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Summary record of the 321st meeting

Topic:
Law of the sea - régime of the high seas

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The Chairman's proposal was adopted by 10 votes to 1 with 1 abstention.

Further discussion of the revised draft articles relating to the régime of the high seas was adjourned.

The meeting rose at 6 p.m.

321st MEETING

Tuesday, 28 June 1955, at 9.30 a.m.

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

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

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, 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) *(continued)*

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the revised draft articles submitted by the Drafting Committee.

Article 5 [6]: Ships sailing under two flags

"A ship which sails under the flags of two or more States may not claim any of the nationalities in question with respect to other States and may be assimilated by them to ships without a nationality."

Article 5 was adopted without comment.

Article 6 [7]: Immunity of warships

"1. Warships on the high seas shall enjoy complete immunity from the jurisdiction of any State other than the flag State.

"2. The term 'warship' means a vessel belonging to the naval forces of a State, under the command of an officer duly commissioned by the government, whose name figures on the list of officers of the military fleet, and the crew of which are under regular naval discipline."

Article 6 was adopted without comment.

Article 7 [8]: Immunity of other State ships

"For all purposes connected with the exercise of powers on the high seas by States other than the flag State, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used only on government service shall be assimilated to warships."

Article 7 was adopted without comment.

Article 8 [9]: Signals and rules for the prevention of collisions

"States shall issue for their ships regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not be inconsistent with those concerning the safety of life at sea internationally accepted for the greater part of the tonnage of sea-going vessels."

*Article 8 was adopted without comment.*¹

Article 9 [10]: Penal jurisdiction in matters of collision

"1. In the event of a collision or any other incident of navigation concerning a ship on the high seas

¹ See, however, paras. 85-92 below.

and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship involved in the collision, proceedings may be instituted against such persons only before the judicial or administrative authorities either of the State of which the ship on which they were serving was flying the flag, or of the State of which such persons are nationals.

"2. No arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying."

Article 9 was adopted without comment.

Article 10 [11]: Duty to render assistance

"The master of a vessel is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to any person found at sea in danger of being lost. After a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers."

Article 10 was adopted without comment.

Article 11 [12]: Slave trade

"Every State shall adopt effective measures to prevent and punish the transport of slaves on vessels authorized to fly its colours, and to prevent the unlawful use of its flag for that purpose. Any slave who takes refuge on board a warship or a merchant vessel shall *ipso facto* be free."

Article 11 was adopted without comment.

Articles 12-19 [13-20]: Piracy

Article 12

"All States shall co-operate as far as possible in the repression of piracy on the high seas."

2. Mr. KRYLOV said the French text of article 12 could be strengthened by adding the word *toute* after the words *doivent coopérer dans*.

3. Mr. FRANÇOIS (Special Rapporteur) agreed to the amendment.

Article 12 was adopted with Mr. Krylov's amendment to the French text.

Article 13

"Piracy is any of the following acts:

"1. Any illegal act of violence, detention, or any act of depredation directed against persons or property and committed for private ends by the crew or the passengers of a private vessel or a private aircraft;

"(a) Against a vessel on the high seas other than that on which the act is committed, or

"(b) Against vessels, persons or property in territory outside the jurisdiction of any State.

"2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts which make the ship or aircraft a pirate ship or aircraft.

"3. Any act of incitement or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article."

4. Mr. ZOUREK said that the definition of piracy contained in article 13 was too restrictive and did not correspond to international law. He maintained his reservations in that respect.

Article 13 was adopted.

Article 14

"The acts of piracy committed on a warship or a military aircraft, whose crew mutinies, are assimilated to acts committed on a private vessel."

5. Mr. ZOUREK suggested that the article be amended to read "by a warship" and "by a private vessel" rather than "on a warship" and "on a private vessel". Warships which were not subject to the authority of a State, whether warships whose crew had mutinied or warships which refused to obey the government of their State in cases where it had taken power in the place of a government that had been overthrown, should, for the purposes of the definition of piracy contained in article 13, be assimilated to private vessels.

6. Mr. FRANÇOIS (Special Rapporteur) agreed to Mr. Zourek's suggested amendment of the text.

Article 14 was adopted as amended.

Article 15

"A ship or aircraft is considered a pirate ship or aircraft when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of article 13, paragraph 1."

Article 15 was adopted without comment.

Article 16

"A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which it was originally derived."

Article 16 was adopted without comment.

Article 17

"On the high seas or in any other place not within the territorial jurisdiction of another State, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that State may pronounce sentence on such persons, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith."

7. Mr. KRYLOV pointed out that the second sentence of the article was ambiguous in its reference to pronouncing sentence "on such persons". The text appeared to suggest that the penalties could be inflicted on the

victims of the pirates as well as on the pirates themselves.

Article 17 was referred back to the Drafting Committee.

Article 18

“Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State, the nationality of which is possessed by the ship or aircraft, for any damage caused by the seizure.”

Article 18 was adopted without comment.

Article 19

“A seizure because of piracy may be made only by warships or military aircraft.”

Article 19 was adopted without comment.

Article 20 [21]: Right of stoppage [Right of visit]

“Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting:

“1. That the vessel is engaged in piracy;

“2. That while in the maritime zones regarded as suspect in international treaties for the abolition of the slave trade, the vessel is engaged in that trade;

“3. That while flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.

“In the case provided for in paragraphs 1-3 above, the warship may proceed to verify the vessel's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspect vessel. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the vessel, which must be carried out with all possible consideration.

“If the suspicions prove to be unfounded and provided that the vessel boarded has not committed any acts to justify them, it shall be compensated for the loss sustained.”

8. Mr. ZOUREK proposed the deletion of the words “or in taking any further action” in the first paragraph.

9. Mr. FRANÇOIS (Special Rapporteur) agreed.

10. He recalled that Mr. Edmonds had proposed the addition of the following words after the words “reasonable ground for suspecting that the vessel is engaged in piracy or the slave trade”, in the original text of the article:

“...or, during times of imminent peril to the security of the State, in activities hostile to the State of the warship.” (A/CN.4/L.57)

That proposal had been referred to the *ad hoc* Committee. After due consideration, that Committee had decided that such a provision would lend itself to abuse

and should, therefore, not be included in the text. He proposed that the Commission should formally reject the proposed addition.

It was so agreed.

11. Mr. LIANG (Secretary to the Commission) said that the title “Right of stoppage” was somewhat incongruous. Probably the reference was to the right of verification of flag.

12. In connexion with the final paragraph of the article, in cases where the suspicions proved unfounded, it seemed unnecessary to stipulate in addition that the vessel should not have committed any acts to justify the suspicions. Possibly the intention was to make provision for two alternative possibilities, in which case the words “or if” should be substituted for the words “and provided that”.

13. Sir Gerald FITZMAURICE said that the intention was to make provision for two cumulative conditions. If a ship acted in a suspicious manner, it did not deserve compensation even if it eventually transpired that no offence had been committed. Compensation was justified only where a ship had neither committed any offence nor given any reasonable grounds for suspicion. With regard to the title of the article, perhaps “Right of visit” might be more appropriate.

14. Mr. GARCÍA AMADOR proposed that the paragraphs be numbered in arabic numerals and the subparagraphs of paragraph 1 be lettered (a), (b) and (c), with a consequential change at the beginning of paragraph 2.

15. Mr. FRANÇOIS (Special Rapporteur) agreed.

Subject to final drafting of its title, article 20 was adopted with that amendment.

Article 21 [22]: Right of pursuit

“1. The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inland waters or the territorial sea of that State, may be continued outside the territorial sea provided that the pursuit has not been interrupted. It is not necessary that, at the time when the foreign vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. If the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against the rights for the protection of which the said zone was established.

“2. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

“3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the vessel pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The commencement of the pur-

suit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

"4. The release of a vessel arrested within the jurisdiction of a State and escorted to a port of that State for the purpose of an enquiry before the competent authorities shall not be claimed solely on the ground that such vessel, in the course of its voyage, was escorted across a portion of the high seas where the circumstances rendered this necessary."

Article 21 was adopted without comment.

Article 22 [23]: Pollution of the high seas

"All States shall draw up regulations to prevent water pollution by fuel oils discharged from ships, taking account of existing treaty provisions on the subject."

Article 22 was adopted without comment.

Chapter II [III]: Freedom to lay submarine cables and pipelines (Articles 23-27 [34-38])²

16. Mr. FRANÇOIS (Special Rapporteur) said that the chapter on submarine cables and pipelines would be included in the report after the chapter on fisheries, which he therefore proposed should be considered first. *It was so agreed.*

Chapter III [II]: Freedom of fishing (Articles 28-37 [24-33])

Article 28 [24]: Right to fish

"All States have the right to claim for their nationals the right to fish on the high seas subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas."

17. Mr. FRANÇOIS (Special Rapporteur) said article 28, dealing with the right to fish, now came before the Commission for the first time. The Commission had felt it necessary to place such an article before the rest of the chapter, which dealt with the conservation of the living resources of the high seas, and the Drafting Committee had prepared the text proposed.

18. Mr. ZOUREK said that it would perhaps have been more appropriate to speak of the nationals of certain States having the right to fish on the high seas.

19. Mr. AMADO said he did not like the term *revendiquer* in the French text. The English "to claim" was perfect. Perhaps a better French expression would be *réclamer pour leurs nationaux*.

20. Mr. FRANÇOIS (Special Rapporteur) pointed out that the various draft articles were concerned with the rights of States. Thus in the chapter on submarine cables and pipelines, all the articles began with the words "All States shall" or "Every State shall".

21. Mr. SALAMANCA said that in cases such as the laying of pipelines and submarine cables, the articles were concerned with the activities of States. But where fishing was concerned, the State's role was to protect those individuals who carried on fishing.

22. Mr. KRYLOV said that perhaps a better French drafting would be *Tous les états ont le droit d'assurer à leurs nationaux...*

23. Mr. SANDSTRÖM said it was better to take the standpoint of duties rather than rights. The text should provide that all States should respect the right to fish enjoyed by the nationals of each other State.

24. Sir Gerald FITZMAURICE said that the difficulties which had been mentioned could perhaps be avoided by framing the article more or less along the following lines: "Subject to treaty obligations and to provisions contained in the following articles concerning conservation of the living resources of the high seas, the right to fish shall not be interfered with."

25. Mr. SCELLE said the article was not necessary. Article 2 contained everything that was required in the way of recognition of the right to fish. The article, though repetitive, was, however, not harmful; but if the Commission decided to keep it, it would be preferable to speak of *garantir* instead of *réclamer* as had been suggested. A State did not merely complain when its nationals' right to fish was interfered with: it took action to protect that right. He quoted the example of Japan, which had introduced proceedings in the International Court of Justice in order to safeguard the right of its nationals to fish in certain areas where Australia claimed sovereign rights over the continental shelf.

26. Mr. GARCÍA AMADOR said that General Assembly resolution 900 (IX) had clearly separated the subject of fisheries conservation from the other problems of the sea. The Commission had not yet decided how it should present its draft on that subject. For his part, he felt that it should be presented separately and be preceded by a preamble.

27. In view of article 2, which fully safeguarded the right to fish, there was no necessity for an article along the lines of article 28.

28. Mr. FRANÇOIS (Special Rapporteur) said that, as article 2 had listed the various freedoms in respect of the high seas, it was essential to have an initial article on the right to fish preceding the articles on fisheries conservation.

29. As to the preamble which had originally accompanied Mr. García Amador's draft articles,³ the various ideas which it contained could well be included in the comment to the articles.

30. Mr. LIANG (Secretary to the Commission) agreed that article 28 required re-drafting. In the English text, the concept of a State's claiming the right of fishing on behalf of its nationals was perhaps far-fetched. What

² See para. 84 below.

³ 296th meeting, para. 16.

took place as an every-day phenomenon was that the nationals of the various States pursued fishing activities, and the State would not intervene until interference with such activities by its nationals on the part of other States called for intervention. It was not desirable either to replace that expression by a term such as "to guarantee", which referred more appropriately to the relationship between a State and its own nationals rather than to relations between States.

31. He suggested that the article be re-drafted so that the operative part would read: "nationals of all States have the right to fish on the high seas". That clause would be preceded by one along the following lines: "Subject to treaty obligations on the part of the State to which they belong and to the provisions..."

32. The CHAIRMAN suggested that the article might be re-drafted along the following lines:

"Subject to treaty obligations... all States have the right that their nationals should fish on the high seas."

33. Mr. KRYLOV, speaking in his capacity as Chairman of the Drafting Committee, said that the Commission should deal with proposals to change the substance of the texts proposed but that it was not practicable for the full Commission to discuss drafting changes.

34. Mr. AMADO said that Mr. García Amador's intention appeared to be to emphasize the moral character of the fisheries conservation articles.

35. Mr. GARCÍA AMADOR said that under resolution 899 (IX) the Commission would produce its final report on the problems of the high seas, territorial sea, contiguous zones and other related questions at its next session. In view of that fact, it was unnecessary for the Commission to try and give a final shape to its whole draft at the present stage.

36. The best procedure was the one which the Commission had already followed in 1953 when it had adopted three separate sets of provisions on the continental shelf, fisheries and the contiguous zone. Those drafts had then been submitted to governments for their comments.

37. If the Commission were to try and incorporate the articles on fisheries conservation in a general draft on the high seas, it would probably find that the comments by governments would lead to the separation of the chapters which the Commission had laboriously knitted together.

38. Finally, there were the provisions which the Commission had adopted at its fifth session concerning the continental shelf and the contiguous zone. Those provisions would have to be incorporated into the final report as well and would therefore alter its presentation. It was obviously too early for the Commission to enter into that problem of presentation; but it was reasons of presentation alone which justified the inclusion of an article on the right to fish as a sort of heading to the articles on fisheries conservation.

39. Mr. SALAMANCA said that resolution 899 (IX) invited the Commission to deal with all the various problems of the sea in a comprehensive manner. That resolution had been motivated by the impression gained in the General Assembly that the Commission had been dealing with the various problems of the sea in a somewhat haphazard manner. It was essential for the Commission to prepare a well-integrated report and present it to governments in a manner which showed clearly the interconnexion of the various problems with which it dealt.

40. Mr. KRYLOV said that Mr. García Amador had played a leading part in drafting the articles on fisheries conservation and naturally desired those articles to be presented separately in view of their novel character.

41. The Drafting Committee, of which he (Mr. Krylov) was the Chairman, had given preference to a different method of presentation and had incorporated the articles in question in the general codification of the law of the high seas, in the interests of coherence.

42. For his part, he felt that governments would be in a better position to study the Commission's draft articles on fisheries if those articles were presented in the way proposed by the Drafting Committee.

43. Mr. LIANG (Secretary to the Commission) stressed how important it was that the final report of the Commission should be as systematic and as comprehensive as possible. In view of that fact, there was no alternative to including the articles on fisheries conservation in the report on the high seas.

44. When the final report came to be submitted to the General Assembly, certain delegations could no doubt extract some part of the report and propose a separate convention on the subject.

45. As far as the work of the current session was concerned, it would be of advantage to send as complete as possible a report to governments for comment. That would be done with the reservation that the Commission might, in the light of those comments, consider certain subjects for separate treatment when adopting its final report. It would be premature to try to predict the fate of the articles on fisheries conservation at the current session.

46. Mr. ZOUREK agreed that it was necessary for the governments to receive a complete report, including the articles on fisheries conservation.

47. At the Commission's next session, the whole draft would have to be reshaped, if only because the provisions on the continental shelf and the contiguous zone had to be incorporated in the final report.

48. Mr. GARCÍA AMADOR pointed out that resolutions 899 (IX) and 900 (IX) had been the result of nearly one month of protracted discussion in the Sixth Committee of the General Assembly.⁴ The provisions of those resolutions, which had been very carefully pon-

⁴ 430th to 438th meetings.

dered and equally carefully drafted, made it clear that the whole problem of the conservation of the living resources of the sea was a distinct question which required separate treatment.

Article 28 was referred back to the Drafting Committee.

Articles 29-37 [1-9]: Conservation of the living resources of the high seas [sea]

“ Article 29 [1]

“ A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

“ Article 30 [2]

“ 1. If the nationals of two or more States are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of the living resources of the high seas.

“ 2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated in article 35.

“ Article 31 [3]

“ 1. If, subsequent to the adoption of the measures referred to in articles 29 and 30 nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them.

“ 2. If the State whose nationals take part in the fisheries do not accept the measures so adopted, and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated in article 35. Subject to paragraph 2 of article 36 the measures adopted shall remain obligatory pending the arbitral decision.

“ Article 32 [4]

“ A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts, is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

“ Article 33 [5]

“ 1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

“ 2. The measures which the coastal State adopts under the first paragraph of this article shall be valid

as to other States only if the following requirements are fulfilled :

“ (a) That scientific evidence shows that there is an imperative and urgent need for measures of conservation ;

“ (b) That the measures adopted are based on appropriate scientific findings ;

“ (c) That such measures do not discriminate against foreign fishermen.

“ 3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 35. Subject to paragraph 2 of article 36, the measures contemplated shall remain obligatory pending the arbitral decision.

“ Article 34 [6]

“ 1. Any State, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coasts, but which has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

“ 2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated in article 35.

“ Article 35 [7]

“ 1. The differences between States contemplated in articles 30, 31, 33 and 34 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

“ 2. The arbitration shall be entrusted to an arbitral commission, whose members shall be chosen by agreement between the parties. Failing such an agreement within a period of three months from the date of the original request, the commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organisation. In that case, the commission shall consist of 4 or 6 qualified experts in the matter of conservation of the living resources of the sea, and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary-General. The commission shall settle its own procedure and shall determine how the costs and expenses shall be divided between the parties.

“ 3. The commission shall, in all cases, be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months, unless it decides to extend that time-limit.

“ Article 36 [8]

“ 1. In arriving at its decisions, the arbitral commission shall, in the case of measures not unilaterally adopted by coastal States, apply the criteria listed in

article 33, paragraph 2, according to the circumstances of each case.

"2. The commission may decide that pending its award the measures in dispute shall not be applied.

"Article 37 [9]

"The decisions of the commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration."

49. Mr. FRANÇOIS (Special Rapporteur) recalled the Commission's earlier decisions,⁵ by which it had been agreed to begin with an article laying down the general criteria for all conservation measures, no matter by what State they were adopted.

50. The Commission had instructed the sub-committee set up to consider the draft articles on fisheries to restrict the scope of article 6 (the present article 33) to the criteria to be applied to the coastal State alone—as distinct from the criteria to be applied to all States, which were to be laid down in a general article. The sub-committee, however, had arrived at the conclusion that it was desirable to leave article 33 as drafted and to place the provision regarding generally applicable criteria immediately after article 35, which dealt with arbitration. Hence the sub-committee's paragraph 1 in article 36, stating:

"In arriving at its decisions, the arbitral commission shall, in the case of measures not unilaterally adopted by coastal States, apply the criteria listed in article 33, paragraph 2, according to the circumstances of each case."

51. The purpose of that provision was to enable subparagraphs (b) and (c) of article 33, paragraph 2, to be applied to conservation measures adopted otherwise than unilaterally by coastal States.

52. Mr. KRYLOV said article 36, paragraph 1, was by no means clear. In order to dispel any possible ambiguities, the article would have to be re-drafted more or less along the following lines:

(i) In an initial paragraph, the article would state that, when faced with a situation arising from unilateral measures by a coastal State, the Commission would apply the criteria listed as (a), (b) and (c) in article 33, paragraph 2;

(ii) The second paragraph of article 36 would state that, in all other cases, the arbitral commission would apply the criteria listed as (b) and (c) in article 33, paragraph 2;

(iii) The final paragraph of the article would remain unchanged as follows: "The commission may decide that pending its award the measures in dispute shall not be applied."

53. Mr. AMADO agreed with Mr. Krylov's suggestion, which would give article 36 an explicit character; it had been originally drafted in an elliptic form.

54. The CHAIRMAN said that the best course was to refer the article to the Drafting Committee for re-drafting in the light of the foregoing remarks.

Article 36 was referred to the Drafting Committee for re-drafting.

Articles 29-35 and 37 were adopted without comment.

55. Sir Gerald FITZMAURICE said the discussion in the Commission had demonstrated the necessity for expert views on so technical a problem as fisheries conservation. He suggested that the Commission should include in its report a proposal for the convening of a committee of fishery experts, whose report would be of assistance with a view to the discussion at the Commission's next session.

56. There was some analogy with the case of the delimitation of the territorial sea, regarding which a group of highly qualified experts had been convened; their report (A/CN.4/61/Add.1)⁶ had been extremely useful to the Commission in its discussion, even though many members had criticized its conclusions. That criticism had been due not to any lack of ability on the part of the experts, but rather to the fact that they had been drawn from too narrow a field.

57. In the case under discussion, the fishery experts chosen might perhaps be more numerous—he would suggest six or seven in number—so as to cover the main points of view on fishery conservation.

58. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice's suggestion, which could well be made the subject of a separate resolution by the Commission. The matter could then be taken up by a delegation to the General Assembly with a view to the suggestion's being adopted.

59. The CHAIRMAN, speaking in his personal capacity, said that the Commission's draft articles were not concerned in any material way with technical problems of fishery conservation. They were concerned with the rights and duties of States in connexion with conservation measures; the problems involved were purely of a legal nature.

60. It was also undesirable to incur further expenditure. Expert advice would be directly available without any such expense, because governments, before submitting their comments, would consult their own experts.

61. Mr. SALAMANCA opposed the idea of convening a group of experts—a course which would suggest that the Commission was not quite sure of its own views.

62. The problems involved were all of a juridical or quasi-juridical nature.

63. The only technical issue which had any material bearing on the questions dealt with in the Commission's article was the simple problem of whether there was any genuine need for conservation. Although some doubt had been cast at times on that point, the report (A/CONF.

⁵ 204th meeting, paras. 6, 10 and 23.

⁶ *Yearbook of the International Law Commission, 1953, vol. II.*

10/6)⁷ of the International Technical Conference on the Conservation of the Living Resources of the Sea which had recently been held in Rome ("the Rome Conference") left no doubt concerning the danger of depletion of stocks and the need for conservation measures.

64. It was common knowledge that fishery conservation measures were indispensable in view of the dangers arising from the extraordinarily efficient technical means now available for fishing. He quoted a recent advertisement for a process of fishing by direct suction from the sea which read: "How to land 6,000 fish per minute".

65. Mr. FRANÇOIS (Special Rapporteur) agreed with the Chairman's remarks. There appeared to be no reason for convening a group of experts before comments were received from governments concerning the Commission's draft articles.

66. Mr. GARCÍA AMADOR said the proposal to convene a group of experts was neither admissible in its form nor appropriate in its substance. On the latter point, he referred to the Commission's unfortunate experience with the report by a group of experts concerning delimitation of the territorial sea (A/CN.4/61/Add.1)—a report in which views had been expressed which were in fact at variance with International Court of Justice rulings. The result had been to lead the Commission to adopt provisions which actually did not reflect international law as construed by the supreme judicial authority on the subject.

67. However, the whole proposal was inadmissible as such. The Commission could not validly propose to the General Assembly the convening of a *group* of experts because the General Assembly had already convened an international technical *conference* of experts precisely to deal with the technical issues involved; that conference had been held and its report was available to the Commission. There was nothing further to be done in the technical field. Discussion at the technical level had ended with the report of the Rome Conference; the Commission was now dealing with the matter on the basis of resolution 900 (IX) at the juridical level. When the Commission terminated its work on the legal aspect, the General Assembly would deal with the problem at the political level.

68. Sir Gerald FITZMAURICE said he did not wish to press the matter though he had not been convinced by the arguments of those members of the Commission who disagreed with him. It was true that the draft articles were juridical in form but he personally would have had great difficulty in helping to draft them without expert advice. Indeed it was well known that they had been largely inspired by the work of experts. The Commission might well be criticized for not submitting the text, which despite its form was fundamentally concerned with technical matters, to experts for comment.

69. Although governments would probably consult specialists in fishery matters, their observations would

undoubtedly be influenced by political, economic and social factors and there would therefore be considerable advantage in obtaining an independent expert opinion.

70. The CHAIRMAN observed that it was open to the Commission under Articles 16 and 25 of its Statute to submit the draft for comment to the Food and Agriculture Organization of the United Nations (FAO) or any other specialized body.

71. Mr. GARCÍA AMADOR said that a serious drawback to sending the text to FAO was that that organization already had an established policy in fishery matters which did not find favour with certain States. Its firm stand on the principle of the freedom of the seas had been one of the reasons for the objections to convening the Rome Conference in that city.

72. The CHAIRMAN did not think that that consideration was a decisive one. He added that whatever was finally decided each member of the Commission could consult experts in his own country before the next session.

73. Mr. KRYLOV was disturbed by Mr. Salamanca's description of the draft articles as quasi-judicial in character. Drafting articles on the conservation of the living resources of the sea was a very different matter to dealing with such questions as piracy where members might feel themselves more or less on familiar ground. He therefore considered Sir Gerald Fitzmaurice's suggestion to be a most pertinent one and doubted whether it should be rejected on grounds of economy. Though he proposed, on his return to Moscow, to consult the appropriate experts, that could not in his opinion suffice and he would certainly be in favour of sending the draft to FAO for comment.

74. Mr. SALAMANCA was unable to see what issues could be submitted to experts for an opinion, since the need for conservation measures had already been established at the Rome Conference as well as by the unilateral action taken by certain States to save the living resources of the sea from excessive exploitation and extermination. His experience in the United Nations had made him somewhat sceptical about the utility of expert committees, which, particularly in economic matters, seemed to find it difficult to reach agreement. Moreover, their members were usually influenced by special national considerations.

75. Mr. SANDSTRÖM believed that the Commission was under-estimating the useful contribution which experts could make to its work. In the present instance it was not so much scientific advice which was needed as the views of persons with experience in the field under discussion, who could judge whether the draft articles covered the ground adequately. He would therefore support the suggestion that the text be submitted to FAO.

76. In reply to Mr. SALAMANCA, the CHAIRMAN confirmed that the text would at the same time be submitted to governments.

⁷ United Nations publication, Sales No.: 1955.II.B.2.

77. Faris Bey el-KHOURI said that the draft articles must be accompanied by a questionnaire if useful comments were to be obtained.

78. Mr. AMADO considered Sir Gerald Fitzmaurice's suggestion to be a very useful one because expert opinion was certainly required concerning the kind of measures necessary for conservation. He was uncertain, however, whether FAO could provide such advice.

79. The CHAIRMAN pointed out that the draft articles only laid down the rights and duties of States with regard to the conservation of the living resources of the sea and did not specify the types of technical measure required. In submitting the text to governments the Commission would have accomplished the essential because they would inevitably consult experts before submitting their observations; those observations would be considered at the next session before final form was given to what was a purely legal text.

80. Mr. LIANG (Secretary to the Commission) said that the Rome Conference had taught him there were two kinds of fishery expert, the scientists conversant with the theory and techniques of conservation and the officials responsible for administering fishery conservation programmes. It was the views of the latter group which it would be most useful to obtain on draft articles in which the data before the Rome Conference and its conclusions had been translated into juridical terms.

81. Mr. GARCÍA AMADOR believed that the draft should also be sent to the United Nations Educational, Scientific and Cultural Organization (UNESCO), which had evinced great interest in fisheries, to the International Council for Exploration of the Seas and to the Permanent Commission for the Exploitation of the Maritime Resources of the South Pacific.

82. Mr. LIANG (Secretary to the Commission) observed that quite a number of inter-governmental organizations had participated in the Rome Conference and the Commission should clearly decide whether all of them should be asked to comment on the draft or whether it should be submitted direct to FAO with the request that other bodies be consulted.

83. Mr. SALAMANCA considered that the technical opinion of the many interested bodies would be valuable.

84. Mr. KRYLOV proposed that the draft articles be sent for comment to FAO and to all the organizations listed in the report of the Rome Conference.

Mr. Krylov's proposal was adopted by 7 votes to 1, with 4 abstentions.

Chapter II [III]: Freedom to lay submarine cables and pipelines (articles 23-27 [34-38]) (resumed from para. 16 above)

" Article 23

"1. All States shall be entitled to lay telegraph or telephone cables and pipelines on the bed of the high seas.

"2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the

exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables.

" Article 24 [35]

"Every State shall take the necessary legislative measures to provide that the breaking or injuring of a submarine cable beneath the high seas done wilfully or through culpable negligence and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communications, or the breaking or injuring of a submarine pipeline in like circumstances, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such break or injury.

" Article 25 [36]

"Every State shall take the necessary legislative measures to provide that if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

" Article 26 [37]

"Every State shall regulate trawling so as to ensure that all fishing gear shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

" Article 27 [38]

"Every State shall take the necessary legislative measures to ensure that the owners of vessels who can prove that they have sacrificed an anchor, a net or any other fishing gear in order to avoid injuring a submarine cable, shall be indemnified by the owner of the cable."

Articles 23-27 were adopted without comment.

Article 8 [9]: Signals and rules for the prevention of collisions (resumed from para. 1 above)

85. Mr. ZOUREK apologized for having been unavoidably detained when article 8 had been taken up. Articles 13 and 15 of the Special Rapporteur's original draft (A/CN.4/79) had now been combined in that article, and he (Mr. Zourek) proposed that the original wording "agreed upon by the majority of maritime States" should be reinstated in the second sentence in place of the words "internationally accepted for the greater part of the tonnage of sea-going vessels". The text would then conform more closely to practice.

86. The CHAIRMAN, speaking in his personal capacity, supported that amendment because he regarded the expression "the greater part of the tonnage of sea-going vessels" as clumsy.

87. Mr. FRANÇOIS (Special Rapporteur) observed that after considerable discussion a clear body of opinion had emerged opposing the concept of a numerical majority

rather than one measured in terms of the relative importance of the interest of each State in safety regulations. Clearly the importance of that interest was very much greater where the merchant tonnage was considerable. He believed the new text to be a more equitable one.

88. The CHAIRMAN observed that if the Drafting Committee's text were to be retained it should be amended by the insertion of the words "the vessels forming" after the words "accepted for".

89. Mr. FRANÇOIS (Special Rapporteur) agreed to that modification.

90. Mr. ZOUREK pointed out in reply to Mr. François that the Commission had taken no final decision in the matter. Clearly, from the point of view of safety, a rule inconsistent with that followed by the majority of States, even if applied by one with a small merchant fleet, could be just as dangerous.

91. Mr. KRYLOV said that in the Drafting Committee he had opposed the reference to tonnages, which did not appear to him a particularly fortunate solution, but the Chairman's amendment would certainly go some way towards improving the text. The important thing was to prevent contradictory rules which might lead to collisions.

92. Mr. FRANÇOIS (Special Rapporteur) said that in fact the issue at stake was the safety of human life.

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

*Article 2 [2]: Freedom of the high seas
(resumed from the 320th meeting)*

93. Mr. GARCÍA AMADOR asked that the heading of article 2 should in the Spanish text read "Freedom of the seas".

94. Mr. SANDSTRÖM proposed, following the Secretary's remarks at the previous meeting,⁸ that the titles of chapters I, II and III should not be prefaced by the words "Freedom of". The title of chapter II would require some further modification.

It was so agreed.

95. Mr. ZOUREK asked what would become of the provision concerning the contiguous zone adopted at the fifth session.

96. Mr. FRANÇOIS (Special Rapporteur) said that it would be explained in the report that the provision would come up for final review at the next session.

Vote on the draft articles as a whole

97. The CHAIRMAN then invited the Commission to vote on the draft articles as a whole.

98. Mr. ZOUREK considered that the Commission should wait for the final text of the articles before voting on the draft as a whole.

99. The CHAIRMAN suggested that the vote be taken on the whole text subject to minor drafting changes.

With that reservation, the draft articles on the régime of the high seas, in the form proposed by the Drafting Committee, were adopted unanimously, as amended in the foregoing discussion.

100. Mr. KRYLOV said that he wished a statement to be inserted in the report indicating that he had voted in favour of the draft articles although he was opposed to article 8 because of its reference to "the greater part of the tonnage of sea-going vessels", and to article 35 because it provided for obligatory jurisdiction by an arbitral tribunal.

101. Mr. ZOUREK also wished a statement of his dissenting opinion to be included in the report to the effect that after intending to abstain from voting on the draft as a whole he had finally supported it although he was opposed to articles 4, 5 and 35 for reasons he had given during the discussion.

102. The CHAIRMAN said that such statements of dissent could always be accompanied by reference to the relevant summary records.

103. Mr. ZOUREK observed that in accordance with the provisions of its Statute, the Commission's final report on each session should accurately reflect any major differences of opinion.

104. The CHAIRMAN stated that that had always been the Commission's practice in the past.

The meeting rose at 12.55 p.m.

322nd MEETING

Wednesday, 29 June 1955, at 10 a.m.

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Chairman : Mr. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members: Mr. Gilberto AMADO, 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. Jaroslav ZOUREK.

⁸ 320th meeting, para. 40.