point of view the only justification for the conception of the "continental shelf" was that there might be riches on the sea-bed of which humanity as a whole ought not to be deprived.

74. The CHAIRMAN said that the discussion would be continued at the next meeting, when he would himself take the opportunity of supporting the Special Rapporteur's point of view.

The meeting rose at 1 p.m.

196th MEETING

Wednesday, 17 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. Gilberto AMADO, *First Vice-Chairman.*

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Régime of the high seas (item 2 of the agenda) (A/CN.4/60) (*continued*)

CHAPTER IV: REVISED DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS. PART I: CONTINENTAL SHELF

Article 1 (continued)

1. Mr. LAUTERPACHT said he had not fully understood the precise nature of the objection raised by