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Summary record of the 235th meeting

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235th MEETING

Saturday, 8 August 1953, at 9.30 a.m.

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Chairman : Mr. J. P. A. FRANÇOIS.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, 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.

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 234th meeting*)

CHAPTER III : RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1) * (*resumed from the 234th meeting*)

Paragraph 13 (70)** (continued)

1. The CHAIRMAN, inviting the Commission to continue its discussion on paragraph 13, pointed out that Mr. Sandström had submitted the following amendments thereto :

First, the insertion before the first sentence of the following passage :

“Some members of the Commission were in favour of replacing, as had been proposed by several governments, the term ‘natural resources’ by the expression ‘mineral resources’. Only those resources had earlier been envisaged ;”

Secondly, the deletion from the first sentence of the words : “for the latter reason”.

Thirdly, the addition at the end of the paragraph of the following passage :

“The dissenting members meant that, even if the term ‘natural resources’ were used, it could not comprise what was not a natural part of the

continental shelf ; i.e., of the subsoil including the sea-bed.”

2. The amendments showed slight changes from those submitted verbally by Mr. Sandström at the previous meeting.¹

3. Mr. LAUTERPACHT said that there could be no harm in inserting an historical comment, such as Mr. Sandström’s first amendment. He could not, however, understand the third amendment.

4. Mr. SANDSTRÖM said that, as he understood it, the view of the majority, as expressed in the second sentence of paragraph 13, was that the term “natural resources” included all attachments to the sea-bed, even though they might be above the level of the floor of the sea. By contrast, he himself considered that the term “natural resources” did not include anything that was not inherently part of the sea-bed, even though attached to it.

5. The CHAIRMAN said that Mr. Sandström’s opinion seemed to be that anything situated or occurring above the level of the sea-bed, for example, sedentary fisheries, could not be a natural resource of, and therefore should not fall under the régime of, the continental shelf. If Mr. Sandström’s third amendment were adopted, it would only cause confusion.

6. Mr. LAUTERPACHT thought that the report should not invariably record dissenting opinions ; such a course would only introduce in another form the system of minority reports, the principle of which the Commission had already rejected. Dissenting views could always be studied in the summary records.

7. Mr. YEPES said that, although he had opposed Mr. Sandström’s opinion as to what the natural resources of the continental shelf comprised, he considered that it should be mentioned in the report if Mr. Sandström so wished.

8. Mr. SANDSTRÖM said he could modify his third amendment to read :

“The dissenting members meant that, even if the term ‘natural resources’ were used, the term ‘exploitation of the natural resources of the continental shelf’ could not comprise what was not a natural part of the continental shelf, i.e. of the subsoil including the sea-bed.”

9. Mr. AMADO said that he understood Mr. Sandström’s view to be that there was a logical difference between what was inherently part of the continental shelf and what was foreign, even if attached, to it.

10. Mr. LAUTERPACHT pointed out that paragraphs 12, 13 and 14 formed a unity which would be disrupted by the interpolation of Mr. Sandström’s first and third amendments.

11. Mr. SANDSTRÖM said that his first amendment was designed to show how the discussion on termino-

* Mimeographed document only. Incorporated with drafting changes in the “Report” of the Commission as Chapter III.

** The number within parentheses indicates the paragraph number in the “Report” of the Commission.

¹ See *supra*, 234th meeting, paras. 78-79.

logy had arisen. He did not agree that the subject of paragraph 12 was so intimately connected with that of paragraph 13 that his first amendment could not be inserted between the two paragraphs.

12. Mr. ALFARO agreed that there was no very close connexion between the subjects of paragraphs 12 and 13. Mr. Sandström's first amendment would add weight to the Commission's report; it should therefore be adopted. The third amendment, however, would add little, and should be rejected.

13. The CHAIRMAN recollected that, during the relevant part of the general discussion, the main difference of opinion had emerged over the question whether sedentary fisheries were or were not a natural resource of the continental shelf. Mr. Sandström's third amendment threw no light on that point, and therefore did not accurately express the minority opinion.

14. Mr. SANDSTRÖM suggested that in his third amendment the phrase "natural part of the continental shelf" should be replaced by the phrase "inherent part of the continental shelf".

15. The CHAIRMAN suggested that further discussion be deferred until Mr. Lauterpacht, Mr. Sandström and himself had succeeded in finding a mutually acceptable text for the paragraph.

*It was so agreed.*²

Paragraph 14 (71)

16. The CHAIRMAN, referring to the second sentence of the paragraph, according to which any interference with rights previously acquired by nationals of States other than the coastal State would be "subject to rules of international law ensuring respect of the property of aliens", said that the right to fish was not a proprietary right. The word "property" should, therefore, not be used.

17. Mr. LAUTERPACHT agreed that the word "property" should be replaced by the word "rights".

18. Mr. ZOUREK, referring to the use of the phrase "*droits acquis*" in the French text, said that such rights related to particular legal systems. In the paragraph under discussion, would they be rights acquired under international law or under municipal law? The use of the phrase implied that the Commission considered that it was possible to acquire rights even over the high seas.

19. Mr. AMADO agreed that the phrase "*droits acquis*" had a specific meaning in civil law; some other rendering should be found.

20. Mr. LAUTERPACHT wondered whether Mr.

Zourek would be satisfied if the first sentence were amended to read:

"Neither... can the exclusive rights of the coastal State be exercised in a manner inconsistent with the existing rights of nationals of other States...", instead of "...inconsistent with rights previously acquired by nationals..."

consequential changes being made as necessary elsewhere in the paragraph.

21. Mr. ZOUREK pointed out that Mr. Lauterpacht's new phraseology differed very little from the original text. He referred also to the phrase reading "respect of the property of aliens", to which the Chairman had previously drawn attention, and asked whether the concept of property as it related to sedentary fisheries included a concept of property in the sponges and oysters concerned.

*An amended text of paragraph 14 was approved by 6 votes to 2, with 4 abstentions.*³

22. The text approved read as follows:⁴

"..."

*Paragraph 15 (72)*⁵

23. Mr. HSU said that paragraph 15 should be either deleted or the second sentence amended to read:

"They are based on a figment of the imagination and therefore belong to it *ipso jure*."

24. Mr. LAUTERPACHT said that the text was based on the Commission's reports on its work on the régime of the high seas at previous sessions.

25. Mr. SANDSTRÖM said that the statement that the coastal State was "not under a strict duty to issue a proclamation formally asserting its rights to the continental shelf" implied that some sort of duty none the less existed. In his view, there was no need for such a proclamation, and that should be stated clearly.

26. Mr. LIANG (Secretary to the Commission) said that, although he did not go so far as Mr. Hsu in disapproving of the concept expressed in paragraph 15, neither could he go so far as the General Rapporteur in his implicit encouragement of States to assert their rights by proclamation. In the Commission's report

³ The third sentence of para. 14 read as follows: "However, apart from the case of existing rights of other States or their nationals, the sovereign rights of the coastal State...".

⁴ See para. 71 in the "Report" of the Commission.

⁵ Para. 15 read as follows:

"The rights of the coastal State over the continental shelf are independent of occupation, actual or fictitious. They may belong to it *ipso jure*. For that reason the coastal State is not under a strict duty to issue a proclamation formally asserting its right to the continental shelf—though having regard to considerations of certainty and orderliness, and also to recent practice, it may be advisable to issue a proclamation to this effect. When made, the proclamation is merely declaratory of an existing right."

² See *infra*, 238th meeting, para. 18.

covering the work of its third session⁶ the comments on the draft article on the continental shelf had been very carefully worded. It was there stated, for example, that the exercise of the right of control and jurisdiction was independent of the concept of occupation. Indeed, it was said that effective occupation of the submarine areas in question would be practically impossible, and that recourse should not be had to a fictional occupation. It was further stated that the right of the Coastal State to the control and jurisdiction of the continental shelf was independent of any formal assertion of that right by that State.

27. He felt that paragraph 15 should follow the wording of that commentary.

28. Mr. AMADO did not like the expression "actual or fictitious". Nor did he think it appropriate for a commission of jurists to tell States what they ought or ought not to do about asserting their rights by proclamation. He much preferred the wording of the relevant comments in the Commission's report covering the work of its third session.

29. Mr. SCELLE suggested that paragraph 15 should be modified in such a way as to bring out the fact that the régime of the continental shelf as it would be established by the articles on the continental shelf was contrary to and no part of existing law. The paragraph stated, for example, that "the rights of the Coastal State...are independent of occupation...". It was possible that if the advice of the Commission was adopted those rights would be independent of such occupation; but to use the present indicative in that sentence gave the paragraph a meaning exactly contrary to existing law.

30. He had similar objections to paragraph 16.

31. The CHAIRMAN pointed out that the present indicative was used in the equivalent sentences of the comment on the draft articles on the continental shelf contained in the Commission's report covering the work of its third session. It was, of course, natural that those members who disapproved of the draft articles on the continental shelf should disagree also with the General Rapporteur's comments. But the Commission could hardly be expected to go back on a decision it had taken formally two years previously regarding the kind of régime it wished to see established over the continental shelf.

32. Mr. SPIROPOULOS said that it was possible to sympathize with Mr. Scelle in his objections to the wording of paragraphs 15 and 16. Nevertheless, the use of the present tense in the first sentence was dictated by the circumstance that the comment was a comment on an existing text.

33. He suggested that the first sentence be amended to read:

"The rights of the coastal State over the continental shelf are independent of any occupation."

34. The implied invitation to States to issue proclamations formally asserting their rights to the continental shelf should be eliminated, preferably by deleting the last two sentences of the paragraph.

35. Mr. AMADO wondered whether Mr. Scelle would be happier if the paragraph began with the sentence "The exercise of the rights of the coastal State over the continental shelf is independent of any occupation."

36. Mr. SCELLE replied in the negative; obviously there could be no exercise of rights unless there was occupation.

37. Mr. LIANG (Secretary to the Commission) said that, although the General Rapporteur contended that the text of the paragraph did not differ substantially from the text of the comments on the draft articles on the continental shelf in the Commission's report covering the work of its third session, he (the Secretary) thought that there were serious differences, and even, perhaps, contradictions. For example, comment 6 on article 2 of the draft articles on the continental shelf⁷ was worded non-committally, as follows:

"The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction...";

By contrast, the wording of the first sentence of paragraph 15,

"The rights of the coastal State over the continental shelf are independent of occupation, actual or fictitious.",

was positive.

38. So far as he could remember, the only discussion on the issue of proclamations by States with the object of asserting their rights to the continental shelf had taken place between Mr. Lauterpacht and himself. The last two sentences of paragraph 15 could raise many difficulties, inasmuch as the practice of States regarding the issue of proclamations was by no means uniform, and some proclamations had been immediately challenged by other States. It was, of course, possible for the subject of proclamations to be discussed by the Commission, which might even wish to make a pronouncement on it. Mr. Lauterpacht's thesis was not unreasonable; but in his (the Secretary's) view it would be unfortunate for the Commission to publish at that time a report on the subject that apparently contradicted its report of two years previously.

39. Mr. YEPES recalled that he had proposed an amendment to article 2 substantially in the words adopted by the General Rapporteur for the first sentence of paragraph 15. The Commission had decided that it went without saying that the rights of the coastal State over the continental shelf were independent of occupation, that there was therefore no need to make

⁶ *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*. Also in *Yearbook of the International Law Commission, 1951*, vol. II.

⁷ *Ibid.*, Annex, Part I, Article 2, comment 6.

a statement to that effect in the articles themselves, and that the matter could be mentioned in the Commission's report. The General Rapporteur should not be blamed for simply doing what the Commission had asked him to do.

40. To meet Mr. Scelle's objection to the first sentence, he suggested that it might be amended to read:

"In the régime proposed by the Commission, the rights of the coastal State...".

41. He agreed with Mr. Spiropoulos that the last two sentences of the paragraph should be deleted.

42. Mr. LAUTERPACHT said that, apart from the parenthetical sentence suggesting the advisability of governments making proclamations out of regard for considerations of certainty and orderliness and out of regard for recent practice, the substance of the paragraph was identical with that of the equivalent comments on article 2 of the draft articles on the continental shelf, as set forth in the Commission's report covering the work of its third session. He could see no substantive difference between the sentence:

"The exercise of the right of control and jurisdiction is independent of the concept of occupation" and the sentence:

"The rights of the coastal State over the continental shelf are independent of occupation, actual or fictitious."

43. Even the use of the word "fictitious", to which some members had taken exception, derived from the sentence in the Commission's report on the work of its third session reading:

"Nor should recourse be had to a fictional occupation."

44. He asked whether the Commission wished to provide a legal basis for what must be recognized as a revolutionary innovation, namely, the principle stated in article 2 that:

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

45. Paragraph 6 of the comment on article 2 of the draft articles on the continental shelf contained in the Commission's report on the work of its third session stated that the principle adopted by the Commission was "based upon general principles of law which served the present needs of the international community"; and further, that the Commission had not "attempted to base on customary law the right of a coastal State to exercise control and jurisdiction" over the continental shelf.

46. Mr. HSU realized that he was in a minority in objecting on principle to the whole concept of the continental shelf as accepted by the Commission, and accordingly in suggesting some qualification of the text of paragraph 15. Nevertheless, he saw no reason to preserve in that paragraph, either in form or in substance, the comments on article 2 of the draft articles

on the continental shelf given in the Commission's report covering the work of its third session. The Commission had changed its mind in the light of the observations of governments, and it should not be afraid to change its mind on its own initiative. There was no need to cling to a false concept merely because it had first been conceived two years previously.

47. Mr. ALFARO found paragraph 15 in general both correct and in conformity with the position previously taken up by the Commission. He could accept Mr. Yepes' amendment to the opening words of the first sentence.

48. It might be useful to remind States that they were under no direct obligation formally to assert their rights to the continental shelf, and the parenthetical invitation advising them to do so by proclamation should certainly be deleted. If that were done, however, the last sentence of the paragraph should be allowed to stand.

49. Faris Bey el-KHOURI said that the paragraph was well drafted, that it accurately reported the views of the Commission, and that there was no reason to amend it.

50. The Commission was not proposing to confer on coastal States any rights that they had not previously enjoyed; neither was it proposing to modify the régime of the high seas. On the contrary, the principles laid down in the draft articles on the continental shelf were a natural extension of existing rights.

51. Mr. SPIROPOULOS said that although, as the General Rapporteur had admitted, the parenthetical sentence advising governments to make proclamations contained a new idea that the Commission had not previously discussed, he (the General Rapporteur) had made it very clear that the paragraph was in substance founded on the text of the comments on article 2 of the draft articles on the continental shelf contained in the Commission's report covering the work of its third session. He thought that the ideas expressed in the last three sentences of the paragraph could be conveyed more briefly and clearly by an appropriate addition to the first sentence, the second part of which would then read:

"...actual or fictitious, and of any formal assertion of those rights".

52. Mr. SCELLE said that Mr. Yepes' amendment would entirely meet his objection. He could not admit that the concept adopted by the Commission regarding the continental shelf was in any sense based on existing law.

53. Mr. LAUTERPACHT withdrew the parenthetical sentence reading:

"though having regard to considerations of certainty and orderliness, and also to recent practice, it may be advisable to issue a proclamation to this effect."

54. He was, however, opposed to Mr. Yepes' amendment, for the Commission had assumed as the basis for its work that the articles on the continental shelf were

founded upon general principles of existing law. That assumption was what Mr. Scelle denied, and the adoption of Mr. Yepes' amendment would imply that the Commission shared Mr. Scelle's misgivings.

55. He admitted that there was a slight difference of emphasis between the paragraph and the equivalent paragraph commenting on article 2 of the draft articles on the continental shelf in the report on the third session. That was because the views of the Commission had in fact developed, though they had not developed in the direction that Mr. Hsu wished.

Mr. Yepes' proposal that paragraph 15 should begin with the words: "In the régime proposed by the Commission..." was rejected by 5 votes to 4, with 3 abstentions.

56. Mr. KOZHEVNIKOV explained that he had voted against Mr. Yepes' amendment because it contained the words "In the régime...". He only accepted part of the Commission's draft relating to the continental shelf.

57. Mr. ALFARO said that he had voted in favour of Mr. Yepes' amendment because he conceived one possible meaning of it to be that the régime adopted by the Commission was based upon general principles of existing law.

Mr. Spiropoulos' proposal for the addition, after the words "...actual or fictitious" of the words "and of any formal assertion of those rights" at the end of the first sentence of the paragraph and the deletion of the remainder of the paragraph was adopted by 8 votes to 1, with 3 abstentions.

58. Mr. LIANG (Secretary to the Commission) suggested that the word "fictitious" should be replaced by the word "fictional", to bring the paragraph into line with the corresponding paragraph of the comments on article 2 of the draft articles on the continental shelf in the report on the work of the third session.

It was so agreed.

Paragraph 15, as amended, was approved by 9 votes to 2, with 1 abstention.

59. It read:⁸

"..."

Paragraph 16 (73)⁹

60. Mr. HSU recalled that he had already commented

⁸ See para. 72 in the "Report" of the Commission.

⁹ Para. 16 read as follows:

"The Commission does not deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State. Some of the considerations relevant to this matter have been adduced above in paragraphs 11 and 12. These considerations cannot be reduced to a single factor. In particular, it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice. There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned. For that practice itself is considered..."

on paragraph 16 from his own point of view, at the 233rd meeting.¹⁰ He would now attempt to comment on it from the Commission's point of view.

61. It was surprising to read in the first sentence that: "The Commission does not deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State." Such a statement could only be justified if the Commission regarded itself as an authoritative body which had merely to lay down the law without explaining it. The paragraph, however, then went on to refer to various "considerations relevant to this matter", all of which, with the exception of the statement that "it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice", were, as he had shown, either unjustified or irrelevant. That being the case, the last sentences of the paragraph, in which it was stated that "all these considerations... provide a sufficient basis of the principle of sovereign rights of the coastal State", and that "that principle is in no way incompatible with the rationally conceived principle of the freedom of the sea", were no more than unfounded assertions. In his view, the entire paragraph should be deleted, unless the Commission wished to set itself up as an authoritative arbiter in international law, in which case the first sentence could be retained.

62. Mr. YEPES proposed the deletion of the sentence reading "There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned", and of the word "For" from the next sentence, since it was inappropriate that the report should mention such theoretical considerations, and because, in any case, the sentence added nothing to the argument. He also proposed the deletion of the words "no longer" from the phrase reading: "it is no longer practicable to treat [the sea-bed and the subsoil] as *res nullius*", since it had never been practicable to treat them in that way. Lastly, he proposed the insertion of the words "geographical continuity" after the word "contiguity" in the sentence reading: "Neither is it possible to disregard the physical phenomenon of geography, whether that phenomenon is described as propinquity, contiguity, appurtenance or identity of the submarine areas in question with the non-submarine contiguous land."

63. Mr. AMADO proposed that the word "physical" be deleted from the English text of that sentence, as it had been from the French. He also proposed that the words "rationally conceived" be deleted from the last sentence.

64. Mr. SANDSTRÖM felt that it would be impracticable to delete paragraph 16 altogether, as Mr. Hsu had suggested, and saw no objection to stating that the Commission did not "deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State". Having

¹⁰ See *supra*, 233rd meeting, paras. 65-67.

said that, however, the General Rapporteur immediately proceeded to consider the question in some detail. In his (Mr. Sandström's) view, it would be preferable simply to refer to the comments attached to the draft articles which the Commission had approved at its third session, and to delete the remainder of paragraph 16. The wording used in that paragraph was unconvincing, vague and, in one particular, open to misinterpretation, for the reference to considerations of convenience would certainly be interpreted as referring to the convenience of the coastal State instead of to the convenience of the international community as a whole. The matter was dealt with much more satisfactorily in the comment in the report on the third session, where it was clearly stated that "the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community".¹¹

65. Mr. LAUTERPACHT accepted the proposals made by Mr. Amado and Mr. Yepes. With regard to Mr. Sandström's suggestion, he felt that it would be highly undesirable, in discussing the legal basis of the sovereign rights attributed to the coastal State, to refer the reader to a report which had been published so long ago as 1951 and which might not be easily obtainable. The comments which the Commission had made in 1951, moreover, did not differ substantially from those contained in paragraph 16, which was, indeed, based on them; so far as the form was concerned, he preferred his own text.

66. The CHAIRMAN put to the vote Mr. Sandström's suggestion that the whole of paragraph 16, except for the first sentence, be replaced by a reference to the relevant comments contained in the report of the Commission covering the work of its third session.

That suggestion was rejected by 6 votes to 3, with 3 abstentions.

67. Mr. SPIROPOULOS said that, although Mr. Lauterpacht had accepted all Mr. Yepes' proposals, he himself was opposed to the deletion of the sentence reading: "There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned".

68. Mr. LIANG (Secretary to the Commission) pointed out that as soon as the General Rapporteur submitted his report to the Commission, it became the property of the Commission. An amendment submitted by a member was not automatically adopted by the mere fact of its acceptance by the General Rapporteur; if other members of the Commission objected to it, it must be put to the vote.

69. The CHAIRMAN therefore put to the vote Mr. Yepes' proposal for the deletion of the sentence reading:

"There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned."

Mr. Yepes' proposal was rejected by 5 votes to 1, with 5 abstentions.

70. Mr. YEPES said that he had voted in favour of the deletion of the sentence in question because, though he rejected legal positivism, he considered that unilateral declarations by States could have some value as one of the constituent elements of customary law.

71. Mr. ZOUREK said that, as the sentence was to be retained, he wished to suggest that the words "a unilateral practice resting solely upon the will of the States concerned" be replaced by the words "a non-concordant practice of the States concerned", since if all the States concerned accepted a certain practice, it had, in his view, the authority of a legal rule.

72. Mr. SCELLE said that he could support Mr. Zourek's suggestions, since he agreed that a concordant practice provided a basis for customary law.

73. Mr. LAUTERPACHT said that he would vote against Mr. Zourek's suggestion, since, although recent practice in the matter of the continental shelf was concordant, that in his view did not suffice to give it the authority of a legal rule.

Mr. Zourek's suggestion was rejected by 6 votes to 3, with 2 abstentions.

74. Mr. SPIROPOULOS felt that paragraphs 11 and 12 of the draft chapter did not contain any "considerations relevant to this matter", as was stated in the second sentence of paragraph 16. He also asked what was meant by the word "premature" in the fourth sentence, reading "In particular it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice".

75. Mr. LAUTERPACHT felt that the original drafts of paragraphs 11 and 12 had contained some relevant considerations. Now that they had been amended, however, he agreed that the reference to them was no longer so appropriate, and accordingly suggested that the second and third sentences of paragraph 16 be combined to read: "The considerations relevant to this matter cannot be reduced to a single factor."

With regard to the fourth sentence, it could not be denied that if the practice ever became universal and met with no objections, it would be possible to base the principle of the coastal State's sovereign rights upon it; that was what he meant by "premature".

76. Mr. SPIROPOULOS felt that even in that case practice could not constitute a legal basis. He suggested that the text be amended to read:

"In particular it is not possible to base the principle of the sovereign rights of the coastal State exclusively on recent practice, for there is no question..."

¹¹ "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, Article 2, comment 6.*

He also suggested that the word "For", in the sentence beginning "For that practice itself" be replaced by the word "However".

77. Mr. LAUTERPACHT accepted those suggestions.

Paragraph 16, as amended, was approved by 7 votes to 2 with 2 abstentions.

78. Mr. ALFARO, on a point of order, drew attention to the fact that the Commission had already devoted many hours to the draft chapter on the régime of the high seas, but had considered only 16 of its 61 paragraphs. If the Commission was to finish its work by the end of the following week, as planned, it was obviously essential that less time be spent on the individual paragraphs, and he suggested that the Chairman might make some proposals designed to restrict discussion, particularly of questions of substance.

79. Mr. YEPES and Mr. SCELLE supported Mr. Alfaro's suggestion.

80. After some discussion, Mr. KOZHEVNIKOV suggested that the Chairman should submit his proposals in writing at the next meeting, and that the Commission should in the meantime proceed with its work.

81. The CHAIRMAN said that he would do as Mr. Kozhevnikov suggested,¹² but feared that any proposals which he could make would be insufficient to ensure that the Commission would complete its work by the appointed time. He therefore suggested that the next meeting, on Monday, 10 August, should last from 2.30 p.m. to 6.30 p.m., instead of from 2.45 p.m. to 6 p.m., and that the following meetings should, if circumstances so required, begin at 9 a.m. instead of 9.30 a.m.

It was so agreed.

82. The CHAIRMAN said that, in accordance with Mr. Kozhevnikov's suggestion, the Commission should in the meantime proceed with its work. In view, however, of the impending departure of Mr. Spiropoulos, who had been Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, he suggested that consideration of the draft chapter be deferred in order to enable the Commission to have the benefit of Mr. Spiropoulos' view on the further action it should take in connexion with that subject.

The Chairman's suggestion was adopted.

Draft Code of Offences against the Peace and Security of Mankind (item 6 of the agenda) (A/CN.4/72)

83. The CHAIRMAN drew attention to the note by the Secretariat on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/72). It was there pointed out that, in view of the General Assembly's decision to defer consideration of the draft Code from its sixth session to the seventh, the Secretary-

General had invited Member Governments to communicate to him their comments or observations on the draft Code, for submission to the General Assembly at its seventh session. At the seventh session, however, the United Kingdom representative had stated that "in the opinion of his delegation the draft Code was not ripe for consideration by the General Assembly, that the comments received by governments should be submitted to the International Law Commission; and that only after having considered the comments could the Commission present to the General Assembly its final recommendations in the matter". The draft Code had therefore been removed from the General Assembly's agenda, "on the understanding", in the words of the President, "that the matter would continue to be discussed by the International Law Commission".

84. The Commission had therefore to examine the fourteen comments which had so far been received from governments and which were reproduced in documents A/2162 and A/2162/Add.1.¹³ When in receipt of governments' comments in the past, the Commission had followed two different courses. In the case of the draft articles on the continental shelf it had requested the Special Rapporteur to study those comments and in the light of them and of the views expressed by other authorities to submit a new report. In the case of the draft on Arbitral Procedure, it had made no such request to the Special Rapporteur, although Mr. Scelle had subsequently given it an oral summary of the comments at the outset of its discussions. In his view, it was essential that the closest possible attention should be given to the comments which had been received on the draft Code of Offences against the Peace and Security of Mankind, since in many cases it was obvious that they reflected very careful and lengthy study on the part of governments.

85. It should also be noted that the General Assembly had set up a special committee for the purpose of establishing a definition of aggression, which was, of course, one of the main offences referred to in the draft Code. He would ask the Secretary to give further particulars of that committee, whose report would obviously have an important bearing on the Commission's work.

86. Mr. LIANG (Secretary to the Commission) said that the special committee set up to establish a definition of aggression was holding a session beginning in August in New York.¹⁴ Its report would be submitted to the General Assembly, which, however, would probably not consider it until its ninth regular session. It would however be available for consideration by the Commission at its next session, preceding the session of the General Assembly. The Commission would have to determine the relation between the draft Code and the special committee's definition, and he did not think it would be feasible for it to wait until its seventh session,

¹³ See *Official Records of the General Assembly, Seventh Session, Annexes, agenda item 54.*

¹⁴ 24 August-21 September 1953.

¹² See *infra*, 236th meeting, para. 1.

when the General Assembly would have considered the latter, before doing so. He submitted that the Commission should therefore place the draft Code on the agenda for its next session.

87. The CHAIRMAN asked whether the Commission wished to request the Special Rapporteur to submit a new report to assist it in its consideration of the draft Code at its next session.

88. Mr. YEPES proposed that Mr. Spiropoulos be invited to submit to the next session a report concerning the comments which had been received from governments, and containing the conclusions he had reached from study of them.

89. Mr. HSU supported Mr. Yepes' proposal, but suggested that Mr. Spiropoulos should be left free to submit an entirely new report if he so wished. Several years had elapsed since the Commission had last considered the matter and members had had time for reflection. They might now feel that the draft Code which they had prepared in 1951 had been unduly conservative. At that time, the Commission had regarded it as its main function to study the positive rules of international law; with the conclusion of the draft Convention on Arbitral Procedure it was now venturing more boldly into the field of the progressive development of international law. The draft Code which had been adopted in 1951 merely listed certain acts which could be regarded as offences under existing rules of law;¹⁵ it did not attempt to show the relation between them or to define what was common to them all. In his view the basic offences against mankind were aggression and persecution, but there were many more aspects both of aggression and of persecution than were covered by the merely illustrative list contained in article 2 of the draft Code.

90. Mr. SPIROPOULOS (Special Rapporteur) said that he was at the Commission's disposal and that, unless it received a written report on the subject, the Commission might well be in a difficult situation at its next session. In the case of the draft on Arbitral Procedure the Commission had known that the Special Rapporteur would be present to assist it in its examination of the comments received from governments; in the present instance it had no assurance that either he or any other member would be present at the next session.

91. He recalled that the Commission had decided against attempting to define aggression. The definition adopted by the special committee would not be binding on it, but the Commission would certainly wish to take it into account.

92. The CHAIRMAN pointed out that the Commission could only take a formal decision on the question within the framework of its other decisions

concerning arrangements for the next session. It had been of value, however, to discuss the question in the presence of Mr. Spiropoulos, whom he wished to thank on behalf of the Commission for the contribution he had made to all its discussions, and to whom he wished to convey the Commission's best wishes for his re-election.

93. Mr. SPIROPOULOS thanked the Chairman of the Commission for his kind words and expressed his pleasure at having had the privilege of collaborating with all its members.

The meeting rose at 1.5 p.m.

236th MEETING

Monday, 10 August 1953, at 2.30 p.m.

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Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CORDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 235th meeting*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1)* (*resumed from the 235th meeting*)

1. The CHAIRMAN said that, in pursuance of the suggestion made by Mr. Kozhevnikov at the previous meeting,¹ he wished to propose that the following procedure be adhered to during the discussion of the remainder of chapter III, on the understanding that if it proved satisfactory, the same procedure might also be adhered to during the discussion of the remaining chapters of the draft report:

* Mimeographed document only Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

¹ See *supra*, 235th meeting, para. 80.

¹⁵ See text in "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) Chapter IV*. Also in *Yearbook of the International Law Commission, 1951*, vol. II.