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Summary record of the 215th meeting

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215th MEETING

Tuesday, 14 July 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. Gilberto AMADO, *First Vice-Chairman.*
later: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Régime of the high seas (item 2 of the agenda) (A/CN.4/60) (*resumed from the 210th meeting and concluded*)

1. The CHAIRMAN recalled that, after the Commission had decided at its 210th meeting to reconsider the text which it had adopted for article 2 of the draft articles on the continental shelf (Part I),[1] Mr. Sandström had proposed that the first paragraph of article 2 be deleted, and Mr. Spiropoulos had reintroduced the text which he had previously proposed for article 2 but subsequently withdrawn. That text read as follows:

> "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

2. Since the 210th meeting, Mr. Hsu had submitted the following two alternative proposals for the text of article 2:

> "A
>
> "The coastal State shall have the exclusive right to exploration and exploitation of the natural resources of the continental shelf.
>
> "B
>
> "The continental shelf is subject to the exclusive right of exploration and exploitation of natural resources by the coastal State."

3. Mr. SANDSTRÖM said that in his view existing international law did not give the coastal State rights of sovereignty over the continental shelf. Until President Truman's proclamation, the general concept had certainly been that the coastal State had sovereignty over its territorial sea and the underlying sea-bed and subsoil, but no further. The fact that by that proclamation the United States of America had claimed certain rights — not sovereignty — in respect of the exploration and exploitation of the natural resources of the continental shelf had not created any new rule of law. Nor had the proclamations of certain other governments following President Truman's proclamation, even if some of them had contained the word "sovereignty"; if a State or a group of States could change the law by mere proclamation, that would mean the negation of a law-bound community of States. Nor was the position changed by the fact that, during the past years, there had been no protests against such proclamations. Absense of protest did not, in itself, mean that other States approved the proclamations; for if the proclamations were not accompanied by action which infringed upon the interests of foreign States, there was evidently no need for such States to protest.

4. With regard to the whole problem, he would refer to paragraph 6 of the Commission's comments on article 2 of the draft which it had approved at its third session. That paragraph read as follows:

> "The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2. Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community."[2]

5. If the text now proposed for article 2 was intended to confer on the coastal State sovereignty over the continental shelf, it did not lay down a rule of existing law, but a rule proposed as a step in the progressive development of international law. In his opinion, however, the new article 2 as a whole did not in fact give sovereignty to the coastal State. It was clear from paragraph 2 that the coastal State was granted only limited rights and for

[1] See *supra*, 210th meeting, para. 74.

[2] "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), Annex, Part I.

a special purpose, namely, the exploration and exploitation of the natural resources of the continental shelf. Such limited powers could not be called sovereignty. The situation with regard to the continental shelf was quite different from that which arose when the sovereign powers over a territory were divided between different States. In the latter case, the words "limited sovereignty" could be used, because the sovereign rights in the territory were envisaged as a whole. He did not understand, however, how it could be said that the continental shelf was subject to the sovereignty of the coastal State.

6. Some members would perhaps like to take the radical step of awarding sovereignty to the coastal State. In his view, that would not be sound legislative practice. The Commission must take into consideration not only the particular sphere of law which was directly concerned in the matter, but also related subjects, such as the territorial sea and the régime of the high seas. There was no doubt that a rule such as that contained in paragraph 1 of article 2 would have immediate repercussions upon those fields of law. Logically, sovereignty over a territory was bound to result in sovereignty over what lay above that territory. Where such important fields of law were concerned, the existing law should not be modified in the indirect way proposed.

7. Some might argue that paragraph 1 of article 2 was necessary in order to provide a basis for the rule stated in paragraph 2. In his opinion, that was not so. As he had already said, paragraph 1 did not state the existing law. What was more important, in the progressive development of law the source or basis of the new law was neither positive law nor a kind of natural law, but a new need of the community. That was precisely what had happened in the present case, and it was to needs of the community that the last sentence of paragraph 6 of the 1951 commentary referred. It was unnecessary, however, for the new rule of law to go further than was required to meet the new need. On that score, too, paragraph 1 was unnecessary, and it would even be wrong to maintain it.

8. It would also be detrimental to the Commission's prestige to reverse the views which it had officially and publicly expressed in the report on its third session. Nothing had occurred to justify such a change of position. Any government which, in its comments on the 1951 draft, had expressed the view that sovereignty ought to be conferred upon the coastal State, had probably already expressed that view before, and in more solemn form, for example, by making a proclamation on the subject.

9. For the reasons he had given, he proposed that paragraph 1 of article 2 be deleted, and that paragraph 2 be amended to read:

> "The coastal State exercises exclusive right of control and jurisdiction for the purpose of exploration and exploitation of the natural resources of the continental shelf."

10. The words "exclusive right of control and jurisdiction" seemed to express exactly the type of powers the Commission had in mind.

11. Mr. HSU said that, although he might be able to accept Mr. Sandström's proposal, depending on the ensuing discussion, he felt it desirable to explain the purpose of his own. That purpose was three-fold: first, to avoid using the terms "sovereignty" or "sovereign rights"; secondly, to avoid using those terms in direct relation to the continental shelf instead of in relation to the exploitation of the natural resources of the continental shelf; thirdly, to avoid using the term "control and jurisdiction". "Control and jurisdiction" used in relation to the exploitation of the natural resources of the continental shelf had scarcely any meaning, whereas "control and jurisdiction" used in relation to the continental shelf itself had too much. For he found it difficult to disagree with the United Kingdom Government that control and jurisdiction over the continental shelf meant the same as sovereignty or the possession of sovereign rights over it.

12. Neither term — "sovereignty" or "sovereign rights" — was necessary in the present instance. It was not the practice to speak of sovereign rights over the high seas for the purpose of naval engagement, visit, search and capture or for the purpose of exercising penal jurisdiction over collisions, exercising control over fishing or suppressing piracy and the slave trade. Nor was it the practice to speak of sovereign rights over the sea-bed of the high seas for the purpose of maintaining sedentary fisheries or cable-laying. Nor was it the practice to speak of sovereign rights over the contiguous zones beyond the territorial sea for the purpose of enforcing customs, fiscal and immigration regulations. Why then should the Commission speak of sovereignty or sovereign rights over the continental shelf for the purpose of exploiting its natural resources. Use of either term was not only unnecessary but also unjustifiable for five main reasons.

13. In the first place, freedom of the high seas could be subject to restrictions without changing its character, just as could sovereignty over territory in a similar situation. If innocent passage through the territorial sea did not assimilate the territorial sea to the high seas, there was no reason why exploitation of natural resources should necessitate the assimilation of the continental shelf to territory. Indeed, the enforcement of customs, fiscal and immigration regulations in the contiguous zones had not converted those zones into territorial sea. What was needed concerning the continental shelf was exclusive right of exploitation, not sovereignty.

14. Secondly, it was not the case that the coastal State's sovereignty over its continental shelf was an existing rule of law. Claims had been made to exercise certain rights over it, but that was all. Not enough time had elapsed since those claims had been made for it to be possible to say that they were generally accepted. The point was pertinent, particularly because what was affected was collective or community interests, not interests of individual States; it usually took more time

for opposition to encroachments on collective interests to become articulate. It could not be argued that a claim which was not immediately contested was accepted, for the fact that no protest had been made against the claims of Chile, Peru and Costa Rica not only to the continental shelf but also to the superjacent waters, surely did not mean that those claims had been accepted. Final proof of the absence of any new rule of international law in the matter was furnished by the very fact that the Commission had been seized of it; if there had been general agreement, that would have been unnecessary. It was worth bearing in mind, moreover, that when the Commission had, in 1951, provisionally approved a text which made it quite clear that it did not recognize sovereignty over the continental shelf, not a single government had protested that it was being deprived of something which it already possessed; the most that any government had been moved to do was to say that, in its view, sovereignty over the continental shelf should be recognized.

15. Thirdly, it was unrealistic to suppose that sovereignty over the continental shelf could be restricted to the sea-bed and subsoil. In his view, those States which, in claiming sovereignty over the continental shelf, had claimed sovereignty over the superjacent waters as well, had been perfectly logical.

16. Fourthly, acceptance by the Commission of the principle of sovereignty over the continental shelf would only encourage a mischievous trend which had begun with the United Kingdom Order in Council of 6 August 1942 concerning the Gulf of Paria, and the proclamation by the President of the United States of America on 28 September 1945,[3] which had been confirmed by the example of many other States and which had found its latest and most extreme expression in the claim of El Salvador. It was noteworthy that since 1951, when the Commission had refused to recognize sovereignty over the continental shelf, no further claims had been made. If the Commission now accepted the principle of sovereignty over the continental shelf, it was not to be doubted that the trend would be resumed, or that it would lead to more sweeping claims than those which had been made in the past, embracing the superjacent waters and air and extending out into the high seas beyond the limits which the Commission had fixed, unless political situations proved to be unfavourable to such developments.

17. Finally, the Commission should realize that, although States were at liberty to parcel out the high seas among themselves, the initiative in acts of that kind should be left to political bodies such as the General Assembly. The Commission, as a legal body, should resist attempts to encroach upon established principles of international law, particularly those favouring the development of the community idea, such as the freedom of the high seas.

18. Mr. SPIROPOULOS agreed with Mr. Hsu that the term "sovereign rights" was not entirely happy, but recalled that it had been used by the Special Rapporteur in the text which he had proposed in his fourth report (A/CN.4/60), and subsequently taken over by him (Mr. Spiropoulos) in an attempt to find a compromise solution. The Commission, which had been unwilling to accept even the term "sovereign rights" in 1951, was now envisaging use of the stronger term "sovereignty". The fact that four or five governments, out of a total of sixty or more, had expressed the view that the coastal State should exercise sovereignty over the continental shelf was not sufficient reason for that change of position.

19. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had already devoted four meetings to the consideration of article 2, and that it had finally been adopted by 8 votes to 4, with 1 abstention, Mr. Scelle being the only absentee at the time of the vote.[4] In those circumstances he hoped that the whole question would not be re-opened, since members had already heard, and had an opportunity of commenting on, all the arguments that could be advanced.

20. The alternative texts proposed by Mr. Hsu were quite inadequate, since they would apply with equal force to any holder of a concession. The rights exercised by States were fundamentally different by nature. On the other hand, he could vote in favour of the text proposed by Mr. Spiropoulos, which, as the latter had said, was based on that contained in his (Mr. François') fourth report (A/CN.4/60). The only difference between it and the text proposed by Mr. Sandström was that the latter referred to the "exclusive" right of control and jurisdiction. He could vote for that text too, though he preferred Mr. Spiropoulos's.

21. Mr. YEPES said that he could vote for either Mr. Spiropoulos's or Mr. Sandström's text; he wished, however, to refer to two points in the latter's statement. Mr. Sandström had rightly warned the Commission against abandoning the position which it had publicly taken as recently as 1951; but the Commission had as radically and with as little reason reversed the position which it had publicly taken in 1951 with regard to the definition of the continental shelf. There was still time for it to revert to its previous position in that matter, as well as in the matter at present under consideration.

22. Mr. Sandström had also said that there was no existing international law with regard to the continental shelf, but he (Mr. Yepes) had already pointed out that a customary law of the continental shelf had developed, even if its development had not followed the usual course.

23. Faris Bey el-KHOURI recalled that he had not opposed Mr. Sandström's motion for the re-consideration of article 2 because he had supposed that new arguments would be advanced. Nothing had been said at the present meeting, however, which had not been said

[3] See texts in *Laws and regulations on the régime of the high seas* (United Nations publication, Sales No.: 1951.V.2), pp. 38 and 44.

[4] See *supra*, 200th meeting, para. 83.

before, and he would therefore vote in the same way as before, namely, in favour of the text provisionally adopted. That text would not encroach on the principle of the freedom of the high seas provided it was clearly stated, as was done in paragraph 2, that sovereignty was limited to the sea-bed and its subsoil and did not extend to the superjacent waters. If the Commission acknowledged the exclusive right of the coastal State to explore and exploit the sea-bed and its subsoil, it would be recognizing its sovereignty over them, for below the surface, and at such a depth, sovereignty could mean no more than exclusive rights of exploration and exploitation.

24. Mr. ALFARO said that, although during the earlier discussion he had strongly supported the wording proposed by the Special Rapporteur, in which the term "sovereign rights" had been used, now that he had before him the text of the other articles the Commission had adopted, he felt that it would be more appropriate to use the wording proposed by Mr. Sandström. The term "sovereignty" was entirely inappropriate. With all the restrictions which were placed on the coastal State's rights in the other provisions of the text, what remained could not possibly be termed "sovereignty", at least, not in any sense in which that term was understood in international law.

25. The second paragraph of article 2 limited the coastal State's exclusive rights to the rights of user, control and jurisdiction for certain specific purposes; if Mr. Sandström's proposal was rejected and that text was retained, he would, incidentally, have certain observations to make about the term "the rights of user". Articles 3 and 4 stated that the coastal State's right did not affect the legal status of the superjacent waters or of the airspace above the superjacent waters. Article 5 stipulated that the measures which could be taken for the purposes laid down in article 2 should be "reasonable". Finally, article 6 provided that the coastal State must not interfere with navigation or fishing, must give due notice of installations constructed on the continental shelf, and refrain from constructing such installations in narrow channels or on recognized sea lanes essential to international navigation. It was therefore abundantly clear that the Commission was not recognizing the coastal State's sovereignty over the continental shelf, but its exclusive, or, if the Commission really saw fit, sovereign right of control and jurisdiction for the purposes of exploring and exploiting its natural resources. A legal text should not contain a conventional lie, and he therefore supported Mr. Sandström's proposal, although he could accept Mr. Spiropoulos's if the latter found favour with the majority of the Commission.

26. Mr. KOZHEVNIKOV recalled that he had voted in favour of the text which the Commission had adopted for article 2. The arguments which he had heard at the present meeting could not shake his agreement with that text. If, however, the Commission wished to reverse its previous decision, as was its right, he would suggest that the term "exclusive right", in Mr. Sandström's proposal, be replaced by the term "sovereign rights".

27. Mr. SANDSTRÖM said that he would prefer not to use the term "sovereign rights", but would be prepared to do so if that would render his proposal acceptable to a majority of the Commission.

28. Mr. PAL said that he had previously voted against the text which the Commission had adopted, but that on reflection he felt obliged to vote for it and against the alternative proposals introduced at the present meeting. Unless the Commission recognized the coastal State's sovereignty over the continental shelf, there would be no legal basis for the exercise of its rights, however they might be termed. It was not the Commission's function merely to give legal sanction to the proclamations of States; it must endeavour to find some legal basis on which their claims might be justified, and if they correspond to a real need, such a basis must necessarily exist. In the present case, he considered that such a basis did exist, in a logical extension of the principle of the coastal State's sovereignty over its territory. As a result of scientific progress, it was now possible for the coastal State to exploit the natural resources of its continental shelf, in the same way as scientific progress had at an earlier date made it possible for it to exploit the natural resources of its river beds and of the sea-bed and subsoil of its territorial sea.

29. Mr. CÓRDOVA recalled that he had not been present during the previous discussions, but could confine himself to saying that he had heard no valid argument against the proposal to give the coastal State sovereignty over the continental shelf. Although he favoured the text previously adopted by the Commission, he could accept that proposed by Mr. Sandström or that proposed by Mr. Spiropoulos; in substance, there was very little difference between them.

30. Mr. SCELLE said that it seemed to be generally recognized that to award the coastal State sovereignty or sovereign rights over the sea-bed and subsoil of an area of the high seas was not in accordance with existing law; it was, in fact, in flagrant violation of it, for it was a cardinal principle of international law that the high seas were *res communis* which could not be subjected to the sovereignty of any one State. The Commission could only justify such a violation of the existing rules of law if that were necessary in the interests of the international community as a whole. The interests of the international community as a whole, however, did not require that exclusive rights of exploration or exploitation be given to the coastal State. There was no reason why the same principle should not be observed as in the case of fisheries, and the right of exploration and exploitation given to whichever State or States were best qualified. From what he had said it was obvious that he could not vote for any of the texts proposed, since not only were they all contrary to existing international law, but they also went beyond what was required by modern developments.

31. Mr. LAUTERPACHT said that, as he had previously stated, he was prepared to vote for any text which would secure a clear majority, since he thought that that was a point of considerable importance. The different proposals had different advantages, and there was no great substantive difference between them. The use of the word "sovereignty" might invite some far-fetched speculations in relation to the superjacent waters. On the other hand it had the merit of giving a definite legal status to the areas in question. With regard to the text proposed originally by the Special Rapporteur and now taken over by Mr. Spiropoulos, the term "sovereign rights" was inappropriate in a legal text. It was in the nature of a descriptive term in political science; the appropriate legal term was "rights of sovereignty". If Mr. Spiropoulos could accept that change, he would support the text which he had proposed.

32. It should be emphasized that the Commission was not by virtue of that text conferring full sovereignty upon the coastal State; it merely said that the coastal State exercised the rights of sovereignty over it, and that for a specific purpose. The legal basis which Mr. Pal had sought to find in the principle of sovereignty would be constituted rather by the fact of the Contracting Parties' acceptance of the convention.

33. Mr. ZOUREK recalled that he had voted in favour of article 2 in the form in which it had been adopted, and said that he had heard nothing during the present discussion to lead him to change his mind. If a substantial majority of the Commission was in favour of reversing its previous decision, however, he could accept the text proposed by Mr. Spiropoulos, preferably with the amendment suggested by Mr. Lauterpacht.

34. He could not agree with Mr. Yepes that a customary law existed in the matter, since by no means all coastal States had laid claims to a continental shelf, and even those which had made such claims were in complete disagreement about the extent and the scope of the rights they claimed.

35. Replying to a question by the CHAIRMAN, Mr. HSU said that he would ask for a vote only on the first of the two texts he had proposed. He recalled that at the beginning of the meeting he had said that he might be able to vote in favour of Mr. Sandström's proposal, but the discussion had convinced him that that proposal suffered from the taint of compromise.

36. Since Mr. Pal had raised the question of the legal basis for the rights to be accorded to the coastal State, he thought he should explain the legal basis on which his own proposal rested. That basis was the principle of the freedom of the high seas. He also realized, however, that, in the interests of the international community as a whole, the exploitation of the natural resources of the continental shelf was economically necessary, and as the Commission appeared to think that such exploitation could most conveniently be carried out by the coastal State, he was prepared to give the coastal State exclusive rights for the purpose. There was a distinction between the exploitation of the natural resources of the continental shelf and the operation of fisheries, which justified the granting of exclusive rights in the one case but not in the other.

37. He had gone as far as he could to meet the views of those who wished the coastal State to exercise sovereignty over the continental shelf, and the text which he proposed went far enough, he believed, to meet the coastal State's legitimate needs. Further he could not go.

38. Mr. SPIROPOULOS regretted that he could not accept Mr. Lauterpacht's suggestion to replace the term "sovereign rights" by the term "rights of sovereignty" which, in French at least, would be open to some misunderstanding.

39. The CHAIRMAN put to the vote the first of the two texts proposed by Mr. Hsu.

That text was rejected by 7 votes to 1, with 5 abstentions.

40. The CHAIRMAN then put to the vote the text proposed by Mr. Spiropoulos.

The text proposed by Mr. Spiropoulos was adopted by 10 votes to 3, with 1 abstention. It read as follows:

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources".

41. The CHAIRMAN, speaking in his personal capacity, explained that he had voted for the text just adopted because it best expressed the Commission's views.

Mr. François took the Chair.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*resumed from the 214th meeting*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*resumed from the 214th meeting*)

Article V [5] (*resumed from the 213th meeting*) and *Article VI* [7] (*resumed from the 214th meeting*)

42. The CHAIRMAN requested the Commission to continue its discussion of article VI of the draft Convention on the Elimination of Future Statelessness prepared by the Special Rapporteur (A/CN.4/64). That discussion, which might become very complicated, turned on three major issues.

43. First, there was the distinction between paragraphs 1 and 2 of the text proposed by the Special Rapporteur. Mr. Córdova had thought that there should be absolute prohibition of deprivation of nationality as a penalty, and that there should be only a qualified limitation on deprivation for other reasons. Mr. Alfaro, on the other hand, thought that the two matters could be combined; and, following his line of thought, Mr. Lauterpacht had suggested a new text which read:

"No Party shall revoke, or deprive a person of, nationality, by way of penalty or for any other reason,

by operation of the law or otherwise, unless such person has or acquires another nationality."

44. *Prima facie,* Mr. Lauterpacht's text was not easy to understand, and it might require some redrafting. The French translation too was not happy and needed revision.

45. Secondly, there was Mr. Alfaro's third amendment relating to the distinction made in Latin American countries between citizenship and nationality.[5] That was a separate question and would have to be discussed separately.

46. Thirdly, Mr. Sandström had suggested that the contents of article V were partly covered by article VI. Mr. Sandström had therefore proposed that the last two paagraphs of article V should be deleted and included in a revised version of article VI. In his (the Chairman's) view, that matter should be discussed first, as the question whether or not there was duplication between articles V and VI would arise regardless of the fate of the Special Rapporteur's text.

47. Mr. SANDSTRÖM said that the Chairman had accurately explained his proposal. Article V related not only to the consequences of general changes of personal status, but also to the consequences of specific changes, namely, renunciation of nationality and application for naturalization. He doubted whether it was wise to treat all those matters in one article, particularly because renunciation of nationality and the consequences of application for naturalization had points in common with the matters treated in article VI.

48. He did not like the phrase "by way of penalty" which it had been suggested should be inserted in article VI. On the one hand, he thought that article VI should not concern itself with criminality; on the other hand, there were many legal systems which provided that persons could be deprived of their nationality for acts which were not of themselves necessarily wrong: for example, the continued residence of a naturalized person in the country of his previous nationality. He emphasized that neither nationality nor naturalization was in the nature of a contact: it was a relationship between the subject and the State that created legal obligations.

49. Mr. CÓRDOVA (Special Rapporteur) said that the precise form of the provision adopted was a matter of technique. It was possible to draft an article in the form of a general prohibition of deprivation, renunciation or loss of nationality without the acquisition of another nationality. When, however, he had been confronted with the problem he had thought it advisable to take separately each of the historical sources of statelessness and to provide a remedy for each.

50. There was a distinction between deprivation of nationality as a penalty for, perhaps, a criminal act, and the automatic application of the law depriving a person of nationality for other, non-criminal reasons, which was again different from renunciation of nationality. He felt that it would be more comprehensible, both for the public and for lawyers, to deal with those matters *seriatim,* rather than by a general clause providing simply, for example, that no State should deprive a person of its nationality if that person did not acquire another.

51. He agreed that paragraphs 3 and 4 of article V had in themselves very little relation to the question of change of personal status dealt with in paragraphs 1 and 2. It would be possible to make a new article VI of paragraphs 3 and 4, leaving the present article VI substantially as it was, but renumbering it. If the Commission wished to make no distinction between deprivation of nationality as a penalty and deprivation of nationality by automatic operation of law, then paragraps 1 and 2 of the original article VI could be merged, and he would be able to accept Mr. Lauterpacht's proposed redraft thereof. But he opposed the merging of that subject with loss of nationality resulting from an application for naturalization or from renunciation of nationality.

52. Mr. ALFARO said that he would withdraw his third amendment on condition that the statement contained therein was recorded in the Commission's report on the work of the session. He agreed that that amendment was concerned not with a mandatory provision, but rather with the absolute distinction between citizenship and nationality that obtained in twenty-five States. In so far as there was any misunderstanding about that distinction, he stressed that it should be made clear in the summary record that the prohibition of deprivation of nationality did not limit the right of States to restrict citizenship rights within his meaning of the term. That was important, in order to avert possible misunderstanding of action that Latin American countries might have to take under their existing legislation.

53. As to his other amendments, he maintained that paragraphs 1 and 2 of article VI should be combined in the sense of the suggestions made by Mr. Lauterpacht, Mr. Spiropoulos and himself, but was somewhat disturbed by some of the technical expressions used in Mr. Lauterpacht's draft. He would prefer that paragraph to read:

"No person shall lose or be deprived of his nationality on any ground or for any reason unless that person has or acquires another nationality."

54. That would cover sanctions, deprivation by operation of law and all the other circumstances which the Commission had in mind.

55. Mr. SANDSTRÖM asked whether Mr. Alfaro intended that article V should be kept as it was.

56. Mr. SPIROPOULOS was in favour of dealing with the matter by a general clause laying down that there should be no deprivation of nationality without the acquisition of a new one. Mr. Córdova had said that the article could be cast either in a general or in an enumerative form; the danger of the enumerative

[5] See *supra,* 214th meeting, para. 36.

method was the possibility that one or more instances might unwittingly be omitted. Further, he agreed with Mr. Sandström that paragraphs 3 and 4 of article V should be removed from that article; all duplication between articles V and VI should be eliminated.

57. He would suggest informally that, in order to meet all points of view, article VI should begin by stating a general rule and continue by giving specific examples.

58. Mr. LAUTERPACHT said that he agreed with the Special Rapporteur. In the first place, it might well be better to divide article V into two parts, the first consisting of paragraphs 1 and 2, and the second of paragraphs 3 and 4. In the second place, it was very important that article VI should be particularized, to enable the important historical causes of statelessness to be dealt with; a general clause would not meet practical requirements. He felt, too, that the Commission should be careful to avoid giving the impression that it did not attach due importance to the most conspicuous cause of statelessness, namely, deprivation of nationality by way of penalty. For those reasons, he could not accept Mr. Sandström's amendment. That amendment mixed the various causes of statelessness. Also, it was undesirable that the Commission should rescind an earlier decision. He agreed with the Chairman that his (Mr. Lauterpacht's) text for article VI required drafting changes, but he was convinced that the Commission should maintain the principles of the Special Rapporteur's draft for article VI, and see to it that that article dealt with deprivation of nationality both as a penalty and for analogous reasons: even automatic denaturalization as a result of continued residence abroad had to his mind an element of sanction in it.

59. Mr. AMADO put a number of questions concerning the syntax of Mr. Lauterpacht's proposed text. Concerning deprivation of nationality as a penalty, he said that the Brazilian Constitution laid down three grounds for loss of nationality: first, voluntary acquisition of another nationality; second, acceptance of employment, pension or commission in another State without the permission of the President of Brazil; third, conviction by a court of justice of an offence for which deprivation of nationality was the appropriate sentence.

60. The connexion between the individual and the State was, as he had said before, of the essence of allegiance, and to his mind the concept of sanction did not enter the picture; it should therefore not be mentioned. A prohibition of denationalization in general terms might possibly have some effect; but particularization could only cause difficulties for a number of States.

61. Mr. SANDSTRÖM said that it seemed to him that everyone was in agreement about the purpose of article VI; the differences related solely to the way in which it should be drafted. For his part, he had no objection to the matters treated in articles V and VI being spread over three articles: the first consisting of paragraphs 1 and 2 of article V, the second of paragraphs 3 and 4 of article V, and the third of article VI. The various specific issues cited by various members of the Commission as constituting reasons for deprivation of nationality could be summarized in the phrase:

> "... deprivation of nationality as a penalty or otherwise by reason of a person's conduct."

62. Mr. LIANG (Secretary to the Commission) referring to Mr. Lauterpacht's proposed text for article VI, said, first, that Mr. Lauterpacht had emphasized a distinct concept, namely, the deprivation of nationality by way of penalty; that was otherwise known as denationalization. Secondly, it seemed to him to be confusing, when referring to loss of nationality by operation of law, to call that loss deprivation, which was a word more properly associated with the concept of denationalization. Thirdly, as Mr. Alfaro had said, the word "revoke" was obscure in the context of the other concepts contained in Mr. Lauterpacht's text. Revocation applied to nationality acquired by naturalization: one could hardly speak of revocation of nationality acquired by birth.

63. As regards the drafting of articles V and VI, there were three distinct subjects which should be treated in three separate articles: first, deprivation of nationality; secondly, loss of nationality by operation of law; thirdly, revocation of nationality. Mr. Lauterpacht's suggested draft for article VI had the merit of comprehensiveness, but he thought it was necessary to emphasize the political and juridical consequences of denationalization by dealing with that issue separately.

64. Mr. YEPES agreed that the subject-matter of paragraphs 1 and 2 of paragraph V differed in nature from that of paragraphs 3 and 4; the Commission was, however, discussing paragraph VI. He pointed out a number of discrepancies between the English and French texts of Mr. Lauterpacht's proposal, and asked which version the Commission was meant to be discussing; they would only get confused if they discussed both. Mr. Lauterpacht's English text mentioned revocation of nationality; but it was evident to him that nationality as such was not revocable, though naturalization might be. Was there any distinction in English? Furthermore, Mr. Lauterpacht's English text prohibited the deprivation of nationality "unless such person has or acquires another nationality." He asked at what date the person concerned was to acquire the other nationality; was it to be on the date on which he was deprived of his first nationality or later? For his part, he would prefer a text reading "... unless such person has or acquires *ipso facto* another nationality".

65. Mr. LAUTERPACHT agreed that his text should be amended; it should state at what date the new nationality was to be acquired, and it should be modified inasmuch as revocation was the term used in English law in respect of a certificate of naturalization.

66. He urged the Commission to adopt the Secretary's suggestion that the three main causes of loss of nationality, which were independent and different, should be treated separately, to make them more easily understandable. He hoped to be able to submit a revised text at the next meeting.

67. Mr. ALFARO was in favour of the retention of the expression, "by way of penalty", for deprivation of nationality on that ground was the main source of statelessness; but he still opposed the use of the expression "by operation of law", for all deprivations of nationality were to his mind the result of the operation of some law. Mr. Lauterpacht was probably thinking of loss of nationality caused by lapse of time, as well as of such cases as that of a person born of foreign parents in a given country who would lose the nationality of that country unless he made a declaration when he came of age that he intended to retain it. If the Commission wished to cover cases of loss of nationality by the automatic operation of law in that manner, it should draft a special provision according to which the high contracting parties would agree that no one should lose his nationality in that way unless he acquired another.

68. Mr. CÓRDOVA asked Mr. Lauterpacht, on the assumption that deprivation of nationality by way of penalty should be treated in one paragraph, what was to be treated in the other paragraphs.

69. Mr. LAUTERPACHT said that the remaining paragraphs should deal with loss of nationality by operation of law — due to residence abroad and so forth — and with revocation of nationality acquired by naturalization — naturalization acquired by fraud, for example — in that order.

70. The CHAIRMAN shared the opinion of those members who thought that Mr. Córdova's proposal was preferable to the perhaps more scientific view expressed by Mr. Sandström; Mr. Spiropoulos' suggestion should also be studied attentively.

71. He noted that Mr. Lauterpacht had said that it might be possible for him to present a revised text the following day; he himself thought that the Drafting Committee, which might co-opt Mr. Sandström for the purpose, should be asked to present a new text for both article V and article VI in the light of the foregoing discussion.

72. Mr. YEPES wondered whether the Special Rapporteur's text for article VI was not after all the best. The Commission had so far been unable to do better, though it might be preferable to make paragraph 1 of article VI a separate article.

73. Mr. SCELLE said that, from the point of view of juridical technique, when fraud entered into an apparent naturalization the act of naturalization was void; hence the person concerned was not naturalized, and it was not possible to speak of the revocation of such non-existent naturalization. The article should take account of that consideration, though it was evident that it would not always be possible to avoid statelessness in such cases. There were, however, many difficulties, for a void act could have no legal effect, and in that event the change of nationality, and *a fortiori* the deprivation of the acquired nationality, could not have taken place.

The Chairman's proposal that articles V and VI be referred to the Drafting Committee was adopted.

Nationality of married women

74. The CHAIRMAN said that the next day, before taking up article VII, the Commission would have to take up the question of the nationality of married women.

75. Mr. CÓRDOVA said that the Commission on the Status of Women had reached the conclusion that no woman should lose her nationality as the result of her marriage; it wished women to be in the same position as men as regards nationality. The Economic and Social Council had endorsed the Commission's recommendation and had requested the International Law Commission to study the problem, and draft an appropriate convention. The International Law Commission had taken the view that it should deal with the matter within the general framework of nationality including statelessness.[6]

76. He had now received a communication from the Chairman of the Commission on the Status of Women drawing attention to article V of the draft Convention on the Elimination of Future Stateslessness and to article VI of the draft Convention on Reduction of Future Statelessness. She had suggested that the International Law Commission might see its way to drafting the articles in such a way as to give the present drafts temporary effect only, pending agreement between all States on the principle that no woman should lose her nationality as a consequence of her marriage.

77. The International Law Commission had to decide between two principles. The first was the principle of family unity, according to which a wife and the children of a marriage should in general acquire the nationality of the husband and father. The second was the principle that the position of women with regard to nationality should be the same as that of men.

78. The CHAIRMAN said that the matter should be taken up the following day when members had had time to study the letter from the Chairman of the Commission on the Status of Women.

79. Mr. LIANG (Secretary to the Commission) said that he had been advised that the Social Committee of the Economic and Social Council, which was at present meeting in the Palais des Nations, was considering the matter raised in the letter from the Chairman of the Commission on the Status of Women, and would in due course report to the Economic and Social Council. He was concerned about the possible overlapping of competence, and suggested that more time should be allowed for study of the letter in question.

80. Mr. CÓRDOVA then referred to the draft article VII which was concerned with the question of the inadequacy of treaties on territorial settlements. As a matter of general principle, the inhabitants of a territory should acquire the nationality of the State to

[6] See "Report of the International Law Commission covering the work of its fourth session", *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), para. 30.

which the territory was transferred, and it was also a principle of existing international law that the State to which the territory was transferred should allow the right of option to persons who wished to retain their own nationality. There were, of course, cases in which it was impossible to apply the second principle, for example, when a whole territory was absorbed by the elimination of a State. In those circumstances, all the inhabitants of the territory had to acquire the nationality of the State into which the territory was incorporated. Article VII as drafted would make it a rule that the State to which the territory was transferred should confer its nationality on the inhabitants of the territory, subject to the right of option, but would at the same time ensure that the State from which the territory had been transferred did not deprive the inhabitants of their old nationality until they had acquired the new one.

81. There was, however, one point which was not covered by the article, namely, the case of a person who had previously inhabited the transferred territory but who had left it. It was open to question whether he should retain his original nationality or acquire the nationality of the State to which the territory was transferred. He (Mr. Córdova) thought that such a person should have the right of option, and that there should be a third paragraph in the article to deal with that.

82. He realized that States tended to conclude treaties as they pleased, and that transfers of territory were a constant cause of statelessness; article VII would attempt to limit the right of States so to act. He was opposed to the view that because States were sovereign they should not be asked to surrender the right to act in all circumstances as they chose; in his view, international law should have precedence over the unfettered will of States, and States should comply with it.

The meeting rose at 1 p.m.

216th MEETING

Wednesday, 15 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

* The number within brackets corresponds to the article number in the Commission's report.

Present:

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

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

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

Article VII [9]

1. The CHAIRMAN invited the Commission to take up article VII of the draft Convention on the Elimination of Future Statelessness (A/CN.4/64, Part I).

2. Mr. LAUTERPACHT said that article VII raised a number of questions. In paragraph 1, reference should be made not only to existing States to which territory might be transferred, but also to new States created on the territory of one or more States. In the latter case one could hardly speak of the transfer of territory.

3. Again, the phrase "persons inhabiting the said territory" would not, if interpreted literally, cover persons who, though they might have had the nationality of the State from which the territory was transferred, did not habitually reside in the transferred territory. Such persons might in some cases become stateless unless specific provision were made for their case.

4. Moreover, some persons might have grounds for not wishing to acquire the nationality of the State to which the territory was transferred; that nationality might be hateful to them. The possibility of option was therefore necessary.

5. On the other hand, it should be made clear that when the text referred to the possibility of option, only an effective or an exercised option was meant.

6. He therefore proposed the following text for article VII:

> "Existing States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality on persons possessing the nationality attaching to such territory unless such persons effectively opt for the retention of that nationality, or unless they have or acquire another nationality."

7. Mr. SCELLE said that he agreed in part with Mr. Lauterpacht. It seemed to him, however, that article VII as drafted provided yet another example of the tendency, which he remarked throughout the convention, to lay down unrealistic rules. The draft failed to take into account territorial changes other than those brought about by the cession of territory; but there was