Document:-
A/CN.4/SR.306

Summary record of the 306th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1955 , **vol. I**

"Article 9

"The board may decide that pending its decision the measures in dispute shall not be applied".

Article 9 was adopted by 9 votes to none, with 4 abstentions.[9]

Article 10 [9] [10]

108. Mr. FRANÇOIS (Special Rapporteur) said that there appeared to be some misunderstanding about the second sentence of article 10. It was not suggested that the board should make recommendations instead of taking decisions. The sentence in question simply meant that, when giving a decision on an actual dispute, it would be open to the board to make what recommendations it considered appropriate concerning suitable conservation measures.

109. Mr. ZOUREK said that it might well happen that the board would be unable to arrive at a decision, because it could find no rule of international law on the subject in dispute. It would appear that in that case, under the second sentence of article 10, the board would merely make a recommendation.

Further discussion of article 10 was deferred.[11]

Programme of work

110. The CHAIRMAN said that, on completing the discussion on fisheries the Commission would first take up Mr. Scelle's proposed general arbitration clause relating to all the draft articles on the régime of the high seas. It would then go on to deal with the territorial sea, particularly the breadth of the territorial sea, in which connexion he urged members not to re-open the general discussion, but to submit concrete proposals.

111. Mr. LIANG (Secretary to the Commission) said it was desirable that at its next meeting but one the Commission should discuss the question of the time and place of its next session, as well as proposed amendments to its Statutes.

112. The CHAIRMAN announced that those topics would be discussed in private at the next meeting but one.

The meeting rose at 6.10 p.m.

[9] See *infra*, 306th meeting, para. 2.

[10] See *supra*, 300th meeting, para. 1.

[11] See *infra*, 306th meeting, para. 8.

306th MEETING

Tuesday, 7 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

** The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*resumed from the 305th meeting*)

NEW DRAFT ARTICLES ON FISHERIES
(resumed from the 305th meeting)

1. The CHAIRMAN invited the Commission to resume its discussion of the new draft articles on fisheries.

Article 9 [*8, para. 2*] (resumed from the 305th meeting)

2. Mr. EDMONDS explained that he had abstained from the vote on article 9 at the previous meeting because he was of opinion that, once challenged, conservation measures should not apply until the competent board of experts had given its decision.

Article 6 [*5, paras. 2 and 3*]
(resumed from the 304th meeting)

3. Mr. FRANÇOIS (Special Rapporteur) said that in the course of the discussion on articles 7 and 8 Mr. Zourek had raised an important point, namely, the question of the rules the arbitration board would have to apply.[1] A provision covering that point would be extremely useful in the draft, but would require a separate article.

4. The answer to the problem would probably be found in the fate of article 6. At its 304th meeting the Commission had, on Mr. Zourek's proposal, adopted a statement of prinicple to the effect that the principal objective of conservation was to secure the optimum sustainable yield, and that all conservation measures must be based on valid scientific findings. The decision was tantamount to making article 6, paragraph 1, sub-paragraph (*b*) applicable to all States and not to the coastal State alone.

5. Furthermore, the Commission had decided that the principle of non-discrimination, originally asserted in article 6, paragraph 1, sub-paragraph (*c*) should have a wider application than was implicit in the text of that sub-paragraph, but had left it to the Drafting Committee to decide where and how that principle could most appropriately be expressed.

6. Thus the only one of three principles embodied in article 6, paragraph 1, which remained applicable to the coastal State alone was the requirement that scientific evidence should show that there was an imperative and urgent need for measures of conservation.

7. In order to put the Commission in a position to vote on new texts laying down the criteria on which the arbitration board should base its decisions, he proposed that the whole matter be referred to the Drafting Committee, which should piece together the various provisions adopted by the Commission concerning the criteria for determining the validity of conservation measures.

It was so agreed.

Article 10 [*9*] (resumed from the 305th meeting)

8. Mr. SANDSTRÖM inquired whether the second sentence of the article implied that the board might address recommendations to States that were not parties to the future convention on fisheries conservation, and against which no actual decision was possible.

9. Mr. FRANÇOIS (Special Rapporteur) said that the second sentence had been drafted with a definite purpose: it envisaged the case in which, when giving its decision on a dispute, the board would recommend measures that it was not in a position to impose, but whose usefulness had become apparent as a result of the investigation of the dispute.

10. Mr. Sandström's point could perhaps be met by a suitable statement in the comment.

11. Mr. KRYLOV said that it would be most unusual for an arbitration board of the kind provided for to issue recommendations *erga omnes*.

12. Sir Gerald FITZMAURICE said that the Commission's draft articles on fisheries would ultimately be embodied in a convention that would normally not be binding on States which did not accede to it: such States would not be obliged to submit their disputes to the board. Should such a State voluntarily accept the board's jurisdiction, that would imply its acceptance of the board's findings; but should it decline to do so, it was obvious that the board's recommendations would serve no useful purpose.

13. Mr. SCELLE said that the entire draft was based on the assumption that, upon adoption by the State whose nationals fished in an area, or by the coastal State, conservation measures would be applicable to any newcomers to that area.

14. The draft articles prepared by the Commission at its fifth session in 1953 (A/2456, para. 94) had made provision for an international authority to prescribe conservation measures *erga omnes*, the Food and Agriculture Organization of the United Nations (FAO) being the authority in view.

15. If the validity of the principles adopted by the Commission were to be made subject to the signing of a convention by all the interested States, the Commission's work would be of no avail.

16. The CHAIRMAN said that the General Assembly would no doubt adopt the Commission's draft articles as a draft convention, and open it to signature with the customary proviso that it would become effective only after a given number of States had acceded to it. For his part, he felt that the accession of a sufficient number of States with an important fishery industry should also be stipulated.

17. When a convention of that kind came into force, it would have such moral authority that even States that had not actually acceded to it would have to respect its provisions. There would be some analogy with the treaties on international waterways, or again with that on Swiss neutrality, all of which, though signed by only a certain number of States, were valid *erga omnes*.

18. Mr. LIANG (Secretary to the Commission) said that the Commission's decisions at the present session did not seem so radical a departure from the 1953 articles as Mr. Scelle had suggested. Article 3 of the earlier draft had been couched in terms which lacked precision; it referred to "an international authority", whereas what had probably been intended was an organ rather than an authority—indeed, an organ of the same

[1] 304th meeting, para. 63.

kind as the board for which the Commission had made provision in article 8 of the new rules.

19. The purpose of the 1953 provision, despite the rather authoritarian tone in which it was expressed, was not really incompatible with the present articles. When the earlier provision spoke of an international authority prescribing a system of regulation of fisheries, it did not, and indeed could not, imply that FAO would be empowered to issue such rules as binding on all States. FAO could not be invested with such authority without the consent of States. In essence, the 1953 provision amounted to much the same thing as article 10 of the present draft: that the competent board would decide disputes and make recommendations.

20. The main difference between the present system and that proposed in 1953 lay in procedure.

21. Mr. ZOUREK pointed out that there was one important departure from the 1953 procedure; instead of a permanent organ, the Commission had now come out in favour of an *ad hoc* body.

22. Mr. HSU considered that the second sentence of article 10 was unnecessary. It added nothing to the meaning of the article, and could only serve to create the mistaken impression that in certain cases the board might not give a decision, but merely issue recommendations.

23. Mr. FRANÇOIS (Special Rapporteur) proposed that, to clarify its meaning, the second sentence should be amended to read:

Au cas où des recommendations y seront jointes, ces recommendations doivent recevoir la plus grande considération.

24. Mr. HSU expressed his satisfaction with that proposal.

Article 10 as amended by the Special Rapporteur was adopted by 9 votes to 2, with 2 abstentions.

25. Mr. AMADO said that as he could not understand what useful purpose the second sentence of article 10 could serve, he had abstained from voting.

26. Faris Bey el-KHOURI recalled that in its draft code of arbitral procedure, the Commission had made detailed provision for the possibility of challenging the validity of an arbitral award where the tribunal exceeded its powers. He had therefore abstained from voting on article 10, which stipulated that the decisions of a mere board of experts should be final and without appeal.

27. Mr. KRYLOV explained that having voted against article 8, it was only logical that he should have voted against article 10.

28. Mr. ZOUREK said that he too had voted against article 10 because of his opposition to article 8.

29. Furthermore, he disapproved of the amendment introduced by the Special Rapporteur. The real purpose of the provision concerning recommendations was to cover the case where the board might not be in a position to take a formal decision.

Article 6 [*5, paras. 2 and 3*] (resumed from para. 7)

30. Sir Gerald FITZMAURICE, reverting to the question of the proposed new articles to deal with the subject matter of article 6 and with Mr. Zourek's introductory provision, recalled that at the 304th meeting[2] the Commission had adopted his own proposal to the effect that the criterion common to all cases and all States should be that conservation measures must be based on valid scientific findings. It was clear from that decision that sub-paragraph (*b*) alone of the requirements of article 6 applied to all States alike. Sub-paragraph (*a*) applied only to the coastal State; that State alone was required to demonstrate that scientific evidence showed that there was an imperative and urgent need for conservation measures. Where measures were adopted by agreement among States whose nationals fished an area and not unilaterally by a coastal State, that criterion would not apply, for clearly the States concerned might agree on certain measures which they considered desirable and useful, but the need for which was not imperative and urgent.

31. Mr. FRANÇOIS (Special Rapporteur) proposed that the whole matter be referred to the Drafting Committee.

It was so agreed.

32. Mr. SCELLE raised the question of the fate of the articles to which the Commission had just given a first reading. He suggested that the Commission should ask the General Assembly to adopt the articles in the same manner in which the Convention on Genocide had been adopted; that would endow them with great force. On the other hand, were the General Assembly merely to draft a convention on the understanding that it would apply only to those States that were prepared to accede to it, the Commission's efforts would be of little avail.

33. Mr. KRYLOV was more optimistic than Mr. Scelle about the fate of the draft articles. He suggested that the Drafting Committee should go into the question of the manner in which the draft articles on fisheries conservation should be presented to the General Assembly.

It was so agreed.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 4, A/CN.4/93, A/CN.4/L.54) (*resumed from the 299th meeting*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*resumed from the 299th meeting*)

Article 22 [*20*]*: Charges to be levied upon foreign vessels*

Article 22 was adopted without comment.

[2] Para. 6.

Article 23 [21]: Arrest on board a foreign vessel

34. Mr. FRANÇOIS (Special Rapporteur) said that article 23 had elicited from the United Kingdom Government (A/2934, Annex, No. 16) the comment that paragraph 3 should be made more precise in order to give greater weight to the interests of navigation.

35. For his part, he felt that the interests of navigation had been adequately provided for in paragraph 3, particularly in view of the comment on the article, the third paragraph of which reproduced the relevant part of the comment on the similar provision in the report of the Second Committee of the 1930 Conference for the Codification of International Law.[3]

36. Sir Gerald FITZMAURICE said that the text of paragraph 3 was somewhat vague. He suggested that it should read:

> "3. The local authorities shall carry out any arrest on board a vessel in such a manner as to cause the least possible interference with navigation."

37. Mr. FRANÇOIS (Special Rapporteur) thought that Sir Gerald's text did not go so far as his own. Under his own, the coastal State would have to refrain altogether from making an arrest where that would seriously interfere with the freedom of navigation, whereas it was not possible to interpret Sir Gerald's text so broadly.

38. Sir Gerald FITZMAURICE said that if the Special Rapporteur's interpretation of paragraph 3 were correct, he would certainly favour it. But all the text said was: "...when making an arrest..." That clearly implied that there was nothing to prevent a coastal State from making any arrest it desired.

39. Mr. LIANG (Secretary to the Commission) submitted that the term "pay due regard" was always capable of such an interpretation as would minimize the obligation placed upon the State concerned. As Sir Gerald Fitzmaurice had proposed, a sentence inspired by the provision in the report of the 1930 Codification Conference would give more effective expression to the obligation on the coastal State not to interfere with navigation.

Article 23 was approved in principle, and referred to the Drafting Committee for the recasting of paragraph 3.

Article 24 [22]: Arrest of vessels for the purpose of exercising civil jurisdiction

40. Mr. FRANÇOIS (Special Rapporteur) said that article 24 followed the lines of article 9 of the report of the 1930 Codification Conference. It did not go so far as the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, signed at Brussels on 10 May 1952,[4] which allowed arrest for claims against sister ships belonging to the same company, and also for claims in respect of liabilities incurred during a previous voyage. For his part, he would prefer the Commission's text to be brought into line with the 1952 provisions, which had been agreed upon by a diplomatic conference after very thorough examination of the 1930 text. It was not irrelevant to point out that the 1930 provision had been the first of its kind on the subject, and that subsequent experience had shown that it needed improvement.

41. Sir Gerald FITZMAURICE drew attention to the United Kingdom Government's comments (A/2934, Annex, No. 16), which were in harmony with those of the Netherlands Government (A/2934, Annex, No. 10). Both governments had mentioned the desirability of reconciling article 24 with the terms of the 1952 Convention.

42. That Convention was the outcome of many years of work, its provisions representing a balance between many conflicting factors. Shipping circles attached very great importance to the new procedure, and the Commission should not depart from it without extremely good reason.

43. Mr. ZOUREK said that paragraph 1 related only to ships merely passing through the territorial sea, which were naturally treated better than ships at rest in a port.

44. The 1952 Convention listed no fewer than seventeen cases in which a ship might be arrested for the recovery of maritime claims. Freedom of navigation would be seriously impaired if in any of those many cases it was permissible to levy execution against or to arrest a vessel which was merely passing through the territorial sea.

45. Mr. FRANÇOIS (Special Rapporteur) proposed that discussion on that point be deferred until the Drafting Committee submitted a definite text.

It was so agreed.

46. Mr. FRANÇOIS (Special Rapporteur) proposed that the words "in the inland waters of the State or" be deleted from paragraph 2. The Commission was only concerned with the problem of the territorial sea, and any reference in its draft to inland waters would be out of place.

47. Mr. ZOUREK questioned the desirability of the penultimate phrase of paragraph 2, reading:

> "or passing through the territorial sea after leaving the inland waters of the State".

A vessel leaving the inland waters of a State would presumably have spent some time in a port where the coastal State would have had ample opportunity to arrest it had there been any good reason. It seemed undesirable in such a case to allow the coastal State to pursue the vessel when it was crossing the territorial sea to reach the high seas.

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[3] *Acts of the Conference for the Codification of International Law*, League of Nations publication, *V. Legal, 1930.V.14* (document C.351.M.145.1930.V), p. 129.

[4] United Kingdom, *Parliamentary Papers*, 1952–53, vol. XXIX, Cmd. 8954. Also extracts in *Laws and Regulations on the régime of the territorial sea* (United Nations publication, Sales No.: 1957.V. 2), p. 723.

48. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee would take Mr. Zourek's remarks into consideration.

Article 24 was adopted, subject to appropriate drafting changes.

Article 25 [23]: Government vessels operated for commercial purposes

49. Mr. FRANÇOIS (Special Rapporteur) said that he could not quite follow why the United Kingdom Government's objections (A/2934, Annex, No. 16) to articles 18, 19 and 20 should apply equally to government vessels operated for commercial purposes.

50. Mr. KRYLOV proposed that article 25 be deleted. It raised extremely complicated issues, and was not indispensable to a set of provisional articles on the territorial sea.

51. A great many States wanted to assimilate government vessels operated for commercial purposes to merchant vessels. Other States, in particular the Soviet Union and Poland, did not wish such vessels to come under ordinary maritime law.

52. In the presence of those two diametrically opposed views, the Commission could not do better than to leave the subject alone. It should attempt to codify only subjects that were ripe for the process.

53. Sir Gerald FITZMAURICE explained that the United Kingdom Government's comments on article 25 must be read in conjunction with its proposal for a new article 17 entitled "The right of innocent passage", which consisted of eight paragraphs intended to replace articles 17, 18, 19, 20, 26 and 27, as adopted by the Commission at its sixth session (A/2693, Chapter IV). The acceptance in principle by the United Kingdom Government of the proposal that government ships employed in commercial service should be subject to the provisions of articles 17 and 21 to 24 clearly covered the content of articles 18, 19 and 20, which, in the United Kingdom Government's proposal, should be made part of a new article 17.

54. The United Kingdom Government's objection to article 25 as it stood was that it failed to define with sufficient precision what types of ship were to enjoy immunity.

5. Mr. AMADO agreed with Mr. Krylov that article 25 was not absolutely indispensable. The subject was certainly not ripe for codification.

56. Mr. SANDSTRÖM recalled that the Commission's provisional articles (A/2693) had originally been subdivided into two sections: section A dealing with vessels other than warships, and section B dealing with warships. Article 25, which constituted the final article of section A, dealt with a special category of ship, namely, government vessels operated for commercial purposes.

57. Mr. ZOUREK said that the fact that the Brussels Convention of 10 April 1926[5] had included for the first time a provision to the effect that state-owned vessels operated for commercial purposes should be treated as merchant ships proved that, under general international law, government vessels enjoyed immunity.

58. He recognized that his opinion was not shared by everyone, and he therefore agreed with Mr. Krylov about the desirability of deleting article 25.

59. In any event, the article itself did not dispose completely of the problem it raised, since it did not cover government vessels not operated for commercial purposes.

60. Sir Gerald FITZMAURICE said that government vessels could fall into either of two categories: some might well be classed with warships, others were merchant vessels pure and simple. Hence the United Kingdom Government's insistence on some clearer definition of the vessels covered by article 25; as drafted, its provisions were far too broad to be acceptable.

61. Mr. FRANÇOIS (Special Rapporteur) said that the deletion of article 25 would conduce to misinterpretation. The absence of such a provision might be taken to mean that all government vessels enjoyed complete immunity. Such an interpretation would arouse the opposition of a great number of States.

62. The situation would be different if it were made clear that the deletion of article 25 left the matter open.

63. Mr. KRYLOV said the fact that the question remained open could be indicated in the comment. That would leave both groups of States in their respective positions.

64. Mr. SANDSTRÖM said that if the subdivision into sections A and B were retained, it would not be possible to omit a reference to government vessels operated for commercial purposes.

65. Mr. AMADO said that it was very difficult to codify—or to petrify—a doubt.

66. Mr. FRANÇOIS (Special Rapporteur) said that a re-reading of the observations contained in the report of the Second Committee of the 1930 Conference for the Codification of International Law[6] had confirmed his impression that the present text of article 25 was not particularly felicitous, because it failed to define the position with regard to government vessels not operated for commercial purposes. It would be remembered that the rules laid down in the articles relating to arrest on board foreign vessels, and to arrest of vessels for the purpose of exercising civil jurisdiction, had been adopted by the Codification Conference without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service. Perhaps the Commission might omit article 25 altogether, stating in the comment that the position of

[5] Société des Nations, *Recueil des Traités*, vol. 120, p. 188.

[6] League of Nations publication, *V. Legal, 1930. V. 14* (document C.351.M.145.1930.V), p. 129.

government vessels operated for either commercial or other purposes was reserved.

67. Mr. HSU wondered whether that procedure might not be a step backwards, since it would leave a gap in the draft, and States without guidance.

68. The CHAIRMAN observed that would not be the only omission.

69. Mr. KRYLOV pointed out that, as the situation had changed since 1930, the Commission might well follow the Special Rapporteur's suggestion.

70. Mr. HSU said that he was not necessarily opposed in principle to omissions, provided there was good reason for them. If he were given a valid explanation of the change that had occurred since 1930 that would justify the deletion of article 25, he would be the first to support it.

71. The CHAIRMAN observed that the issue was a very delicate one.

72. Mr. AMADO considered that the Commission's reasons for omitting article 25 could be explained fully in the comment.

73. Mr. SANDSTRÖM pointed out that the change that had supervened since 1930 consisted in the considerable increase in the number of vessels operated by States for commercial purposes. In view of that development, he doubted whether such vessels should be left outside the scope of the draft. Government vessels for non-commercial purposes, being fewer, presented no such problem. For those reasons, he would prefer a provision of the kind adopted by the 1930 Codification Conference.

74. Mr. SCELLE agreed with Mr. Sandström. The number of vessels operated by governments for commercial purposes was growing steadily, and he considered that they should be treated on exactly the same footing as private merchant vessels. The draft would be deprived of much of its force by the deletion of article 25, and he would be firmly opposed to such a step.

75. Mr. KRYLOV considered that the State was an indivisible entity and retained all its attributes when entering the commercial field. If, for example, the French Government were to nationalize the French merchant fleet it would not regard itself as a private shipowner.

76. Mr. SCELLE said that he personally had no knowledge of such an entity as "the State", and strongly denied its existence. On the other hand, the actions of a head of State, of ministers or of a local authority were definite and recognizable. It would be most retrograde to hold that when a government acquired rights in any sphere, those rights were not subject to any control.

77. Sir Gerald FITZMAURICE observed that the difficulty had perhaps arisen as a result of the distinction drawn between merchant vessels and warships. He had not insisted on that point at the 299th meeting, because the Special Rapporteur had not found the United Kingdom Government's suggestions (A/2934, Annex, No. 16) for rearranging the articles in chapter III entirely satisfactory. Nevertheless, the suggestion, which was based on the premise that some provisions concerning the right of passage had a general application to all vessels, might usefully be examined by the Drafting Committee. If the suggestion to unite all those provisions in a single new article 17 were adopted, the Commission would no longer have to concern itself with a separate category of government vessels operated for commercial purposes.

78. Mr. FRANÇOIS (Special Rapporteur) pointed out that no one had proposed that article 24 should be applicable to warships. The question of whether an arrest could take place on board a government vessel operated for commercial purposes must be answered, and could not be shelved by any rearrangement of the articles.

79. Mr. ZOUREK considered that those who wished article 25 to be retained were inspired by a subjective concept of the nature of the State. He entirely disagreed with them, being convinced that the State itself must fix the limits of its competence and decide how much could be left to the individual. He deplored the efforts of certain members to force a decision in favour of their own view, which was fundamentally contrary to that of certain States and might render the draft unacceptable as a whole.

80. The CHAIRMAN put to the vote Mr. Krylov's proposal that article 25 be deleted.

The proposal was rejected by 6 votes to 2, with 5 abstentions.

81. Mr. AMADO said that he had abstained from voting because he had no clear idea of what was meant by government vessels operated for commercial purposes. In view of the great variations in types and conditions of ownership some definition was required.

82. Faris Bey el-KHOURI explained that he had voted against the proposal because he saw no reason why States engaging in commerce should not be treated on an equal footing with private individuals or companies, or why they should enjoy a privileged position.

83. Mr. SANDSTRÖM suggested that article 25 be accepted and referred to the Drafting Committee on the understanding that the issues involved would be fully elucidated in the comment.

It was so agreed.

Article 26 [25]: Passage

84. Mr. FRANÇOIS (Special Rapporteur) observed that article 26 had given rise to a number of observations by governments, which showed that it had not been fully understood. That was hardly surprising in

view of its defective drafting, which failed to make clear the relationship between paragraphs 1 and 2.

85. It would be remembered that the Commission had first sought to indicate that several of the preceding articles, and notably article 20, paragraph 2, were applicable to warships. The coastal State could, if necessary, temporarily suspend the right of innocent passage in definite areas of its territorial sea. Another question which the Commission had wished to settle was whether the coastal State was entitled to require previous authorization or notification in all cases, and it had finally been decided that that could be done only in exceptional circumstances. Several governments had questioned that decision on the ground that previous authorization or notification was in fact already required by many countries. The point must therefore be reconsidered.

86. In conclusion, he drew the Commission's attention to the new text he had submitted for article 26 (A/CN.4/93).

87. Mr. SALAMANCA was unable to see the reason for the Special Rapporteur's new text. The meaning of the words "or in times of crisis" was particularly obscure. By virtue of Article 51 of the Charter of the United Nations, States could take exceptional measures for legitimate self-defence but were not free to declare war. The original text of article 26 seemed to him less ambiguous.

88. Mr. SANDSTRÖM held that the position of merchant vessels, for which freedom of communication was vital, was quite different from that of warships, since the latter's presence in the territorial sea of another State might possibly imply a show of force. That was not very palatable to States with a small fleet, and if there was any lack of clarity in article 26, the article should be modified in the direction of limiting freedom of navigation in the territorial sea, particularly as the legitimate interests of warships were adequately safeguarded by paragraph 4 of the original text.

89. Sir Gerald FITZMAURICE asked what grounds were provided by international law for the attitude adopted by the Special Rapporteur and Mr. Sandström. The Commission was not laying down ideal rules but was codifying existing law and practice, which established a clear distinction between warships passing through the territorial sea of another State and warships visiting a foreign port or anchoring in a foreign roadstead. Mr. Sandström had seemed to suggest that warships were in the habit of steaming about haphazardly in the territorial sea of another State. In practice that hardly ever occurred, as they were usually either passing though a territorial sea because it was the natural route between two points, or visiting a foreign port. It had been the practice to give previous notification of such movements, and visits to ports were usually arranged in advance. However, in the exceptional case of warships in distress seeking safety in a foreign port, it had never been suggested that previous authorization was necessary.

90. If previous authorization or notification were to be required in all instances a severe restriction would be placed on the normal movements of warships in peacetime. Commerce was not the only legitimate object of navigation and vessels passing through a territorial sea for another reason should not be *ipso facto* regarded as suspect. If Mr. Sandström's suggestion were followed a totally new and unnecessary burden would be imposed on warships, which he could not agree should be embodied in a code of rules already containing ample safeguards for the protection of the interests and safety of coastal States.

91. Mr. SCELLE observed that the adoption of the United Nations Charter had materially altered the situation, since before that act States had been free to commit an act of aggression and to send their warships to any area for purposes of attack. The right to initiate offensive action now belonged exclusively to the Security Council, with the result that any coastal State could invoke the provisions of the Charter to refuse the right of passage to a warship committing a hostile act or threatening to do so. However, warships could use the territorial sea of another State for purposes of legitimate defence, but it remained to be seen who was to decide whether the requirements of legitimate defence were in fact at stake. Was it to be left to the coastal State or to the Security Council?

92. Mr. FRANÇOIS (Special Rapporteur) considered that the coastal State should have the right to close some areas of its territorial sea altogether to foreign warships, for example, in order to protect ports vital to its defence system. The provision in article 20, paragraph 2, was inadequate to protect the interests of the coastal State.

93. Sir Gerald Fitzmaurice appeared to think that the right of passage could never be denied to a foreign warship if the passage were genuinely innocent, but in the Netherlands, for example—and it was probably not the only country in that position—innocent passage was not in all circumstances allowed to warships without previous authorization.

94. He therefore considered that article 26 required modification, because on the one hand it was obscure and on the other hand it was too rigid. He had submitted a new text to safeguard the right of coastal States to demand previous authorization or notification.

95. Mr. SCELLE was anxious that the article should stipulate that prior authorization must be obtained, because it must be denied in cases involving offensive acts or threats.

96. Mr. LIANG (Secretary to the Commission) did not consider it possible to deal with authorization and notification in a single article. His personal experience some years ago in the Ministry of Foreign Affairs of his own country confirmed Sir Gerald Fitzmaurice's impression that, while it was obligatory in international

law to grant the right of passage without authorization, notification had always been the practice except in urgent cases of vessels in distress. That fact had been clearly brought out in the comment of the Yugoslav Government (A/2934, Annex, No. 18) which deserved attention.

97. Referring to Mr. Scelle's remarks, he said that in the cases mentioned the Security Council would have already reached a decision and world have requested States to carry out the enforcement measures called for under the Charter. In the absence of such a request it would be risky for a State to take a unilateral decision to refuse passage to a foreign warship. Such cases need not be provided for, since they belonged to the general category of questions connected with enforcement measures initiated by the Security Council in accordance with the provisions laid down in Chapter VII of the Charter.

The meeting rose at 1.5 p.m.

307th MEETING

Wednesday, 8 June 1955, at 12.15 p.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS
Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 26 [25]: Passage (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 26 of the provisional articles adopted at the previous session (A/2693), together with the Special Rapporteur's proposed new text (A/CN.4/93).

2. Mr. FRANÇOIS (Special Rapporteur) said that, as he had explained at the previous meeting,[1] the original text of article 26 had not been entirely clear, and had given rise to misunderstandings. In response to the observations of certain governments, he had indicated in his new draft the circumstances in which coastal States could require previous authorization or notification of the passage of warships through their territorial sea.

3. The CHAIRMAN observed that the coastal State might wish, for other than military reasons, to prohibit passage through parts of its territorial sea, for example, for the purpose of safeguarding its neutrality.

4. Mr. FRANÇOIS (Special Rapporteur) explained that he had mainly had in mind the possible need to protect that part of the territorial sea surrounding a port of military importance.

5. Mr. AMADO asked for a precise definition of the words "in times of crisis".

6. Mr. FRANÇOIS (Special Rapporteur) said that he had envisaged times of political tension giving grounds for expecting an imminent outbreak of war.

7. Mr. ZOUREK observed that, in the light of the comments made at the previous meeting and of the observations of certain governments, particularly that of Sweden (A/2934, Annex, No. 13), it would be advisable for the Commission to vote on the principle which several members had upheld, namely, that passage by warships through the territorial sea should be subject to the consent of the coastal State. In the interval since the previous meeting he had had a further opportunity of consulting the authorities, most of whom confirmed that the prevailing rule of international law was that passage for warships was not a right but a concession granted by the coastal State. The Institute of International Law had left the question aside in 1914, but in 1928 had recognized the right of coastal States to regulate the passage of warships through their territorial sea.[2] The Harvard Draft (article 19) followed the same line.[3]

8. Some coastal States did not invariably require special authorization or notification, having imposed once and for all certain conditions on the passage of warships.

9. The Commission must also consider the point raised by Mr. Scelle at the previous meeting about the new situation created by the signing of the Charter of the United Nations, whereby States were prohibited from resorting to the threat or use of force against the territorial integrity or political independence of any State. Warships by their very nature constituted a potential

[1] 306th meeting, para. 85.

[2] Institut de droit international, *Annuaire*, 1928.

[3] Harvard Law School, *Research in International Law*, III, *Territorial waters* (Cambridge, 1929), p. 245.