Document:-
A/CN.4/SR.368

Summary record of the 368th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1956, vol. I

without the consent of the State to which they belonged. Government vessels constituted a special problem. On the one hand, a right of innocent passage for merchant vessels must certainly be recognized; on the other hand, there was the very important question of the immunity of State property. It was for that reason that at the previous session he had favoured reserving a decision on the matter.[5] Adequate treatment of the question of the immunity of the State and its property would require a detailed study, to the necessity for which the United Kingdom Government had already drawn attention (A/2934, p. 45). The Commission must choose between a fully explicit text or, as the Chairman had suggested, deletion of the articles.

99. Mr. AMADO said that the Commission's task was the codification of existing rules. The only possible solution was to refer to the relevant preceding articles in respect of the right of innocent passage, stating that they were applicable to the cases in question.

100. Mr. SPIROPOULOS said that there would be no difficulties if the question were restricted to right of innocent passage. Other aspects, however, were involved —e.g., in articles 21 and 22. As article 23 was drafted, it referred to preceding articles which bore on factors other than innocent passage. It should, however, be limited to the question of passage only.

101. Fundamentally, the restriction imposed on warships arose from their character as units of the armed forces of a State which sought passage through the territorial sea of a coastal State. The right of passage for government vessels, whether operated for commercial or non-commercial purposes, had no link with that granted to units of the armed forces and there was therefore no reason to apply the same strict provisions. It would be advisable simply to state that the Commission had been unable in the time at its disposal to study adequately the two cases in question, which could be taken up by a possible international conference.

102. Mr. AMADO said that, alternatively, the Commission could accept the United Kingdom view, in which case the provisions of article 16 could be applicable. It was clear that certain provisions of the preceding articles would not be applicable to government vessels.

103. Mr. PAL pointed out that the 1954 draft of article 26, referring to passage of warships, had been modified in 1955 as a result of government comments stressing the dangerous character of such vessels. Would it not meet the case if the Commission adopted the 1954 text, relating to warships, for government vessels? That text did not require previous authorization or notification.

104. The CHAIRMAN said that there seemed to be general agreement that articles 23 and 24 should be applicable to government vessels only in respect of right of innocent passage. It that were agreed, the question could be left in the hands of the Drafting Committee.

On that understanding, articles 23 and 24 were referred to the Drafting Committee.

[5] A/CN.4/SR.306, para. 58.

Article 25: Passage of warships

105. Mr. FRANÇOIS, Special Rapporteur, said that with regard to the right of passage for warships, opinion was equally divided between the Belgian and Danish Governments, on the one hand, which held that it was a concession contingent on the consent of the coastal State and that the requirement of previous authorization was justifiable, and the United Kingdom and Netherlands Governments on the other hand, which did not accept the requirement of previous authorization.

106. The comment of the Turkish Government raised no difficulties.

107. Mr. AMADO said it was important to know what was the existing practice of governments in respect of previous authorization or notification. He doubted whether such a provision was applied by the Latin-American States.

108. Mr. FRANÇOIS, Special Rapporteur, said that the Netherlands Government was opposed to the provision because it did not itself require previous notification from foreign warships.

The meeting rose at 1.10 p.m.

368th MEETING

Friday, 15 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2693, A/2934, A/CN.4/97/Add.2, A/CN.4/99 anp Add.1) (*concluded*)

Article 25: Passage of warships (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 25 of the draft articles on the regime of the territorial sea.

2. Mr. KRYLOV favoured the retention of the article as drafted, although it might be thought that paragraph 2 was slightly tautologous in its repetition of the provision of paragraph 4 of article 18.

3. With regard to the substance of the article, he would invoke the authority of Gidel, who had written: " Le passage des bâtiments de guerre étrangers, dans la mer territoriale, n'est pas un droit, mais une tolérance."[1] That principle had been taken up by the Belgian Government (A/CN.4/99, page 12), which upheld the view that the right of passage of warships through the territorial sea was merely a concession contingent on the consent of the coastal State. The American jurist Elihu Root, in the North Atlantic Fisheries Arbitration, had made the same point, " Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and re-pass, because they do not threaten."[2] Moreover, both the Danish and Netherlands Governments held that, although authorization was not required, previous notification through diplomatic channels was in accordance with international usage. The absence of any comment from the United States Government seemed to imply acceptance of the draft article. Only the United Kingdom opposed both previous authorization and notification.

4. In view of the changed situation brought about by the provisions of the Charter of the United Nations —a highly relevant consideration—the 1955 draft was an accurate reflexion of contemporary conditions and there was no reason to modify it in any way.

5. Mr. FRANÇOIS, Special Rapporteur, felt that Mr. Krylov had not stated the Netherlands' point of view correctly, for in its reply it had urged the restoration of the 1954 text, under which neither previous authorization nor notification was required. The reason was that, in the opinion of the Netherlands Government and the Netherlands Navy, in practice neither was required.

6. The exclusion of the requirement of previous authorization or notification had been found unacceptable by some governments, and as a result the draft had been modified at the previous session. The 1955 draft was opposed by only two States, whose criticism might be met by a slight drafting amendment to paragraph 1. He would simply change the order of the two sentences it contained, and insert at the beginning of the new second sentence the word " Nevertheless,". That amendment would have the advantage of providing that, so long as the coastal State did not prohibit the right of innocent passage, the existing situation would continue.

7. Sir Gerald FITZMAURICE said that he would go still farther than the Special Rapporteur and propose reverting to the 1954 text. His views on the matter were well known, and he need only refer to his remarks at the previous session.[3] His criticism of the draft article was that it neither accurately enunciated international law nor reflected international practice. In a set or articles in which the Commission was attempting to codify existing law, it should not introduce an innovation which was in conflict with usage. Hitherto, a clear distinction had been drawn between the visit by a foreign warship to the port of a coastal State and passage through some part of its territorial sea. International practice was that in the former case notification was always given, whereas in the latter, when it was a question of mere passage, that formality was not required. The view that previous notification was required was based on an erroneous conception of the function of warships in time of peace and of the reasons for the desired recognition of the right of innocent passage. In peacetime, warships had the right to proceed on their lawful occasion, just as had any other vessels, and passage through the territorial sea was due to the fact that such a course was the only one available, or that it lay along a normal shipping lane, or that, on account of weather or other special conditions, it was the most practicable highway. Why then assume some sinister motive calling for previous authorization or notification? In practice, the coastal State would gain nothing by such a provision, which would merely constitute an impediment to navigation.

8. The comment by the United Kingdom Government (A/CN.4/99/Add.1, page 70) stressed that there was no question of disputing the right of the coastal State to regulate the passage of warships through the territorial sea. It listed four considerations that should govern the treatment of warships by the Commission, and the fourth of those, referring to the tendency of some countries to claim large extensions of the territorial sea, was of particular importance. Even if it could be conceded that, on the basis of the three-mile limit, the passage of foreign warships through its territorial sea might cause some apprehension to the coastal State, with the extensions now claimed there could be none.

9. Again, articles 16 to 19 were applicable to all vessels, and in respect of warships did provide adequate safeguards against abuse, including the right to suspend passage under certain conditions. The innovation introduced in 1955 would have the regrettable consequence of rendering the draft unacceptable to those countries whose warships had been in the habit of proceeding freely on their lawful occasions about the world. Paragraph 2 of the 1954 draft provided ample safeguards and the 1954 draft was the text that should be adopted.

10. Mr. SCELLE, fully endorsing Sir Gerald Fitzmaurice's remarks, said that it was surprising and regrettable that at its previous session the Commission should have jettisoned the liberal text that it had adopted in 1954, for its decision was in accordance neither with customary law nor with the requirements of the situation.

11. He could not support Mr. Krylov's interpretation of Gidel's position in the matter. His own understanding of Gidel's position was that right of innocent passage was not a concession by the coastal State, but an absolute necessity of navigation. French legal doctrine had tended to stress the fusion of the territorial sea with the conti-

[1] *Le droit international public de la mer*, vol. III, page 284.

[2] *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague, 1910*, World Peace Foundation, 1912, p. 99.

[3] A/CN.4/SR.306, paras. 89 and 90, A/CN.4/SR.307, paras. 16 to 21, A/CN.4/SR.308, paras. 27 and 30.

guous zone and the high seas, maintaining that passage through territorial waters was an essential requirement for the utilization of the high seas. Moreover, under certain circumstances it might be undertaken as a result of some unforeseeable maritime contingency, in which case notification could obviously not be expected.

12. Mr. KRYLOV said that, in the context of the article, Sir Gerald Fitzmaurice's reference to the navigational aspect of the passage of a warship through the territorial sea seemed to be irrelevant. Navigation was a function of merchant vessels, but not of warships. With the possible exception of cadet training ships, the latter did not navigate ocean waters; they proceeded from one place to another under government orders, which was a different matter.

13. With regard to the Special Rapporteur's reply to his (Mr. Krylov's) previous comment, he regretted his misunderstanding of the Netherlands position. The Special Rapporteur's proposal was therefore perhaps acceptable.

14. In reply to Mr. Scelle, he had the strong impression that he had quoted Gidel accurately, but he had referred to him only as representing French doctrine on that subject.

15. Faris Bey el-KHOURI, drawing attention to one point that had not been mentioned by Sir Gerald Fitzmaurice—with whose remarks he was in general agreement—said that the extension of the limit of the territorial sea from three to twelve miles would result in most of the maritime highways of the world falling within territorial waters. That was a consideration that must be borne in mind, for it was essential that the article should not prove an impediment to navigation, although it was true that the movements of warships were not in the same category as those of merchant vessels.

16. Mr. ZOUREK pointed out that the Special Rapporteur, in introducing the article at the previous meeting,[4] had referred only to the comments by governments communicated that year. Account should also be taken, however, of the replies from governments in 1955, some of which, in particular that of the Swedish Government (A/2934, p. 39) were critical of the 1954 draft.

17. The reason for the provision by international law of special stipulations with regard to the innocent passage of warships through the territorial sea of a coastal State was, as the Special Rapporteur had correctly pointed out, based on their dangerous character[5] The mere presence in territorial waters of a foreign warship constituted a threat to the coastal State and might well be a disturbance to the tranquillity of mind of its nationals. A warship was, after all, a combatant unit of the armed forces of a State. International law prohibited the free entry of foreign land forces into the territory of a State, and the reasons for following that analogy in respect of the passage of warships through the territorial sea—which also constituted national territory—were cogent.

18. International practice in the matter was far from uniform, as was shown by the replies from governments to the questionnaire circulated by the Preparatory Committee of the 1930 Conference for the Codification of International Law[6] some States requiring previous notification, others not. The practice of the passage through the territorial sea of foreign warships was not founded on international law, but on *comitas gentium*. As Mr. Krylov had correctly pointed out, passage of warships through the territorial sea was generally allowed as a matter of courtesy; but there was no right, it was only a concession, or act of comity, which might be withheld without any infringement of the provisions of international law. The correctness of that view was borne out by the records of the 1930 Conference for the Codification of International Law, which showed that it had been endorsed by both the United States and the United Kingdom representatives.[7] That view was also held by many other authorities. Mr. Krylov had already quoted Gidel's opinion, to which he would add only that of Oppenheim: "But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognized";[8] and that of the Harvard Law School Research in International Law which stated the same thesis.[9] There was therefore a considerable volume of evidence that the practice of the passage of warships through the territorial sea was based not on any right under international law, but on the comity of nations.

19. Mr. Krylov had also drawn attention to the provisions of the Charter of the United Nations, which had the effect that warships could be operated only for defensive purposes. Any departure from that principle would be in conflict with the Charter. The presence in the territorial sea of the warship of a foreign State without previous notification could hardly be interpreted as being for purposes of defence. At the previous session, Mr. Scelle too had made the point that the adoption of the United Nations Charter had materially altered the situation,[10] a point with which he was in full agreement.

20. The 1955 draft, therefore, was entirely in accordance with the provisions of international law, and a study of the text, in particular the use of the word "may" in the first sentence and of "Normally" in the second sentence of the first paragraph, showed that it was a compromise solution which took into account the interests of both the coastal State and the foreign State.

21. Mr. SANDSTRÖM clarified the Swedish Government's view by quoting the comment to which Mr. Zourek had referred. It stated that, according to the Commission's draft, the right of passage of foreign warships through the territorial sea of a coastal State appeared

[4] A/CN.4/SR.367, para. 105.

[5] *Ibid.* para. 90.

[6] League of Nations Publications: C.74.M.39.1929.V, pp. 65-70.

[7] League of Nations Publications: C.351(*b*).M.145(*b*).1930.V, pp. 59 and 63.

[8] International Law (7th edition), vol. I, p. 448.

[9] Harvard Law School Research in International Law, *Territorial Waters*, 1929, p. 295.

[10] A/CN.4/SR.306, para. 91.

to rest on a somewhat precarious basis and that consequently it might be preferable to make no provision for the right of passage of warships in a future convention (A/2934, p. 39).

22. The feelings of small States could not be disregarded, for some, such as Denmark and Norway, had undergone distressing experiences during the Second World War as a result of the passage of foreign warships through their territorial sea. It might be objected that those incidents had taken place during a world war and were therefore abnormal, but that did not allay the apprehension felt in small countries. Mr. Zourek's point was therefore of importance and, in view of the uncertainty with regard to the precise provisions of international law, it would be more in accordance with contemporary thought and the United Nations Charter to retain the text of the 1955 draft.

23. Mr. SCELLE said that if, as it appeared, he had misinterpreted the view of Professor Gidel, he must point out that his colleague had failed to take account of the essential unity of the sea. The territorial sea, the contiguous zone, and the high seas, though different from the legal standpoint, were, from the practical standpoint of navigation, all parts of a single element, the sea. And navigation was still navigation, whether the ship were a merchant ship or a warship. Policemen had the same rights of movement on the highway as ordinary citizens—fortunately—for otherwise the only persons who would be able to move about freely would be brigands. In the same way, warships, the policemen of the seas, had the same normal rights of passage as commercial shipping. Mr. Zourek's conception of the purely defensive role of warships would severely restrict their movement. Warships could not perform their task if perpetually anchored in their home roadstead. If they were not permitted to pass through territorial waters, they would have no *droit d'escale* and so would be unable to circulate freely on the high seas.

24. Mr. Zourek had also referred to the concept of comity in connexion with the permission for warships to pass through the territorial sea. But international comity, though it might at one time have served as a substitute for international law, could not serve as a basis for any rule of international law.

25. The Commission appeared to be forgetting that chapter VII of the United Nations Charter had profoundly modified international law. Though no agreements had been concluded, as provided for in article 43 in that chapter, regarding the armed forces to be made available to the Security Council by the Members of the United Nations, it was inconceivable that Members, were there a threat of war, would not take measures to support the action of the Security Council. That being so, there must be freedom of movement for warships to travel to parts of the world where aggression, which the Commission had described as the principal international crime, was threatened. However, a power would have to be completely mad before it would commit aggression at a time when all nations wished for peace and were, implicitly at least, bound to preserve it. There was therefore no reason to restrict the right of passage of warships because of the danger of sudden invasion, as in the case, cited by Mr. Sandström, of Denmark and Norway during the recent World War.

26. In short, he did not think that the text adopted by the Commission at its sixth session was in any way outmoded. On the contrary, it was a step forward and should be made a rule of international law.

27. Mr. LIANG, Secretary to the Commission, after recalling that for many peoples the idea of foreign warships was closely associated with that of a display of force, said that according to the laws and regulations examined by the Secretariat, many countries subjected the passage of warships through the territorial sea to previous authorization or notification. It was quite understandable that States which felt that they had reason to be suspicious of foreign warships should enact such provisions. While previous authorization was not required in every case, notification appeared to be quite generally practised. Indeed, since warships constituted a far greater threat to the safety of traffic than did commercial shipping, it might be regarded as a necessary precaution.

28. The requirement of authorization or notification was, however, subject to two qualifications which were not open to dispute. The first was the right of warships of a State to enter another State's waters during a storm or other emergency, and the second the absolute right of innocent passage through straits normally used for international navigation between two parts of the high seas. In other cases, however, previous notification appeared to be called for on commonsense grounds and by general practice.

29. Referring to Mr. Scelle's statement, he said that when an international police force came into being in pursuance of Article 43 of the Charter, no notification or authorization would be necessary with respect to warships belonging to that force. The Commission's draft, however, envisaged other situations which were more normal and had nothing to do with the application of enforcement measures by the United Nations.

30. Mr. ZOUREK observed that *droit d'escale* was quite different from right of innocent passage. In any case, the modern warship normally carried enough fuel to make it generally unnecessary for it to exercise its *droit d'escale*. There was, incidentally, no rule of international law that warships of a State must be admitted to the ports of other States, though, of course, they might be admitted in case of distress.

31. Much had been made of the fact that it was merely " innocent passage " that was involved. But a coastal State could hardly know whether the passage of a warship was innocent unless it had at least been notified of the warship's arrival. And the experience of some countries in time of crisis or war was not calculated to allay their fears in that respect.

32. Referring to Mr. Scelle's and the Secretary's remarks on an international police force, he pointed out that, under Article 43 of the United Nations Charter, the placing of armed forces, assistance and facilities, including rights of passage, at the disposal of the Security

Council, was not automatic, but conditional on the conclusion of a special agreement or agreements.

33. Mr. AMADO observed that the countries of Latin America had known what it was to experience a display of force by foreign warships. He could not understand the objections to the requirement of previous notification. If an armed foreigner entered a State's territory, the police had a perfect right to inquire his intentions. Why, therefore, must a State tolerate the presence of powerful naval units in its territorial waters and not even have the right to know the reason for their presence? He preferred the text adopted by the Commission at its seventh session.

34. Mr. SPIROPOULOS said that he had no strong feelings either for or against the principle of subjecting the right of passage of warships to previous authorization or notification. He was merely interested in enabling the Commission to reach a solution. The provisions of the Charter cited by Mr. Scelle did not have any real bearing on the problem. All questions of international law were affected in some degree by the Charter, and he could not see that the problem under discussion was affected any more than another. The 1930 Codification Conference, regarding the passage of foreign warships through a territorial sea as a by no means extraordinary and, indeed, rather rare occurrence, had approached the question in a much calmer fashion than the Commission and had not been at all concerned about the possibility of a display of force. And quite rightly, since, in modern times, there was no need to enter the territorial sea of a State in order to make a display of force.

35. As a possible compromise solution, he would propose as an amendment the deletion of the first sentence in paragraph 1, merely retaining the words " Normally, the coastal State shall grant innocent passage to warships through the territorial sea subject to the observance of the provisions of articles 18 and 19." Such a solution would leave a State the right to require previous authorization or notification in circumstances which were not normal. It would also reflect existing practice and would be much on the lines of paragraph 1 of article 12 in the text of the Codification Conference at The Hague, which ran as follows: " As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification." [11]

36. Faris Bey el-KHOURI thought that Mr. Spiropoulos' amendment offered a satisfactory solution. It established the principle that coastal States should allow innocent passage to warships subject to certain conditions but, at the same time, did not deprive those States of the right to make regulations. Regulations of that kind would in any case be of no value against States acting in bad faith. The invasion of Norway and Denmark during the Second World War could not have been prevented by regulations.

37. Sir Gerald FITZMAURICE agreed with Mr. Spiropoulos in noting a tendency to introduce ideological and sociological considerations which were not really germane to the subject. Much had been made of the threat to the security of the coastal State inherent in the passage of warships through its territorial sea. Under modern conditions such considerations were totally unrealistic. Warships could bombard a coast with the utmost accuracy from a distance of 40 miles or more and aircraft carriers could operate from a distance of 200 or 250 miles or much more. There was no need whatever for warships wishing to commit hostile acts to enter the territorial sea, and if they did wish to, they certainly would not ask previous authorization.

38. The discussion appeared to have moved away from the real problem, which was that of granting innocent passage through the territorial sea—in other words, a matter of navigation. And, despite Mr. Krylov's claims,[12] the navigational needs and rights of a warship travelling normally from one point to another were identical with those of a commercial vessel.

39. Mr. Zourek, in a very interesting statement, had really only proved points upon which all were already agreed. It was admitted that there had always been certain reservations regarding the right of innocent passage of warships. The fact remained that the practice of States, on which international law was ultimately founded, normally admitted the passage of warships through the territorial sea, without authorization or notification. Indeed he was prepared to wager that the admiralties of most States with warships, though notifying other States from time to time, did not regard themselves as bound to do so in cases of ordinary passage of warships, without stopping, through the territorial sea. He therefore considered that the Commission would be taking the wrong course in subjecting the passage of warships, for the first time, to such requirements. He would not, however, press his proposal to restore the text adopted by the Commission at its sixth session and would accept Mr. Spiropoulos' amendment, which left the question open.

40. Mr. KRYLOV said the wisest course would be to retain the text adopted at the Commission's seventh session or, failing that, to adopt the Special Rapporteur's proposal which did not involve a change of much consequence. He was quite unable to accept Mr. Spiropoulos' amendment since it only half settled the question.

41. Mr. EDMONDS, comparing the texts adopted by the Commission at its sixth and seventh sessions respectively, pointed out that in the latter the right of innocent passage of warships was qualified only to the extent that it was subject to previous authorization or notification. The amendment proposed by Mr. Spiropoulos would, he thought, leave the question even more in doubt and imply a much more restricted right than that enunciated in the text adopted by the Commission at its sixth session. It was, furthermore, not clear what meaning was to be attached to the word " normally " in Mr. Spiropoulos' text. For the sake of clarity, the Commission should

[11] League of Nations Publications: C.351.M.145,1930.V, p. 130.

[12] See para. 11, above.

either return to the text adopted at its sixth session or approve that adopted at its seventh session.

42. The CHAIRMAN declared the discussion closed and invited the Commission to vote first on Mr. Spiropoulos' amendment[13] to delete the first sentence of paragraph 1.

Mr. Spiropoulos' amendment was rejected by 9 votes to 3, with 2 abstentions.

43. Sir Gerald FITZMAURICE said that, Mr. Spiropoulos' amendment having been rejected, he wished to resubmit his own proposal[14] that the Commission revert to the text adopted at its sixth session.

Sir Gerald Fitzmaurice's proposal was rejected by 7 votes to 3, with 4 abstentions.

44. At the request of Mr. Krylov, the CHAIRMAN put to the vote the Special Rapporteur's amendment[15] that the position of the two sentences in paragraph 1 of article 25 as adopted by the Commission at its seventh session be transposed.

The Special Rapporteur's amendment was rejected by 4 votes to 3, with 6 abstentions.

Article 25 was adopted without change.

Article 26: Non-observance of the regulations.

There were no comments on the article.

Article 26 was adopted without change.

45. The CHAIRMAN *declared* that the Commission had completed its consideration of the draft articles on the regime of the territorial sea.

The law of treaties (item 3 of the agenda) (A/CN.4/101)

46. The CHAIRMAN invited the Commission to take up item 3 of its agenda, the law of treaties, and called on Sir Gerald Fitzmaurice, Special Rapporteur, to introduce his report (A/CN.4/101).

47. Sir Gerald FITZMAURICE, Special Rapporteur, said he would not go into the articles embodied in his report as that would involve too detailed a discussion. He wished to have the Commission's guidance on some of the points on which his draft had been based, so that he might be able to base his future work on the general feeling expressed, or perhaps amend some of what he had already done. The questions on which he would be grateful for an expression of views on the part of members of the Commission were as follows:

(i) Did members of the Commission agree that in general a codification of the law of treaties should not take the form of a convention, but of a code *stricto sensu* —i.e., of a set of rules and principles stated in the abstract, and not in the language of obligation?

(ii) Did members agree that the articles on the drawing-up and conclusion of treaties (with which the present report was mainly concerned) had not previously been formulated in sufficient detail and required expansion? The answer to that question would be without prejudice to the further question of what degree of expansion was desirable, a question which might be left open for the present.

(iii) Did members favour the idea that, although a code on the law of treaties must begin with the topic of the *conclusion* of treaties, it should nevertheless, as a matter of presentation, give an early place to certain absolutely fundamental principles of treaty law, such as those set out in articles 4-9 of the present text, even though, as a matter of pure logic, those articles should probably figure in later parts of the code.

(iv) Did members favour a continuation of the method of attempting to draft each article of the code in such language as to cover all kinds of "treaties" by one and the same form of words—i.e., not only formal treaties and conventions, but also such things as exchanges of notes, agreed memoranda, etc.—and not only general multilateral instruments, but also bilateral ones? Or would it be better to split up the subject more, and devote special sections to particular classes of instruments? A combination of those methods might also be envisaged.

(v) At its third session, the Commission had decided[16] to leave aside the question whether the code should cover treaties made by and with international organizations. It had decided that the code should be drafted in the first place so as to cover States only. The question whether the articles so drafted could be applied to international organizations as they stood, or would require modification, could be decided later. Sir Hersch Lauterpacht in his reports[17] had definitely included international organizations. He himself had mentioned the matter in his report in the commentary on articles 1 (3) and 2 (1) in paragraphs 2 and 3 on page 44. He felt it would be desirable to take a final decision as to whether international organizations should be covered, and if so in what form.

48. To take those questions in order and a little more fully, in connexion with the first one, he explained that he was perfectly well aware that more than one method might be employed. The Commission's draft on the law of the high seas was an example of a combination of the methods used in conventions and in codes, as the language adopted had been to some extent the conventional language in which States undertook obligations. That method might not be wholly appropriate in dealing with the law of treaties. There would inevitably be passages where conventional language would be used, but the subject lent itself to looser treatment, because a certain amount of introductory or explanatory matter was very often required. If the Commission departed from conventional language, it would be able to introduce some general language, which was often extremely useful for explaining in an article itself the precise reasons for the form proposed, without the need for reference to a commentary.

49. As regards his second question, he was conscious

[13] See para. 35, above.

[14] See para. 7, above.

[15] See para. 6, above.

[16] A/CN.4/L.55.

[17] A/CN.4/63 and A/CN.4/87.

that he might have expanded the articles more than was strictly necessary and that the Commission might find on examination that they could be abbreviated or telescoped. If, however, the basis for his proposals was accepted, the articles would be fuller than those drafted by Professor Brierly[18] or by Sir Hersch Lauterpacht.[19] He felt some diffidence in departing from the previous reports, but his impression had been that, while as a matter of law the topic of the conclusion of treaties had been very adequately and effectively set out, the articles were not adequate when related to daily practice, and many points had not been covered.

50. In the law of treaties there was a distinction, although it was often considerably blurred, between matters strictly of law and matters which might be regarded as merely protocol and not really matters of law in the sense that they could not be dispensed with. Care should be taken not to overstep the line which separated the law of treaties and daily practice with regard to treaties. Nevertheless, there was a case for introducing into a code on the law of treaties matters which were not strictly law, but very considerably affected practice.

51. His third question did not raise a point of the first importance. He had to some extent departed from logic by beginning with the topic of the drawing-up and conclusion of treaties and going on in articles 4 to 9 to introduce very general and absolutely fundamental principles of treaty law which went beyond that topic. It was perfectly true that articles 4 to 9 should have been placed later, in connexion with the validity of treaties and the position of third parties. As a matter of presentation, however, it had seemed more advisable that a code on the law of treaties should start by enumerating a few really fundamental principles of treaty law, and he had therefore begun by defining substantially what a treaty was, for the purpose of a code, had continued with articles enumerating the fundamental principles of treaty law, and had then gone on to the topic of the drawing up and conclusion of treaties. There were other questions of arrangement which would have to be decided in due course, but they were less important.

52. His fourth question raised a point of some difficulty, of which anyone drafting a code of treaty law immediately became conscious. The system adopted by Professor Brierly and Sir Hersch Lauterpacht had been to draft the articles in language which would cover every kind of treaty. He had followed that method, but had realized that in fact there were great differences between the different types of treaty, for example between a general multilateral treaty—with the whole process of drawing up, signature, ratification and accession—and bilateral treaties in the form of exchanges of notes or agreed memoranda.

53. Both forms of international agreements were basically governed by the ordinary law of obligation, but there were very great differences with regard to drawing up and concluding the various kinds of treaties and the methods of bringing them into force. It was not impossible, of course, to draft articles applicable to all kinds of treaties, but there were great difficulties in the way, and the drafter must often be conscious that since there were certain aspects relating only to one kind of treaty, language designed to cover all kinds of treaties might sometimes be inappropriate. There was, for example, the whole question of ratification, which did not arise with exchanges of notes. He had therefore wondered whether it might not be better to split up the subject and include sections on particular types of instrument. It might be best to include an article to the effect that, unless otherwise stated, the provisions of the code would apply to all types of treaty, and then to draft articles in which rules were stated applicable to only a particular type of treaty.

54. The question of treaties made by and with international organizations had been discussed at previous sessions and the results had been summarized in a working paper on the law of treaties prepared by the Secretariat.[20] In that paper the texts of articles prepared by Sir Hersch Lauterpacht and the provisional decisions and tentative texts adopted by the Commission had been placed side by side.

55. In the comment to article 1 of Sir Hersch Lauterpacht's text (essential requirements of a treaty) it was stated that a majority of the Commission had been in favour of including in its study agreements to which international organizations were parties and it had been generally agreed that while the treaty-making power of certain organizations was clear, the determination of the other organizations which possessed the capacity for making treaties would need further consideration.[21] At its third session[22] the Commission had decided to adopt the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside for the moment the question of the capacity of international organizations to make treaties; that it should draft the articles with reference to States only; and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification.

56. On that basis, the articles might have been expected to relate only to States, but Sir Hersch Lauterpacht in his second report[23] had definitely included international organizations, and he himself also thought that they should be included. It would be impossible to ignore in a modern code of treaty law the fact that many international organizations existed and most of them had a treaty-making capacity. Such capacity had been recognized to the United Nations by the advisory opinion of the International Court of Justice in the case of Reparation for Injuries suffered in the service of the United Nations.[24] The language in which that judgment had been couched was clearly applicable to many other international orga-

[18] A/CN.4/23 and A/CN.4/43.

[19] A/CN.4/63 and A/CN.4/87.

[20] A/CN.4/L.55.

[21] A/1316, paras. 161, 162 and A/CN.4/SR.50, 51 and 52.

[22] A/CN.4/SR.98, p. 3.

[23] A/CN.4/87.

[24] I.C.J. Reports 1949, p. 174.

nizations with treaty-making powers similar to those of the United Nations.

57. If it was agreed that such international organizations should be covered by the code, the question arose how that code should be drafted in accordance with the decision [25] taken by the Commission at its third session. Language might be used consistent with the enunciation of the principles for treaties between States, but a paragraph might be included stating that they applied, *mutatis mutandis*, to treaties made by and with international organizations, unless anything to the contrary was stated. He anticipated that it would be desirable to include a section providing for a number of exceptions. If that were agreed, he might continue as he had begun, drafting the articles as applicable to States unless the contrary was stated, and conclude with a section in which the exceptions were set forth. There would thus be three classes of treaties: those between States, those between international organizations, and those between States and international organizations. He would welcome any comments from members of the Commission on his questions.

58. Mr. AMADO said that he had been gratified to see that the Special Rapporteur had gone straight to the heart of the matter instead of writing yet another book on the law of treaties. At the outset, he had rightly drawn a distinction between treaties proper—the *actes solennels*, as Mr. Scelle called them—and the minor forms of treaty-making such as exchanges of notes, often executed by individual Ministers with the approval of the Head of State, which did not require ratification. Incidentally, he had been amused at the very English definition of ratification in article 13, paragraph (viii), as the act whereby a signatory State ratified its signature. In his own view, ratification was a procedure by which a State agreed to be bound by the treaty. He entirely agreed that a separate section of the code should be devoted to the minor forms of treaty-making.

59. Much more thought would have to be given to the question whether there should be a separate formulation for treaties made by and with international organizations, which obviously could not be treated on the same footing as treaties between States.

60. He also entirely agreed that a code would be preferable to a convention for a codification of the law of treaties and that it should include enunciations of fundamental principles, provided that it was drafted in such precise terms as to obviate difficulties of interpretation and to maintain international law as a consistent whole. He also agreed with the Special Rapporteur's second and third questions, but, at that stage, could go no farther on the fourth and fifth questions than to congratulate him on their skilful drafting.

61. Mr. SCELLE said that he had not had time to consider the Special Rapporteur's questions in detail, but in general thought the suggestions a very good method of enabling the Commission to study the report methodically.

62. He entirely agreed with the substance of the first question, but would require explanations on the second. There would hardly be time to discuss questions of method in detail, especially the question whether treaties made by and with international organizations could be assimilated to bilateral or multilateral treaties. Professor Philip Jessup was to deliver a lecture shortly at the Academy of International Law on the question of how international law might be drawn up by international organizations. That question would open up entirely new problems.

63. The practice of international organizations was parliamentary rather than diplomatic, and took place in circumstances quite different from those which governed relations between States. According to Kelsen's theories, a whole series of rules of law would issue from that difference. The law of treaties was the law of an already organized international society rather than the law of a society of States. The method of dealing with treaties made by and with international organizations would depend very greatly on whether they were regarded as societies of nations or as universal international societies and from that difference would issue great differences in the rules of international law. When States entered international organizations, they abandoned a considerable amount of their general competence. The treaties made by them could not be regarded in the same light as treaties between States, because they did not serve the total interests of individual States, but the interests of individuals or corporations, which lay outside the interests of States.

64. The rules of law issuing from treaties and the rules of law issuing from international custom and the judgments of international courts must be considered separately. The question could not be solved *a priori*, and the solution to be suggested by the Special Rapporteur would undoubtedly appeal to the Commission's imagination.

65. A profound change was occurring in the nature of international law, for it was evolving towards a single standard of law based on universality. One of the reasons for its present fluid state was that it no longer governed solely the relations between States, but was becoming something more like municipal law, despite the existence of very large States and very small States, almost like the mediaeval city States. International law was in fact becoming what had been called the parliamentary law of States. That stage, however, was being preceded by a whole complex of entirely new situations. The Universal Postal Convention, for example, although a treaty, was in a way a municipal law of the whole international community and, as an international construction, could not strictly be regarded as a treaty; being universal, it was something more.

66. The matter might be discussed more fully when the Special Rapporteur's proposals were before the Commission, but the basic distinction to be made was between the law of an organized society, which might almost be called oecumenical, and an anarchic society composed of antagonistic groups of States.

67. Mr. SPIROPOULOS congratulated the Special Rapporteur on his report. The questions that he had

[25] A/CN.4/SR.98, p. 3.

asked the Commission required an answer so that he would be able to continue his work.

68. The question whether a codification of the law of treaties should take the form of a convention or of a code was a thorny one. In all cases up to the present the Commission had presented texts in conventional form and had always recommended to the General Assembly what action to take, whether to take note, to accept the text, or, as in the case of the law of the sea, to convene an international conference. In the case of the law of treaties, the Commission had hitherto had a convention in view, as the rules has been drafted in that form. Sir Gerald Fitzmaurice had quite rightly asked the question, since the way in which he drafted the articles would depend on the Commission's decision. The idea of a code was not unacceptable, as a code would not require approval, but might be regarded as a scientific work for States and those concerned with international law to use in interpreting treaties. As the conventions drafted by the Commission were very rarely accepted, the idea of a code of treaty law was to be welcomed.

69. With regard to the second question, he agreed that the Commission might well go further than it had, and that detailed articles might be useful. The Special Rapporteur's report [26] reminded him of an excellent work by Bittner,[27] which went into great detail on the law of treaties and had thus proved extremely useful. The detail introduced by the Special Rapporteur, particularly the definitions in article 13, would provide a very valuable practical guide to the framing and conclusion of treaties. There was not always complete agreement on the terms defined in that article.

70. It was very hard to decide whether the absolutely fundamental principles of treaty law should be set out at the beginning of the code. That might perhaps be useful, but, if it was subsequently found unnecessary, the general principles might be included in the appropriate place.

71. With regard to the fourth question, he did not think that a combination of the methods suggested would be wise at the outset. As Mr. Amado had observed, there was a radical difference between treaties proper and exchanges of notes. The two topics were better separated, at least in the early stages of the work, and the Commission might subsequently decide whether they could be combined.

72. The Commission had already decided for the time being not to deal with treaties made by and with international organizations. Some attention should undoubtedly be given to the topic, but the matter of main importance was that of treaties between States, which should be dealt with first. The position of treaties by international organizations was not yet wholly clear, and so should be examined separately. It should not, of course, be discarded altogether, since the purpose was to draft a complete code covering all existing institutions.

The meeting rose at 1.05 p.m.

[26] A/CN.4/101.

[27] L. Bittner: *Die Lehre von den Völkerrechtlichen Vertragsurkunden*, 1924.

369th MEETING

Monday, 18 June 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

The law of treaties (item 3 of the agenda) (A/CN.4/101) (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of the Special Rapporteur's report on the Law of Treaties (A/CN.4/101) in the light of the questions he (the Special Rapporteur) had put to the Commission at the previous meeting.[1]

2. Mr. KRYLOV said that he would not so much reply to the Special Rapporteur's questions as express his general feelings about the points raised in them.

3. He entirely agreed both that the codification of the law of treaties should take the form not of a convention, but of a code, which could better express the conclusions reached, and that the code should be presented in the form of a study of the successive stages in treaty-making.

4. He also agreed that a statement of certain fundamental principles of treaty law, such as those set out in articles 4-9, should precede the remainder. He had, however, some doubts with regard to the emphasis laid on executive acts in article 9 and the undue distinction drawn between the rules of international and of constitutional law. Acts of the cabinet or of the Head of State would always have to be consistent with constitutional law.

5. He agreed with the proposal that the code should be drafted in language such as to cover all kinds of treaties, including exchanges of notes and agreed memoranda.

6. With regard to the fifth question, he believed that Sir Hersch Lauterpacht had acted wisely in deciding to depart from the Commission's decision at its third session and in including, not only treaties between States, but also treaties made by and with international organizations.[2] The United Nations had already reached that point, as might be seen from the fact that it included such treaties in the United Nations Treaty Series. He, himself, in compiling the six volumes of the treaty series of the

[1] A/CN.4/SR.368, para. 47.

[2] A/CN.4/L.55.