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Summary record of the 236th meeting

Topic:
Other topics

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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.

"1. The report shall be discussed paragraph by paragraph. The paragraphs shall not be read out.

"2. Members shall be allowed to speak on a particular paragraph only to propose total or partial deletion, addition or changes, and for not more than three minutes. If a proposed amendment involves an addition to the paragraph or a change in the wording, it must be submitted to the Secretariat in writing the day before the discussion.

"3. After the General Rapporteur has had the opportunity of giving his opinion on the proposed amendments, they shall be put to the vote without further discussion.

"4. If no member asks for a vote on a particular paragraph, it shall be regarded as adopted un-animously.

"5. After the voting has taken place, every member shall be entitled to speak for not more than two minutes to explain his vote."

The Chairman's proposal was adopted.

*Paragraph 17 (74) **

2. The CHAIRMAN, speaking as Special Rapporteur, proposed the deletion of the last sentence, reading: "The Commission did not consider that the matter entered within its competence and it makes no formal recommendation in that direction". The matter was within the competence of the Commission, and it had made similar recommendations in connexion with the problem of statelessness.

3. Mr. LAUTERPACHT accepted the Chairman's proposal.

4. Mr. ZOUREK proposed that the whole of paragraph 17 be deleted, since the idea of the internationalization of the continental shelf had been rejected and it was impossible to say anything more without re-opening the whole discussion.

5. Mr. LAUTERPACHT explained that, as some discussion of the question referred to in paragraph 17 had taken place, he had felt it his duty to indicate the gist of what had been said. He therefore felt that the entire paragraph at any rate ought not to be deleted.

6. Mr. KOZHEVNIKOV proposed, as a compromise, that the substance of the first part of the first sentence should be retained and the remainder of the paragraph deleted. The paragraph would then read:

"For the reasons stated, as well as having regard to practical considerations, the Commission has been unable to countenance the idea of the internationalization of the submarine areas comprised in the concept of the continental shelf."

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

7. Mr. LAUTERPACHT pointed out that, if Mr. Kozhevnikov's proposal were adopted, the Commission's intentions would be distorted.

8. Mr. KOZHEVNIKOV said that he could not agree that his proposal distorted the Commission's intentions, since it had in fact rejected the idea of internationalization of the continental shelf.

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

Mr. Kozhevnikov's proposal was rejected by 5 votes to 2, with 4 abstentions.

The Chairman's proposal was unanimously adopted.

Paragraph 17, as amended, was approved by 7 votes to 1 with 3 abstentions.

Paragraph 18 (75)

Paragraph 18 was approved by 9 votes to none, with 2 abstentions.

Paragraph 19 (76)

9. Mr. ZOUREK proposed the insertion of the words "for the purposes of exploration and exploitation" after the words "although the sea-bed is subject to the sovereign rights of the coastal State", in order to bring the text into line with the text of the articles.

10. Mr. LAUTERPACHT accepted Mr. Zourek's proposal.

Paragraph 19, as amended, was approved by 8 votes to none, with 2 abstentions.

Paragraph 20 (77)

11. Mr. KOZHEVNIKOV proposed the deletion of the last sentence.

12. Article 8 was referred to elsewhere, and it was inappropriate to refer to it in connexion with paragraph 20.

13. Mr. LAUTERPACHT said that he could not accept Mr. Kozhevnikov's proposal, since the last sentence of paragraph 20 was perhaps the most important in the whole paragraph, dealing as it did with the settlement of disputes arising out of the crucial word "reasonableness".

Mr. Kozhevnikov's proposal was rejected by 5 votes to 2, with 3 abstentions.

Paragraph 20 was approved by 8 votes to none, with 3 abstentions.

Paragraph 21 (78)

14. Mr. SANDSTRÖM proposed the deletion of the two sentences reading:

"With regard to notice to be given, in accordance with paragraph 4, of "installations constructed", the obligation in question refers primarily to installations already completed. There is in principle no duty to

disclose in advance plans relating to contemplated construction of installations”.

15. The beginning of the last sentence of paragraph 21 should, in consequence, be amended to read: “In cases in which the actual construction of installations is likely to interfere...”

16. What the Commission’s intentions had been in 1951 was clear from the relevant comment on the draft articles then adopted, where it was stated:

“Interested parties... should be duly notified of the construction of installations, so that these may be marked on charts. Wherever possible notification should be given in advance.”²

17. Since the time when it had placed that interpretation on the provision in question, nothing had been said to make the Commission change its mind.

18. Mr. LAUTERPACHT saw no objections to Mr. Sandström’s proposal. It might, however, sometimes be difficult for him to comment on proposed amendments without seeking the views of the Special Rapporteur, and he, therefore, hoped that paragraph 3 of the procedural rules which the Commission had adopted on the Chairman’s proposal would not be interpreted too strictly.

19. The CHAIRMAN, speaking as Special Rapporteur, said that in the present instance he would be glad of an opportunity of commenting on the proposed amendments, since he could not altogether support them.

20. The Commission was agreed that notice of installations constructed should be given wherever possible, but what it had primarily in mind was permanent installations; it had been agreed that it would not always be necessary to comply fully with the provisions of paragraph 4 of article 6 in the case of temporary installations. The text proposed by the General Rapporteur was not perhaps so clear as might be desired, but he could not agree that the two sentences in question should be deleted. If the Commission agreed, he would submit a re-draft of paragraph 21.

It was so agreed.

Paragraph 22 (79)

Paragraph 22 was approved by 8 votes to none, with 3 abstentions.

Paragraph 23 (80)

21. Mr. ZOUREK proposed that in the French text of paragraph 23 the words “*elle interdit dans leurs limites*” be replaced by the words “*elle y interdit*”.

Mr. Zourek’s suggestion was adopted.

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, Article 6, comment 2.* Also in *Yearbook of the International Law Commission, 1951, vol. II.*

³ See *infra*, 238th meeting, para. 23.

Paragraph 23, as amended in the French text only, was approved by 10 votes to none, with 1 abstention.

Paragraph 24 (81)

Paragraph 24 was approved by 8 votes to 2, with 1 abstention.

Paragraph 25 (82-84)

22. Mr. ZOUREK proposed the deletion of the last three sentences of paragraph 23 and the insertion, in accordance with the decision taken by the Commission at its 205th meeting,⁴ after paragraph 25, of a new paragraph reading as follows:

“The Commission was of the opinion that where the same continental shelf is contiguous to the territories of two adjacent States, the delimitation of the continental shelf between them should be carried out in accordance with the same principles as govern the delimitation of the territorial waters between the two States in question.”

23. Mr. LAUTERPACHT said that he could not believe that it had really been the Commission’s intention to take a decision which, at first sight, ran directly counter to the principles of article 7, paragraph 2, of the draft articles. That article clearly stated:

“Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States, or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.”

24. Mr. ZOUREK said that the Commission had adopted by 12 votes to 1 the suggestion “that it should be stated in the commentary that the principles governing delimitation of the continental shelf and those governing delimitation of the territorial waters should be the same”. There was no contradiction between such a statement and the principles of article 7, paragraph 2, since the latter merely stated the rule which should be followed “in the absence of agreement” between the States concerned.

25. Mr. CORDOVA agreed with Mr. Zourek that there was no contradiction between the statement which the Commission had already agreed to insert in the commentary and the principles of article 7, paragraph 2. The States concerned should apply the same principles for delimitation of the continental shelf as for delimitation of the territorial waters; if they could not agree to do so, they should apply the principle which was stated in article 7, paragraph 2.

26. Mr. AMADO and Mr. YEPES agreed that the text proposed by Mr. Zourek should be inserted in the commentary.

⁴ See *supra*, 205th meeting, para. 68.

27. Mr. LAUTERPACHT said that, after further considering the matter, he was inclined to agree that there was no contradiction between that text and article 7, paragraph 2. If a system was already in existence for delimiting the territorial sea of two adjacent States, the same system should be used for delimiting their continental shelves, notwithstanding the provisions of article 7, paragraph 2.

28. The CHAIRMAN, speaking as Special Rapporteur, said that for the purpose of delimiting the territorial sea certain factors had often to be taken into account which were quite irrelevant to delimitation of the continental shelf. If the same principles were to be applied in both cases, the results achieved might well be absurd.

29. Mr. ZOUREK felt, on the contrary, that absurd results would be obtained if the same principles were not applied in delimiting the continental shelf as in delimiting territorial waters; delimitation of territorial waters comprised delimitation of the underlying sea-bed and subsoil, and if the continental shelf was delimited in accordance with principles other than those governing the delimitation of territorial waters, the impossible situation might arise that a State which had begun to exploit the natural resources of the sea-bed and subsoil underlying its territorial sea was obliged to stop exploiting them because they formed part of an adjacent State's continental shelf.

30. Mr. CORDOVA felt that it was unnecessary for the Commission to waste time discussing points of detail; it had only to give effect to the decision which it had already taken. That decision was a wise one, since, apart from the fact that the principle stated was sound, it would lessen the rigidity of article 7, paragraph 2.

31. Mr. LAUTERPACHT felt that it was not article 7, paragraph 2, which was rigid; it allowed for exceptions, whereas the text proposed by Mr. Zourek did not.

32. Mr. SANDSTRÖM felt that the decision which the Commission had taken at its 205th meeting could be expressed in a form of words which would not be open, to the same extent as was the text proposed by Mr. Zourek, to the objections to which attention had been drawn.

33. Mr. CORDOVA said that there was no reason why the Commission should not add something to the text proposed by Mr. Zourek if that was considered necessary.

34. The CHAIRMAN accordingly suggested that the Commission should agree to include the text proposed by Mr. Zourek, but that it should defer the vote on paragraph 25, to which he understood that other members of the Commission in any case wished to submit further amendments, in order to give them an opportunity of proposing additions to the text proposed by Mr. Zourek, so as to make the Commission's intentions quite clear.

35. Mr. SANDSTRÖM said that he wished to be

regarded as abstaining on the Chairman's suggestion, since the text proposed by Mr. Zourek went beyond what the Commission had decided, in that it laid down as an absolute rule what had been intended merely as a statement of principle.

On that understanding, *the Chairman's suggestion was adopted.*⁵

Paragraph 26 (85)

36. Mr. AMADO asked what was meant by the words "as indeed some of the substantive aspects of the question" in the passage "the question of terminology to be used... in the drafts prepared by the Commission, as indeed some of the substantive aspects of the question, will be determined when the Commission adopts its final draft on the regime of territorial waters."

Mr. LAUTERPACHT agreed that those words could be deleted.

Paragraph 26, as amended, was approved by 10 votes to none, with 1 abstention.

Paragraph 27 (86)

Paragraph 27 was approved by 8 votes to 2, with 1 abstention.

Paragraph 28 (87)

37. Mr. SCALLE pointed out that the French text of the fourth sentence,⁶ beginning "Thus, it must often remain a question for subjective appreciation, with the consequent possibility of disputes, whether...", conveyed precisely the contrary sense to the English text, which was correct.

38. Mr. SANDSTRÖM proposed the deletion of the word "sovereign" from the phrase "the sovereign rights of the coastal State over the continental shelf" at the end of the second sentence, as it was misleading without the addition of the words "for the purpose of exploration and exploitation of the continental shelf".

39. Mr. CORDOVA proposed that in the sentence reading "For these reasons it seems essential that States availing themselves of the sovereign right to exploit the continental shelf should be under a duty to submit to arbitration any disputes arising in this connexion, the words "States availing themselves of the sovereign right to exploit the continental shelf" should be replaced by the words "States which are in dispute concerning the exploration or exploitation of the continental shelf", since it was not only the coastal State which should be placed under that obligation.

40. Mr. LAUTERPACHT accepted both Mr. Sandström's and Mr. Córdova's proposals.

⁵ See *infra*, 238th meeting, para. 25.

⁶ It read as follows: "C'est donc souvent par une appréciation subjective — avec les possibilités de contestation qui en résultent — que pourront..."

On the understanding that the French text of the fourth sentence would be brought into line with the English, *paragraph 28, as amended, was approved by 8 votes to 2 with 1 abstention.*

Paragraph 29 (89)

41. Mr. SCELLE said that the last sentence of paragraph 29, reading "Arbitration, as referred to in article 8, is conceived as arbitration in the established meaning, namely, as a procedure aiming at a binding settlement on the basis of law", would be profoundly shocking to any French jurist, at any rate as it stood in the French text. The established meaning of arbitration was very far from being merely "a procedure aiming at a binding settlement on the basis of law", a definition which was equally applicable to the procedure of the International Court of Justice.

42. The CHAIRMAN suggested that the sentence be amended to read: "Arbitration, as referred to in article 8, is conceived as a procedure aiming at a binding settlement on the basis of law".

It was so agreed.

Paragraph 29, as amended, was approved by 8 votes to 1, with 2 abstentions.

Paragraph 30 (90)

Paragraph 30 was approved by 8 votes to 2, with 1 abstention.

Paragraphs 31-39 (91)⁷

43. Mr. LAUTERPACHT, on a point of order, said that he understood that Mr. Sandström intended to make

⁷ Paragraphs 31-39 read as follows:

"31. It is considered useful (as in the case of the Reports presented by the Commission), to indicate the general nature of the task undertaken by it in the matter of the Continental Shelf. Although the subject matter of the Articles on the Continental Shelf is of conspicuous novelty, the Commission is of the opinion that the formulation of legal principles which are applicable to it involves elements both of codification and of development of international law.

"32. From the point of view of codification most of the Articles as now submitted to the General Assembly constitute a re-affirmation of the traditional principle of the freedom of the seas in relation to a problem which was not envisaged at the time when that principle was evolved and consolidated. The principle of the freedom of the seas is not inconsistent with the recognition, within a defined compass and for specified purposes, of the sovereign rights of the coastal state over the continental shelf. The utilization of the subsoil of the bed of the sea (except possibly in connection with submarine tunnels) and, except for the purpose of sedentary fisheries and submarine cables, the utilization of the bed of the sea itself were not contemplated till after the Second World War. For this reason the occasional denial on the part of writers of the possibility of placing the subsoil of the bed of the sea and the bed of the sea under the jurisdiction of individual states, cannot be regarded as expression of a legal rule inevitably following from the principle of the freedom of the seas. They were deductions, unrelated to any concrete situation, from a general principle. The purpose of the Articles as here formulated is to maintain and safeguard the

an important statement covering paragraphs 31 to 39, which comprised sections C and D of the draft chapter, entitled respectively "The nature of the task of the Commission" and "Action recommended in respect of the articles on the continental shelf". He suggested that in the circumstances the Commission should waive paragraph 2 of the procedural rules which it had adopted on the Chairman's proposal and permit Mr. Sandström to speak for more than three minutes.

44. The CHAIRMAN agreed, but expressed the hope that Mr. Sandström would be as brief as possible.

45. Mr. SANDSTRÖM, after thanking Mr. Lauterpacht and the Chairman for their courtesy, said that the proposal which he wished to make was that paragraphs 31 to 39 should be replaced by a single paragraph reading as follows:

"The draft falls within the category of progressive development of international law, and the Commission submits the report through the Secretary-General to the General Assembly with a recommendation in view of the conclusion of a convention [or in view of a recommendation for conclusion of a convention]."

46. He could not accept Mr. Lauterpacht's definition of codification or the conclusion which Mr. Lauterpacht had drawn from it. In his view, codification necessarily entailed the ascertainment (*constatation*) of rules of law with a view to stating what was the law on a given subject. In scientific work one could use whatever terms one pleased, provided that one explained what they meant. The Commission, however, was not—at any rate primarily—concerned with purely scientific work; its task was to decide whether the articles which it had formulated fell within the category of codification or

principle of the freedom of the seas in relation to submarine areas which it is now considered necessary to subject to a régime of sovereign rights of States for the purpose of the exploration and exploitation of the natural resources of these areas. To that extent these Articles are essentially in the nature of a codification, by reference to a new problem, of an existing legal principle. This is the purpose of Articles 3 and 4 which lay down expressly that the sovereign rights of the coastal State over the continental shelf do not affect the legal status of the superjacent sea or of the air-space above it; of Article 5 which preserves, in general, the right of States to lay and maintain submarine cables on the bed of the sea; and of Article 6 which safeguards the freedom of the sea in the matter of navigation and fisheries, especially in relation to any installations that may be erected in connection with the exploration and the exploitation of the continental shelf.

"33. Secondly, notwithstanding the fact that only a short period has elapsed since the Treaty concluded in 1942 between the United Kingdom and Venezuela and the Proclamation of the President of the United States in 1945, there is already in existence, in the language of Article 15 of the Statute of the Commission, an 'extensive State practice, precedent and doctrine' on the subject. In particular, since 1945 a considerable number of States have proclaimed their rights to the continental shelf or submarine areas contiguous to their coasts. These proclamations have met with no protest on the part of other States except when/where they were combined with claims deemed to go beyond the assertion of rights to the continental shelf or submarine areas generally. While there is as yet lacking, in relation to the practice in

within that of the progressive development of international law, as those categories were defined in its Statute. Article 15 of the Statute was quite clear on the point. It read:

"In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in the fields where there already has been extensive State practice, precedent and doctrine."

The Commission should not be misled by the words "extensive State practice, precedent and doctrine" since what went before made it clear that those words referred to cases where the practice, precedent and doctrine had been so extensive as to create a rule of law. It was clear that the purpose of the distinction made between progressive development and codification respectively was to enable a different procedure to be followed in respect of the various drafts prepared by the Commission, according to whether they constituted codification or progressive development. It was also clear that, although other drafts prepared by the Commission might contain elements of both codification and progressive development, the draft articles on the continental shelf were a pure case of progressive development. Article 15 of the Statute provided an easy way of deciding whether a question was codification or progressive development; if a relevant rule of law existed, it was codification; if it did not, it was progressive

the matter of the continental shelf, that element of general recognition which can qualify it as constituting customary international law, that practice cannot be disregarded. To that extent the Articles on the Continental Shelf, insofar as they take into account a widely adopted practice, including that of important maritime States, must be considered as being in the nature of a codification.

"34. Also, insofar as — as stated above in paragraph 16 — these Articles are merely expressive of the physical fact of contiguity, propinquity, or identity of the submerged land in relation to the not-submerged continent of which they are a prolongation, they cannot be regarded as introducing a drastic innovation.

"35. However, that very declaration — whether of an existing fact or of the existing legal practice — in relation to a problem of manifest novelty is such as to bring the Articles in question within the category of 'development of international law'. The same applies to the safeguards adopted in Articles 3-6 for the principle of freedom of the high seas. While that principle is part of the established law the safeguards thus adopted are of necessity an innovation. They emphasise the dual aspect of the function of the Commission considered as an agency for both codifying and developing international law.

"36. In comparison Article 7, which lays down the principle of equidistance for determining the boundaries of the continental shelf, belongs clearly to the dominion of 'development of international law'. This is so although, intrinsically,

development. None of the rules contained in the draft articles were existing rules of law, and the whole draft clearly dealt with a subject which had "not yet been regulated by international law". Of course, the articles referred to existing rules of law — for instance, when they stated that the status of the high seas was not affected by the rights of the coastal State over the continental shelf. That was, however, merely a negative way of defining and limiting the rights conferred upon the coastal State by the new law.

47. It had never previously been suggested that the draft articles were codification. At its third session, the Commission had decided to give to the draft articles on the continental shelf and related subjects which had then been approved "the publicity referred to in article 16, paragraph (g) of its Statute,"⁸ and article 16 dealt solely with the progressive development of international law.

48. Since the draft articles were a work of progressive development, not of codification, he could not agree with the General Rapporteur that the conclusion of a convention based upon them was neither feasible nor desirable. Article 15 of the Statute made it clear that in matters of progressive development the only course open to the Commission was the preparation of draft conventions; indeed, it was difficult to see how else the Commission's recommendations on such questions could acquire the force of law.

49. Mr. LAUTERPACHT felt that it was unavoidable that the Commission should have to discuss the question raised by Mr. Sandström at some length, since it was relevant to all its work. Mr. Sandström had said that it was easy to distinguish codification from progressive development, but the Commission had agreed, when

it does no more than to give expression to the 'reason of the thing' in the matter.

"D.

"Action recommended in respect of the articles on the continental shelf"

"37. As stated above in paragraphs 31 et seq. of this Report, the Articles on the continental shelf as now finally drafted by the Commission fall within both Progressive Development and Codification of International Law in the meaning of the Statute of the Commission. The provisions of Articles 16 and 23 of the Statute referring to recommendations of the Commission in the matter of its final drafts have been surveyed above in paragraphs 44 to 46, Chapter: Arbitral procedure, V. Action recommended with Regard to the Final Draft.

"38. In the opinion of the Commission the course most appropriate and useful with regard to the Final Draft on the Continental Shelf is that envisaged in paragraph (a) of Article 23, namely, that the General Assembly shall 'take no action, the report having already been published'. The subject matter of the present final draft is not such as to call, for the time being, for the conclusion of a Convention as contemplated in paragraphs (c) and (d) of Article 23. There is as yet no sufficiently general practice of governments and no practical experience with regard to the exploration and exploitation of the continental shelf to make feasible and desirable the conclusion of a convention. For the same reason, and also in view of the limited number of States which have so far issued proclamations on the subject, it may not be necessary for the General Assembly in the

dealing with the draft on Arbitral Procedure, that it was sometimes very difficult to distinguish between them.

50. Mr. Sandström had failed to point out that the draft chapter recognized the fact that the draft articles on the continental shelf were largely in the nature of progressive development. If he had elaborated the fact that they also partook to some extent of the nature of codification, that was because that aspect was less obvious. If necessary, the text could be amended in such a way as to make it clear that the Commission recognized that the draft articles were mainly in the nature of progressive development, but it could not be denied that they were also in the nature of codification. He did not, indeed, see how, in the light of what the Commission had itself said concerning the articles in its report on the work of its third session, and again in paragraph 16 of the draft chapter at present under consideration, that could be gainsaid.

51. Mr. Sandström had said that all the rules contained in the draft articles were new. In his own view, all the crucial articles were simply statements of an existing rule of international law in relation to a new phenomenon. If the Commission had stated that the legal status of the superjacent waters or the legal status of the air-space above the superjacent waters, or the traditional rights of navigation and fishing, were affected by the rights given to the coastal State over the continental shelf, it would have been making new rules of law. It had done none of those things, however; it had specifically stated that the legal status of the superjacent waters and of the air-space above the superjacent waters was not affected, and that traditional navigation and

language of paragraph (b) of Article 23, 'to take note of or adopt the report by resolution', though, in the view of the Commission, there may be room for considering the adoption of the latter course. The affirmation of the principle of the freedom of the sea in relation to the new problems raised by the exploration and exploitation of the continental shelf is the main feature of the present Final Draft. As such it is of an importance transcending the interests of States which have proclaimed their right to the continental shelf. That fact may be deemed to be of sufficient significance to call for a resolution of the General Assembly expressly approving the Final Draft of the Articles on the Continental Shelf.

"39. Subject to that consideration, the Commission believe that, as already stated, the alternative envisaged under paragraph (a) of Article 23 would be most appropriate and the Commission so formally recommends. The Final Draft has been adopted by the Commission after detailed study extending for a period of three years and after prolonged discussion. In drafting the rules governing the regime of the continental shelf the Commission has been guided by the view that the progressive development of international law in this and other matters can be secured only through recognition of new legitimate needs and interests within the framework of established principles of unimpaired vitality. It may be sufficient if the rules thus formulated are allowed, without recourse to any formal act of approval on the part of the General Assembly, to exert the influence to which they are entitled by virtue of their intrinsic merit and authority."

⁸ "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)*. Also in *Yearbook of the International Law Commission, 1951*, vol. II.

fishing rights remained intact. And it had provided detailed machinery for ensuring that those rights were left intact.

52. As was stated in paragraph 33 of his draft chapter of the report, there was still lacking, in relation to practice in the matter of the continental shelf, that element of general recognition which could qualify it as constituting customary international law, but the practice was sufficiently widespread—and was also followed by the major maritime States—for it to be impossible for the Commission to disregard it or to dismiss it as of no legal value. To that extent, the draft articles were in the nature of codification. Doctrine in the matter had also been almost unanimously in favour of what was stated in the draft articles. In other words, the draft articles concerned a field where, in the words of that part of article 15 of the Statute which referred to codification, "there already has been extensive State practice, precedent and doctrine."

53. Even were Mr. Sandström correct in maintaining that the draft articles were purely a work of progressive development, it was surely unnecessary to interpret article 15 of the Statute so rigidly as to argue that the only course open was the conclusion of a convention. In fact, the only States which would accede to such a convention would be those which already claimed a continental shelf, and the whole purpose of the Commission's work, which was to provide a legal framework within which such States could exercise their rights over the continental shelf without jeopardizing the principle of the freedom of the seas, would be defeated.

54. The CHAIRMAN pointed out that, under paragraph 3 of the procedural rules which the Commission had adopted at the beginning of the meeting, Mr. Sandström's proposal should be put to the vote without further discussion. If the Commission wished to waive that rule and to permit further discussion, he would have no objection, but must point out that in that case there was a danger that the Commission would be unable to complete its work by the appointed time.

55. Mr. KOZHEVNIKOV, on a point of order, said that the Chairman's proposals concerning the procedure to be followed during the discussion of chapter III of the draft report referred to the discussion of normal issues. A question of principle, such as that raised by Mr. Sandström's proposal, should clearly be discussed according to the normal rules of procedure; the Commission should therefore first decide whether or not it would discuss it.

56. The CHAIRMAN maintained that, as an amendment to paragraphs 31-39 of chapter III, Mr. Sandström's proposal fell within the terms of his (the Chairman's) procedure proposals. It should therefore be put to the vote. If it were adopted, sections C and D of chapter III would be replaced by the text proposed by Mr. Sandström. If it were rejected, those sections would be discussed paragraph by paragraph.

57. Mr. CORDOVA protested that the subject of section C ("The nature of the task of the Commission")

had not previously been considered. In it were raised important questions of principle which should be carefully discussed. It would be better, in his view, for the Commission to vote for the deletion of that section, than to take a hurried decision on Mr. Sandström's alternative text.

58. Mr. HSU said it was evident that Mr. Sandström's proposal was not universally acceptable. He accordingly formally proposed the deletion of sections C and D of chapter III.

59. The CHAIRMAN, accepting Mr. Hsu's proposal, said that it was first of all necessary for the Commission to decide whether to abide by his (the Chairman's) procedural proposals, or to discuss sections C and D in detail.

60. Mr. SCELLE pointed out that the Chairman's procedural proposals had been formally adopted; the Commission should therefore, in his view, abide by them.

61. Mr. LAUTERPACHT inquired whether Mr. Hsu's proposal was in order, for it was obligatory on the Commission to make some recommendation to the General Assembly when submitting drafts to it. If sections C and D were deleted, and Mr. Sandström's proposal were rejected, the Commission would be departing from the terms of its Statute.

Mr. Hsu's proposal that sections C and D of chapter III of the draft report be deleted was rejected, 4 votes being cast in favour of it and 4 against, with 1 abstention.

Mr. Sandström's proposed alternative text for paragraphs 31-39 inclusive was adopted by 4 votes to 3, with 3 abstentions.

62. Mr. LAUTERPACHT pointed out that Mr. Sandström's proposal included alternative texts for the last clause. Which text had the Commission adopted?

63. The CHAIRMAN thought that that was largely a matter of drafting, and asked Mr. Sandström for his opinion.

64. Mr. KOZHEVNIKOV said that he had abstained from voting on Mr. Sandström's proposal because in his view it was wanting in clarity. It raised an important question of principle which, in his view, had not been adequately discussed. He doubted whether the Commission had in fact known what it was voting on, for there was now some doubt as to exactly what text had been adopted. For his part, he had no objections to the conclusion of a convention, but if that was the recommendation that was to be addressed to the General Assembly, he would appreciate the opportunity of entering certain reservations.

65. Mr. ZOUREK said that he, too, had abstained from voting on Mr. Sandström's proposal as a matter of principle. In his view, the Commission had been wrong to take a decision on an important issue without ade-

quate discussion, especially when it was difficult to know exactly what text was being voted on.

66. Mr. AMADO explained that he had voted in favour of Mr. Hsu's proposal, because the texts of sections C and D of chapter III of the draft report contained a number of polemical statements, with which he declined to be associated.

67. Mr. CORDOVA explained that he had voted in favour of Mr. Hsu's proposal because in his view the Commission's report should be confined to providing an account of the Commission's work during the session, and the subject matter of sections C and D had not been discussed previously.

68. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted against Mr. Sandström's proposal because its adoption would have involved the Commission in recommending that a convention be concluded. In his view, such a course would be premature.

69. Mr. ALFARO explained that he had voted against Mr. Sandström's proposal for exactly the same reason.

70. The CHAIRMAN then asked Mr. Sandström and the General Rapporteur for their views on the alternative clauses at the end of the former's proposal.

71. Mr. SANDSTRÖM said that the difference between the two clauses was only a matter of drafting. He had no preference for either.

72. Mr. LAUTERPACHT suggested that the text ought to contain an appropriate reference to the Commission's Statute. He wondered whether Mr. Sandström had in mind article 16, paragraph (j), thereof, according to which proposals relating to the progressive development of international law were to be submitted by the Commission "with its recommendations through the Secretary-General to the General Assembly".

73. Mr. SANDSTRÖM thought that the terms of article 23 were more apposite although, as that article was placed in the section of the Statute entitled "Codification of International Law", it could not be referred to specifically.

74. Mr. LIANG (Secretary to the Commission) referring to paragraph 78 in chapter VII of the Commission's report covering the work of its third session,⁹ pointed out that it was there stated that the Commission had decided "to give to its drafts the publicity referred to in article 16, paragraph (g), of its Statute, in particular to communicate them to governments so that the latter could submit their comments envisaged in paragraph (h) in the same article". The vote that had just been taken was a direct consequence of the action that had followed from the decision reported in that paragraph. If, therefore, it was necessary for the report to refer to any article in the Commission's Statute, it must refer to article 16.

⁹ *Ibid.*

75. Referring next to article 15 of the Statute, he pointed out that it was there stated that "the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions..." Clearly, Mr. Sandström's proposal followed in that respect, too, the Commission's decision at its third session, which was in the light of the references to article 16 of the Commission's Statute to the effect that the articles on the continental shelf constituted a development of international law.

76. Mr. SANDSTRÖM said that he regarded the list of possible courses of action set forth in article 23 of the Commission's Statute as being descriptive of any recommendations that the Commission might choose to make to the General Assembly, whether on the codification of international law or on its progressive development.

77. Mr. CORDOVA wondered whether it would not be wiser for the Commission to reconsider Mr. Sandström's proposal. For his part, for reasons which he had already explained, he had first voted in favour of Mr. Hsu's proposal that sections C and D be deleted, but subsequently for Mr. Sandström's proposal because, had it been rejected, sections C and D would have stood.

78. The CHAIRMAN said that its rules of procedure empowered the Commission to re-open by a two-thirds majority an issue on which a vote had already been taken.

It was then agreed by 7 votes to 2, with 1 abstention, to reconsider Mr. Sandström's proposal to the extent that it involved recommending the conclusion of a convention.

79. Mr. YEPES said that, although article 23 of the Commission's Statute referred to the procedure to be followed in cases of the codification of international law, and although the articles on the continental shelf were concerned rather with the development of international law, yet the alternatives mentioned in article 23 were sufficiently general to be applicable in the present case. He suggested, therefore, that the Commission should, in the words of paragraph 1(b) of article 23, recommend to the General Assembly "to take note of or adopt the report by resolution".

80. Mr. AMADO said that he preferred the wording of paragraph 39 of the General Rapporteur's draft report, namely:

"... the Commission believes that... the alternative envisaged under paragraph (a) of article 23 would be most appropriate and the Commission so formally recommends."

The alternative thus referred to was that the Commission should recommend to the General Assembly "to take no action, the report having already been published".

81. Mr. LAUTERPACHT said that the recommendation in question had been fully explained in the draft report. He would object to its being made without

such explanation, for then the Commission would be implying that it considered the subject to be so unrealistic that no useful purpose would be served by proceeding with it. That would immediately cast doubts on the value of the Commission's work over the past three years.

82. Mr. CORDOVA favoured Mr. Yepes' proposal, for it would add political force to the Commission's technical advice. He was not in favour of recommending that a convention be concluded, as such action would make an unnecessary division between the States which had already adopted rules similar to those in the draft articles on the continental shelf and those which had not.

83. Mr. AMADO withdrew his suggestion that the Commission might make a recommendation to the General Assembly along the lines of paragraph 1(a) of article 23 of the Commission's Statute.

84. Mr. YEPES said that the exact wording of paragraph 1(b) of article 23 of the Statute, should not be followed. In his view, the Commission should recommend either than the General Assembly should take note of and adopt its report, or simply that the General Assembly should adopt it.

85. Mr. SANDSTRÖM reminded the Commission that he had not withdrawn his proposal that the Commission should recommend to the General Assembly that a convention be concluded, for which proposal he had already given his reasons, which were based on article 15 of the Commission's Statute. For developments of international law, conventions were necessary; the adoption of the report by resolution of the General Assembly was appropriate only in cases of codification.

Mr. Yepes' proposal that the Commission should recommend the General Assembly to adopt by resolution the draft articles on the continental shelf was adopted by 7 votes to 2, with 1 abstention.

86. Mr. KOZHEVNIKOV explained that he had voted in favour of Mr. Yepes' proposal because he was in agreement with the greater part of the draft articles on the continental shelf. He wished it to be placed on record, however, that he maintained his objections to articles 7 and 8.

87. Mr. ZOUREK also wished it to be placed on record that his vote in favour of Mr. Yepes' proposal was not to be taken as implying that he had abandoned his opposition to articles 7 and 8.

Paragraph 40 (92)

88. Mr. SANDSTRÖM, referring to the footnote¹⁰ at

¹⁰ That footnote read as follows:

"At a previous session the Commission considered the subject of fisheries in connection with the question of the continental shelf for the reason that in various proclamations relating to the latter reference had been to fisheries. The Commission does not now consider that there is any such close connection between these two questions as to warrant their combined treatment."

the end of paragraph 40, said that the first section was in plain contradiction to the first comment on article 2 of the draft articles on resources of the sea in the Commission's report covering the work of its third session,¹¹ where it was stated that "the question of conservation of the resources of the sea has been coupled with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to be quite distinct, and for this reason they have been separately dealt with".

He therefore considered that the footnote should be deleted.

It was so agreed.

Paragraph 40, as amended, was approved by 9 votes to 1, with 2 abstentions.

Paragraph 41 (93)

Paragraph 41 was approved by 7 votes to none, with 1 abstention.

Paragraph 42 (94)

89. The CHAIRMAN said that paragraph 42 merely quoted the three articles covering the basic aspects of the international regulation of fisheries, and that as those articles had already been approved there was no need to vote on the paragraph.

90. Mr. KOZHEVNIKOV asked whether the Commission had indeed voted on the three articles in question.

91. Having consulted the summary records, the CHAIRMAN said that the three articles had been approved, subject to drafting emendations, at the 210th meeting, held on 7 July.¹² Mr. Kozhevnikov had been right in reminding the Commission that it had not taken a formal vote on them. He suggested that consideration of the matter be deferred.

It was so agreed.

Paragraph 43 (95)

Paragraph 43 was approved by 8 votes to 2.

Paragraph 44 (96)

Paragraph 44 was approved by 9 votes to none, with 2 abstentions.

Paragraph 45 (97)

Paragraph 45 was approved by 8 votes to 2.¹³

Paragraph 46 (98)

Paragraph 46 was approved by 7 votes to 2.

Paragraph 47 (99)

Paragraph 47 was approved by 7 votes to 2, with 1 abstention.

Paragraph 48 (100)

92. Mr. YEPES, referring to the second sentence of paragraph 48, in which it was stated that the Commission had been "influenced by the view that although the prohibition of abuse of rights is not yet firmly established as a doctrine of international law it is not altogether unsupported by judicial and other authorities", said that, although the doctrine of prohibition of abuse of rights had not been unanimously approved, in the sense that certain authorities still contested it, yet it was generally accepted. For at least thirty years the doctrine of abuse of rights had been admitted in the case-law of practically all countries and could now be considered as one of "the general principles of law recognized by civilized nations" mentioned in Article 38 (c) of the Statute of the International Court of Justice. He therefore proposed that the second sentence be amended to read:

"The Commission, in adopting these articles, was influenced by the view that the prohibition of abuse of rights is clearly supported by judicial and other authority and is germane to the situation caused by these articles".

93. Mr. LAUTERPACHT thought that there was insufficient authority for the statement that the doctrine of abuse of rights had clearly become part of international law. He would prefer the sentence to be deleted altogether.

94. Mr. SANDSTRÖM could not accept the contention that the rule formulated in the final draft of the articles on fisheries was in the nature of codification. He therefore proposed the deletion of the first sentence of paragraph 48, and also of the sentence reading:

"to that extent, it may be held that that Article is not altogether in the nature of a drastic departure from the principles of international law".

95. Mr. YEPES suggested that further discussion on the matter be deferred.

It was so agreed.¹⁴

The meeting rose at 6.10 p.m.

¹¹ *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*. Also in *Yearbook of the International Law Commission, 1951*, vol. II.

¹² See *supra*, 210th meeting, paras. 18-21.

¹³ See *infra*, 238th meeting, paras. 58-64.

¹⁴ *Ibid.*, paras. 65-74.