Document:-
A/CN.4/SR.322

Summary record of the 322nd meeting

Topic:
<multiple topics>

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

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 be 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.

[8] 320th meeting, para. 40.

322nd MEETING

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

CONTENTS

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.

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

Co-operation with inter-American bodies (A/CN.4/L.60)

1. The CHAIRMAN invited the Commission to consider the draft resolution (A/CN.4/L.60)[1] submitted by Mr. García Amador.

2. Mr. LIANG (Secretary to the Commission) said that as promised he would make a brief report to the Commission. The Commission had not decided what specific action should be taken to implement the resolution concerning co-operation with inter-American bodies adopted at the previous session,[2] and the Secretariat would have welcomed precise instructions. In the meantime he would like to state what had so far been done.

3. First, ever since the Commission's establishment he had kept in touch with Professor C. G. Fenwick, Director of the Department of International Law of the Pan-American Union, and Secretary of the Inter-American Council of Jurists. They had discussed matters of common interest and had agreed on an exchange of documents, as a result of which the Office of Legal Affairs possessed a complete set of recent documents from inter-American juridical organs concerned with the codification of international law. Unfortunately, it was not possible to furnish each member of the Commission with that material because it was too voluminous, but documents could be supplied on request or could be made available at United Nations Headquarters.

4. Secondly, information on particular topics was exchanged, and in response to Professor Fenwick's request he had been able to provide material about the Commission's discussions on reservations to multilateral treaties. That kind of working co-operation, however, was not of a very far-reaching character.

5. At the beginning of the year, he had received from Professor Fenwick a letter dated 11 February 1955, in which he had expressed the hope that it would be possible for the Organization of American States (OAS) to send an observer to the Commission's seventh session for at least a few weeks. Professor Fenwick had also hoped that the Secretary to the Commission could attend the meeting of the Inter-American Council of Jurists in Mexico City on 12 September 1955, in order to assist in interpreting the work of the Commission, because it was of the highest importance that the Council should be guided by the Commission's proposals in reaching its decisions concerning territorial waters and particularly the continental shelf. Professor Fenwick had added that co-operation between the two bodies was essential for arriving at a satisfactory solution. With the approval of Mr. Sandström, Chairman of the Commission at the time, the OAS had been invited to send an observer to the present session. That invitation had subsequently been renewed on the instructions of the present Chairman, but material circumstances had unfortunately prevented Professor Fenwick from coming to Geneva.

6. Mr. GARCÍA AMADOR, observing that the resolution adopted at the previous session was in accordance with article 26 of the Commission's Statute, which recognized the desirability of consultation with organizations such as the Pan-American Union, said that on that occasion various possibilities for collaborating in the common task of the progressive development and codification of international law had been considered. The Secretary's statement revealed the need for more active collaboration. In his draft resolution he proposed that the Secretary should attend the third meeting of the Inter-American Council of Jurists to be held at Mexico City in 1956, so that he could report to the Commission on the discussions held there. He had also proposed that the Secretary of the Council should follow the Commission's next session as an observer. Collaboration was particularly important because both bodies dealt with maritime questions. He himself had been requested by the Council of the Pan-American Union to report on the programme of work drawn up by the General Assembly in its resolution 899 (IX), so that the Council could adjust its own plans to that programme. The technical, scientific, social and juridical aspects of problems connected with the régime of the high seas and the régime of the territorial sea were to be discussed both by the Inter-American Council of Jurists and by the Pan-American Union the following year. It was fitting that the views of OAS, comprising some twenty of the Member States of the United Nations, should be taken into account. Given the interconnexion between the work of the political and juridical organs of the United Nations and OAS, it was only normal that there should be a standing agreement for each to be represented at the other's meetings. The presence, for instance, of the Secretary-General of the United Nations at the tenth Inter-American Conference at Caracas had been most valuable, and the practice should be continued.

7. The expense entailed in his draft resolution should not be an obstacle to preserving and fostering a real and valuable collaboration.

8. Mr. HSU considered the draft resolution, which was a natural development of the resolution already adopted by the Commission, to be acceptable. It was certainly necessary for the International Law Commission to be represented at the third meeting of the Inter-American Council of Jurists when maritime problems were to be discussed.

9. Faris Bey el-KHOURI said that over and above the proposal which Mr. García Amador had presented, he wondered whether Mr. García Amador, who would undoubtedly be present at the third meeting of the Inter-

[1] Incorporated in A/2934, para. 36.

[2] "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 77 in *Yearbook of the International Law Commission, 1954*, vol. II.

American Council of Jurists, could undertake to inform the Commission about the discussions in the same way as he had reported on the International Technical Conference on the Conservation of the Living Resources of the Sea at the present session.

10. Mr. GARCÍA AMADOR said that since 1950 he had represented his government on the Inter-American Council of Jurists. He could not fulfil a dual role by acting also as representative of the Commission.

11. Faris Bey el-KHOURI explained that he had only suggested that Mr. García Amador, and perhaps Mr. Salamanca if he would also be attending the meeting, should report to the Commission on what had taken place.

Mr. García Amador's draft resolution (A/CN.4/L.60) was adopted unanimously.

Proposal by Mr. Krylov concerning the publication of the documents of the International Law Commission

12. Mr. KRYLOV said that he had always been astonished at the lack of publicity given to the Commission's work, with the result that the world knew practically nothing of what was being done by a highly authoritative body with a considerable range of topics on its agenda. It was absolutely incomprehensible to him why, apart from the Commission's reports on each session, its documents should be so difficult to obtain. Even some of the earlier reports were not readily available.

13. He was convinced that all the Commission's documents and the summary records of its meetings should be printed together in a yearbook, the need for which was particularly great after a session wholly devoted to subjects belonging almost entirely to the domain of international law as distinct from those where the dividing line between national and international law was not so clearly defined. The documents of all past sessions should also gradually be printed. Such yearbooks were indispensable for students of international law whether undergraduates or professors.

14. The Commission might well reinforce its request by reference to the second paragraph of the preamble to General Assembly resolution 176 (II) which stated that "one of the most effective means of furthering the development of international law consists in promoting public interests in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations", and to General Assembly resolution 687 (VII) in which, *inter alia*, the Secretary-General was requested to report on the possibility of publishing a juridical yearbook. He believed that the Secretary-General would appreciate the need and hoped that the request would not be turned down on grounds of economy.

15. The CHAIRMAN thanked Mr. Krylov for taking the initiative in bringing up a problem which had existed since the establishment of the Commission. From the outset he himself had consistently urged that the Commission's documents and summary records should be published because, despite the fact that after the International Court it was the most important international juridical organ, its work was to all intents and purposes unknown and passed without comment in reviews of international law, except for those references which appeared in the *American Journal of International Law* as a result of the Secretary's efforts. It was most extraordinary that the deliberations and conclusions of a private body like the Institute of International Law should be given great weight whereas a public body established by the United Nations and with great responsibilities should not publish any of its documents. Students of international law could only obtain the Commission's reports or summary records by approaching individual members, which was most unsatisfactory. The Commission, as the most highly qualified organ for the codification of international law, must give its documents wide publicity and make them generally available to the public so that it could wield the influence appropriate to its status. The United Nations already published a *Yearbook on Human Rights* and there was no reason at all why an International Law Commission yearbook should not also be issued.

16. Mr. AMADO said that he had always been greatly perturbed by the lack of publicity given to the Commission's work. In his own country, for example, it was sometimes regarded merely as another of the rapidly increasing number of international organizations, and the general public was completely ignorant of the very important work done, for example, on the formulation of the Nürnberg principles, the rights and duties of States and the definition of aggression. It was distressing that private individuals should have to approach members for documents. He therefore considered an International Law Commission yearbook to be indispensable and warmly supported Mr. Krylov's proposal. Such a yearbook should indeed have been published from the outset of the Commission's work.

17. Mr. HSU thanked Mr. Krylov for his timely proposal. It was impossible to exaggerate the educational value of a juridical yearbook in view of the great need for the progressive development of international law. Wider publicity should also serve as an inspiration to the Commission.

18. Mr. SANDSTRÖM considered Mr. Krylov's proposal to be an admirable one but pointed out that if the Commission's summary records were to be printed, members must peruse them very carefully in order to ensure absolute accuracy. It was inevitable in such a complicated and specialized subject that the summary records should not always faithfully reproduce the views expressed.

19. Mr. LIANG (Secretary to the Commission) said that since the establishment of the Commission he had been convinced that its work could only be accomplished in co-operation with scientific circles and if the interest of governments was aroused. It was deplorable that the real nature and purpose of the Commission should be so little known. Many members had sought

to remedy that situation by publishing accounts of its work, but such publicity could not suffice and it was essential to provide first-hand material. He therefore had great sympathy with Mr. Krylov's proposal.

20. In pursuance of General Assembly resolution 602 (VI) adopted on 1 February 1951, the Secretariat had consulted various scientific organizations about the content of a possible United Nations juridical yearbook. Both the Institute of International Law and the American Society of International Law had emphasized the value of publishing the Commission's documents in the contemplated juridical yearbook. The latter, in its memorandum, had stated:

> "The need arises in part from the limited availability and impermanent form of much of the materials of the United Nations bearing upon international law. For example, of some fifty-odd memoranda, collections of documents, draft proposals and bibliographies contained in the series A/CN.4/, only about half a dozen have been printed and made available for purchase. None of the summary records of the International Law Commission or of its working papers are available for purchase."

21. He received innumerable requests for documents, some of which were out of print and others could neither be supplied nor purchased. Recently, after strenuous efforts, he had managed to make arrangements whereby outside subscribers could for a relatively modest sum secure the Commission's mimeographed documents, but of course documents in that form deteriorated and with time and use tended to become illegible.

22. He was therefore convinced of the need for the publication of the Commission's documents but would suggest that the proposal should be in conformity with the General Assembly's decisions concerning the publication of the documents of United Nations organs.

23. If the Commission adopted a draft resolution on the subject it would of course be taken into account by the Secretariat when preparing the report requested in General Assembly resolution 687 (VII).

24. In reply to a question by the CHAIRMAN, Mr. KRYLOV observed that the possibility of separate publications similar to those issued by the International Court of Justice might be considered. Whatever the form chosen, he was anxious to secure the publication of all the material pertaining to the various topics on the Commission's agenda.

25. He agreed with Mr. Sandström that all members would have to check the summary records carefully before they were published.

26. Mr. GARCÍA AMADOR agreed with the other members of the Commission who had expressed support for Mr. Krylov's proposal.

27. He recalled that the Organization of American States published an annual inter-American legal yearbook, for which the Legal Department of the Organization of American States was responsible. That Organization was certainly in a less favoured financial position than the United Nations.

28. The United Nations published a large number of documents, some of which were of somewhat minor interest from the point of view of scholars or, indeed, from the standpoint of the general public itself. Every year, a volume of nearly 1,000 pages was published containing the records of the General Assembly's proceedings, including matters which were certainly of little or no concern to the outside world.

29. There appeared to be a tendency to practise a policy of economy where the International Law Commission was concerned. He recalled the financial difficulties put forward in connexion with the Commission's sessions in Geneva. As an extreme instance of that policy, he referred to the practice of cross-reference in documents—i.e., the practice of not quoting material already published in mimeographed form. The documents concerned thus appeared in a truncated form, and were not so easy to use.

30. Mr. SALAMANCA agreed that the work of the Commission merited wider publicity. The Commission's functions were at times of a quasi-legislative nature and its decisions could be of exceptional importance to the world at large.

31. He recalled that proposals had been made to turn the Commission into a permanent body covering a wider field than it did at present. He wondered whether those proposals would be taken up again.

32. The CHAIRMAN said it was extremely desirable that not only the reports but also the summary records of the Commission's meetings, as well as all the relevant documents (including comments by governments), should be published collectively as an integral whole. It was essential to convince the General Assembly of the need for publishing a yearbook concerning the Commission's work.

33. Sir Gerald FITZMAURICE said there was nothing secret about the proceedings of the Commission: its meetings could be attended by everyone and its records were, to a limited degree, available to readers. In the circumstances, there could be no objection in principle to the publication proposed by Mr. Krylov.

34. It could be argued that the International Law Commission was a body which reported to the General Assembly and that the latter was interested in the Commission's conclusions rather than in the manner of arriving at them. It could also be suggested with some plausibility that if the members were conscious of the fact that their views would be published they might not perhaps express themselves so freely and the debates in the Commission would lose some of their spontaneity.

35. In spite of those reservations, publication of the Commission's proceedings recommended itself for a decisive reason. There were a number of bodies studying

the same subjects as the International Law Commission. Particular reference had been made to the Organization of American States and the Inter-American Council of Jurists; the latter would be discussing some subjects with which the Commission had been concerned. Undoubtedly, in the proceedings of those bodies, reference would be made to the work of the International Law Commission. It would create a very misleading impression if the International Law Commission's proceedings remained unpublished while the published proceedings of other bodies referred to what had occurred in the Internationnal Law Commission.

36. Mr. ZOUREK agreed with the proposal to publish the proceedings of the Commission. He pointed out, however, that such publication would make it incumbent upon the members of the Commission to examine very closely the summary records for purposes of possible corrections; no doubt more time would have to be allowed for that purpose if publicaton were intended.

37. Mr. AMADO said that time was required to lay down in concrete terms a rule of international law. The Commission was devoting great efforts in order to arrive at the formulation of certain legal principles, and its proceedings were therefore of great interest to the learned world.

38. The CHAIRMAN recalled that, in the days of the League of Nations, it had been the general view that the codification of international law could only be achieved by means of conventions.

39. That situation had now changed altogether. Under its Statute the International Law Commission could recommend the General Assembly not only to take note of or adopt the report of the Commission by resolution (paragraph 1 (*b*) of article 23) but even "to take no action, the report having already been published" (paragraph 1 (*a*) of the same article).

40. If the General Assembly raised no objection to codification in that manner by the International Law Commission, the rules codified virtually became binding upon the international community. The International Law Commission thus had an important role in the development of international law, and its functions were, at times, of a quasi-legislative nature.

41. In view of those facts, it was extremely important that not only the General Assembly, but also the learned world—and even the public at large—should know how the International Law Commission had arrived at its formulations.

42. He suggested that further discussion of Mr. Krylov's proposal be deferred until the next meeting, when a definite text of the proposal would be available.

It was so agreed.

Representation at the General Assembly

43. The CHAIRMAN asked whether the Commission wished to adopt a resolution authorizing him to represent it at the next session of the General Assembly.

44. Mr. LIANG (Secretary to the Commission) said that as that was the usual practice, it would be sufficient for a paragraph to be included in the report to the effect that the Commission had asked the Chairman to represent it at the next session of the General Assembly.

It was so agreed.

Ways and means of providing for the expression of dissenting opinions in the report of the Commission covering the work of each session (item 7 of the agenda) (A/CN.4/L.61)

45. Mr. ZOUREK introduced his proposal (A/CN.4/L.61)[3] for ways and means of providing for the expression of dissenting opinions in the Commission's reports He had intended to present that proposal at the previous session but the Commission, owing to pressure of other work, had not been able to deal with it.

46. He stressed that his proposal was concerned only with the cases where the Commission adopted draft rules of international law which were presented to the General Assembly and to governments.

47. His proposal to enable any member of the Commission to attach a statement of his dissenting opinion to any decision of the Commission had a number of advantages.

48. In the first place, the Commission was composed of experts representing several different legal systems. It was therefore important that the opinion of the representative of any one of those systems, whenever it did not find expression in the resolutions adopted by the Commission, should be made known to those bodies which were called upon to deal with the Commission's resolutions and formulations.

49. Secondly, the work of the Commission on each particular item of its agenda was spread over several years. The Commission's first draft was sent to governments for their comments, in accordance with article 21, paragraph 2, of the Commissions's Statute. Following those comments, a final draft was prepared in accordance with article 22 of the Commission's Statute; usually several years after the work had begun, the recommendations of the Commission were passed on to the General Assembly. It was clear that the work both of the governments whose comments were asked for and of the General Assembly would be greatly facilitated if they had before them the views of those members of the Commission who did not see their way to supporting the Commission's decisions.

50. Thirdly, the system at present in force allowed members of the Commission to put their dissent on record in a footnote, in which reference was made to the opinions expressed by the dissenting members, as recorded in the summary records; that system obliged members to make lengthy statements during meetings purely for the purpose of putting their opinions on record. As a particular item was usually discussed at

[3] Incorporated in A/2934, para. 37.

several sessions, members had to repeat the process at each of those sessions. A considerable saving of time and effort would therefore result from the adoption of his proposal.

51. Fourthly, to allow members to express their dissenting opinions, and give their reasons in support, would reflect their views more to their satisfaction than to rely on summary records which were prepared at considerable speed and with a brevity which was, on occasions, excessive. Besides, as matters now stood, the summary records themselves were not easily available to all those wishing to ascertain the reasons for the dissent of certain members—a dissent so laconically recorded in footnotes.

52. Fifthly, his proposal was in line with article 20 of the Commission's Statute, which required the Commission to include in its commentary conclusions relevant to divergencies and disagreements within the Commission, as well as arguments invoked in favour of one or another solution.

53. Lastly, provision was made in the Statute of the International Court of Justice for the expression of dissenting views. Yet the majority decisions of the International Court of Justice were concerned with specific cases—whereas the Commission's decisions were concerned not with one particular case, but with perhaps thousands of cases.

54. The fear which was at times expressed that the authority of the Commission's decisions might be undermined by a provision to put on record dissenting views was not well-founded. The Commission had the duty to put on record all conflicting views: it was therefore incumbent upon it to allow the recording of dissenting opinions.

55. He stressed that his proposal would merely give members the possibility or the right to put on record their dissenting views. Members would no doubt use that right sparingly and only put their dissenting views on record where the importance of the matter justified it. Furthermore, his proposal was that the arguments given in support of dissenting views be summarized very briefly, so as not to lengthen the report unduly.

56. Mr. FRANÇOIS (Rapporteur) said that Mr. Zourek's proposal raised an issue which had already been discussed a number of times within the Commission at earlier sessions. A proposal, practically similar to that now made by Mr. Zourek, had been rejected at the fifth session.[4]

57. The existing rule, adopted at the third session of the Commission, provided that detailed explanations of dissenting opinions were not inserted in the report but merely a statement to the effect that, for the reasons given in the summary records, a member was opposed to the adoption of a particular passage of the report.

58. He recalled the controversies around the question of the expression of minority views in law courts. In the case of the International Court of Justice, the system adopted in its Statute had not given general satisfaction. In fact, it had led in practice to dissident opinions almost monopolizing public attention. In the effort to obtain as broad a measure of agreement as possible in its judgements the International Court of Justice was bound to keep its reasoning extremely brief and many arguments had to be left out in order to produce as generally acceptable a text as possible. Such was not the position with regard to dissident opinions: each dissenting judge expressed his own views without any restraint and there appeared to be no limit whatsoever to the number of pages (sometimes ten or twelve) in which a dissenting opinion could be stated. That gave the dissenting judge an undoubted advantage over the International Court of Justice's actual decision, in that his very full expression of opinion received an attention from learned circles and from the general public which the somewhat incompletely motivated and very brief judgement of the Court could not possibly claim.

59. Mr. Zourek's proposal to provide for the expression of dissenting opinions in the Commission's report assumed that that report had to give full expression to the various conflicting views within the Commission. In actual fact, no report could possibly claim to do justice to all their dissenting views: any attempt to do so would place upon the Rapporteur an impossible burden. Except in cases where there was a large minority, the Rapporteur could only report on the decisions taken by the majority of the Commission. In doing so, only five or six lines of the report were usually devoted to explaining a decision. If each of five or six dissenting members were to be allowed to express in a further few lines his reasons for dissent, the majority view of the Commission would be practically lost to sight amongst the contrary views, giving the reader a totally unbalanced picture.

60. Mr. Zourek had stressed that members were not obliged to put on record the reasons for their dissent. Experience showed, however, that once members were given the right to put on record their dissenting views, they would want to do so at every turn, and put on record their reasons for doing so. The result would be that the report would no longer be homogeneous on the principal points with which it dealt.

61. For all those reasons, he did not support the proposal made by Mr. Zourek in spite of its being commended in theory by several arguments.

62. Finally, he stressed that if the records of the Commission were given much greater publicity than at present by being published as was now proposed, there would be no necessity for the adoption of a proposal along the lines suggested by Mr. Zourek. If the records were readily available, reference to them in explanation of a member's dissenting vote, in other words the present system, would be quite sufficient.

63. Mr. KRYLOV felt that both Mr. Zourek and Mr. François had gone to opposite extremes.

[4] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 163, in *Yearbook of the International Law Commission, 1953*, vol. II.

64. He did not believe that the provision made in the Statute of the International Court of Justice for the expression of dissenting opinions in any way undermined the authority of the Court. After all, what mattered was the decision of the Court, which was operative, rather than the ably drafted dissertations of dissenting judges.

65. No doubt the Rapporteur's task was primarily to set forth and explain the majority decisions of the Commission. It was an unfortunate fact, however, that many of the decisions of the Commission were taken by very small majorities and sometimes with a regrettably large number of abstentions. For his part, he had a greater interest in the Commission's reaching unanimous decisions than in the recording of dissenting views.

66. The CHAIRMAN said that experience had shown that members were tempted to express themselves at length with a view to making better known, through the records, their opinions concerning the Commission's resolutions. If members were encouraged to adopt the same system where the actual report was concerned, the result would be to deprive that document of its homogeneity.

67. Mr. ZOUREK recalled that his proposal had only been fully discussed on one occasion—namely, at the Commission's fifth session in 1953. It had been rejected following a tied vote of 6 votes for and 6 against.

68. Mr. FRANÇOIS (Rapporteur) agreed that Mr. Zourek's proposal had not been discussed in 1954, but only in 1953. Similar proposals, however, had been discussed at practically every session of the Commission prior to 1953.

69. Sir Gerald FITZMAURICE said that provision was made in the International Court of Justice for the expression not only of dissenting opinions, but also of separate opinions, by judges. That system meant that a judge who agreed with a majority decision was enabled to express fully the reasons why he concurred with that decision and thus give it the support of a detailed and carefully prepared expression of his views.

70. Mr. KRYLOV pointed out that it was the practice of the President of the International Court of Justice to draw the attention of dissenting judges to the necessity of limiting the length of their dissenting opinions.

Further discussion of Mr. Zourek's proposal was adjourned.

The meeting rose at 1.5 p.m.

323rd MEETING

Thursday, 30 June 1955, at 10 a.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, 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.

Ways and means of providing for the expression of dissenting opinions in the report of the Commission covering the work of each session (item 7 of the agenda) (A/CN.4/L.61) (*continued*)

The CHAIRMAN invited the Commission to continue its consideration of Mr. Zourek's proposal (A/CN.4/L.61).

1. Mr. SANDSTRÖM said the Commission was in quite a different position from a court of law. Where courts of law were concerned, the problem of putting dissenting opinions on record raised primarily the issue whether the general public was sufficiently mature to understand the relative character of justice. In the case of the Commission's pronouncements, the various divergent views were already given their due place both in the records and in the report. Mr. Zourek's proposal amounted to a specific procedure for setting out dissenting views.

2. The decisive question was therefore to determine for whom the Commission's work was intended. It was primarily intended for the General Assembly; but learned public opinion was also interested in the Commission's proceedings. All those who would actually have to read the Commission's publications were able to engage in the necessary research to find the reasons which motivated dissenting opinions as recorded in footnotes.

3. Moreover, whenever a question decided by the Commission came before the General Assembly, there invariably arose in that Assembly speakers to express the point of view of those members of the Commission who had not voted in favour of a particular resolution.

4. The existing system was quite sufficient in that, besides allowing dissenting votes to be recorded in footnotes, it provided for the inclusion in the general report of the various divergent views. He suggested that full use be made of the latter procedure and that members who had occasion to dissent from a resolution and desired their views incorporated in the general report co-operate with the General Rapporteur to that effect.

5. Sir Gerald FITZMAURICE said that although it was desirable to grant dissenting members the means of recording the reasons for their dissent, Mr. Zourek's proposal was not practicable.

6. Even if no abuse occurred, the reasons given by the Rapporteur were conclusive: the report had to be brief and therefore contained only a paragraph or two on each point. If that brief account of the majority decision were to be followed by a large number of well-expressed dissenting opinions, the report would contain a formidable opposition view which would upset its balance.

7. Mr. SALAMANCA expressed support for Mr. Zourek's proposal. With the present system, the report created a false impression of unanimity; the view of what was sometimes a very narrow majority appeared to be the expression of a general consensus of opinion such as did not exist. One clear example was the vote on the three-mile rule concerning the territorial sea; those members who did not approve of that rule would not be able to convey their views adequately to governments through the Commission's report.

8. As with other United Nations reports, it was important that the International Law Commission's reports to the General Assembly should reflect all the various divergent opinions expressed within the Commission.

9. Mr. GARCÍA AMADOR said that comparisons between the International Law Commission and the International Court of Justice were not valid. The Commission only made recommendations; the Court took decisions. The work, the functions and the procedure of the Commission were different from those of the International Court of Justice.

10. The only valid comparisons could be with organs having a similar purpose. The only ones in existence were the Inter-American Juridical Committee—a permanent body of 7 members sitting in Rio de Janeiro and founded in 1942—and the Inter-American Council of Jurists, which was composed of one representative for each Member State of the Organization of American States and which had first met in May/June 1950.

11. Both the Inter-American Juridical Committee and the Inter-American Council of Jurists, when faced by the same problem as the Commission was now debating, had arrived at the conclusion that dissenting opinions should be put on record in their reports. The matter had been discussed at a higher level within the political organs of the Organization of American States (the Inter-American Conference and the Council of the OAS), which had approved the practice of recording dissenting opinions.

12. Experience within the Organization of American States had demonstrated the adequacy of the system concerned. One excellent example of its good functioning had been the case of a vote in favour of a 200-mile-wide territorial sea which had been adopted in 1952 by the narrow majority of 4 votes against 3 by the 7-member permanent Rio de Janeiro Juridical Committee. That decision had been the result of an accidental majority within the permanent Inter-American Juridical Committee: the opinion of the four members voting in favour of it did not represent the generally accepted view of the American republics. The three dissenting members of the Rio Committee had duly put on record their reasons for dissenting from the majority vote. When the matter was brought before a higher body—namely, the full Inter-American Council of Jurists, at its Buenos Aires meeting in 1953, it was the "minority" opinion against the 200-mile claim which had prevailed by a majority of the 21 Member States of the OAS represented on the Inter-American Council.

13. The position of the International Law Commission was somewhat similar to that of the Inter-American Juridical Committee in that it did not consist of as many members as there were Member States of the United Nations. The Commission consisted of representatives of various juridical systems, and a majority within the Commission could well adopt a rule which would not be acceptable to the General Assembly.

14. Finally, the fear of abuse which had been expressed was not a valid reason for denying members the right to put on record the reasons for their dissenting opinions. Members of the Commission could be trusted to use their discretion and not to misuse what was undoubtedly a somewhat dangerous right.

15. Mr. AMADO said that Mr. Zourek's proposal was not acceptable to him because the report of the Commission had to be a harmonious whole. The report was the work of the Commission; it was prepared by the Rapporteur under the control of the full Commission.

16. Dissenting opinions were expressed from a purely personal point of view and their inclusion in the report could only be permitted if the Commission actually took a vote explicitly agreeing to such inclusion. Failing such a decision by the Commission, it was undesirable to allow each individual member to make a detailed statement of views for inclusion in the report.

17. Mr. HSU agreed with Mr. Sandström that the best solution of the problem was to make liberal use of the existing rule that the various divergent views concerning a problem should be explained carefully in the general report. Where a vote had been especially close and there were two radically different views, such a course was

essential because mere footnotes did not suffice to give a clear picture of the strength of the opposition to the mapority report.

18. Mr. FRANÇOIS (Rapporteur) said that the procedure suggested by Mr. Sandström was in accordance with the existing practice. He agreed that even more liberal use might be made of it.

19. Faris Bey el-KHOURI said he disapproved of Mr. Zourek's proposal because the success of the Commission's task of codification depended on gathering as much support as possible within the General Assembly. The inclusion of extensive dissenting opinions in the report would constitute a destructive element; it would undermine the efforts of the Commission and contribute nothing constructive in the place of what it would serve to destroy. The majority decision had to prevail unquestionably so that the Commission's recommendations should have the maximum authority.

20. Mr. ZOUREK said that the question of dissenting opinions recurred frequently in the Commission's discussions simply because it had not been satisfactorily settled.

21. The Rapporteur had somewhat exaggerated the practical consequences of adopting his (Mr. Zourek's) proposal.

22. He recalled that in 1951, the question of defining aggression had been dealt with in a chapter which set out the various views expressed by members of the Commission and the reasons given by each of them in support of his particular view; it even set out in detail all the individual proposals made by members. The chapter in question had not thereby become unduly long: it covered only some two pages of a report which itself was quite short.[1]

23. The adoption of his proposal would actually facilitate the Rapporteur's work rather than complicate it, in that the arguments of dissenting members would be set forth by them in their own words. Besides, such a system would have the great advantage of placing responsibility for the statement of a dissenting opinion on its author and not on the Commission.

24. To record dissenting opinions in the report would be consonant with the provisions of article 20 of the Commission's Statute, which required the Commission's commentary to include conclusions relevant to divergencies and disagreements as well as arguments in favour of one or another solution.

25. It was unlikely that the adoption of his proposal would lead to any abuse because there were only a few of the Commission's decisions which gave rise to any marked controversy. Moreover, if the Rapporteur included a reference to divergent views in the comment, those members who held such views would not insist on recording their dissenting opinions separately as well.

26. The system he proposed had one great advantage over the present one. It would separate the dissenting opinions from the body of the report. Dissenting opinions would appear in the form of annexes for which the particular members concerned would be responsible. The report of the full Commission would not be encumbered by them.

27. There was nothing unusual in attaching comparatively long annexes to a report. Annexes I and II to the International Law Commission's 1953 report covered forty-one pages whereas the report itself consisted of only thirty-one pages.[2]

28. He emphasized that his proposal provided for the right to add a *short* statement of dissenting opinion. Probably that would not give rise to any difficulty, but if a dispute occurred over the length of the text to be included, he proposed that the officers of the Commission should decide the matter, subject to appeal to the Commission itself. Control by the Chairman and officers, and eventually by the Commission itself, would be a sufficient safeguard against any possible abuse of the right to state dissenting opinions.

29. In principle, there was no disagreement between members of the Commission: they all agreed on the right of members to record their dissenting views, but as far as the procedure was concerned, the system he proposed had the great advantage of obviating the need for members to speak at length for the sake of the summary record. Under the existing system, that was the only means at their disposal to record the reasons why they had voted against a proposal—a fact which could only be mentioned in the report in the form of a footnote with a cross-reference to the summary records.

30. Mr. SANDSTRÖM said that the French text of article 20 of the Commission's Statute, by referring to *les divergences et désaccords qui subsistent,* was perhaps somewhat misleading. If read hastily, it might be construed as referring to divergences of opinion within the Commission. In actual fact, as was made clear by the English text and particularly by the whole context of the article, the reference was to any divergences of opinion which might exist in legal circles generally concerning the issues upon which the Commission was reporting.

31. The comparison with the chapter on the definition of aggression in the Commission's 1951 report was not a valid one. On that question, the Commission had been unable to reach a decision, and had therefore had no option but to record the different views which had been expressed on the subject.

32. If Mr. Zourek's proposal were to be adopted, provision would have to be made not only for dissenting opinions, but also for separate opinions: the majority which voted in favour of a resolution was not necessarily made up of members who all supported it for the same reasons.

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[1] "Report of the International Law Commission covering the work of its third session" (A/1858), paras. 35 to 53, in *Yearbook of the International Law Commission, 1951*, vol. II.

[2] "Report of the International Law Commission covering the work of its fifth session" (A/2456), in *Yearbook of the International Law Commission, 1953*, vol. II.

33. The CHAIRMAN pointed out that article 20 of the Commission's Statute referred not to the Commission's general report but rather to the commentary it attached to the drafts prepared by it.

34. Mr. SCELLE said that a member who disagreed with a majority opinion very rarely had the opportunity of giving his considered views during the course of the discussion. It was essential that a dissenting opinion should be given after the vote, when the dissenting member could formulate his opinion after due reflection on the decision adopted by the Commission. Such was the method followed in the International Court of Justice—a method which enhanced the value of the dissenting opinions attached to its judgements.

35. The majority which favoured a resolution of the Commission was not necessarily right. Moreover, there were so many abstentions in the votes of the Commission that its resolutions often had not even represented a decision of the majority of its members, and a simple footnote with a cross reference to the summary records was not sufficient to inform readers of the report of the reasons which had led certain members of the Commission to disagree with the majority view.

36. With regard to the question of avoiding excessive length in the statement of dissenting views, he favoured the system proposed by Mr. Zourek of leaving the matter under the control of the officers. They would decide whether any particular dissenting opinion could be properly left unrecorded altogether; also, whether a definite limit as to length was necessary.

37. Mr. KRYLOV agreed with Mr. Scelle's remarks. The task of checking abuses in the exercise of the right to state dissenting opinions had to rest with the Chairman. In the International Court of Justice, the President fulfilled that delicate task. It was undoubtedly a burden which would thus be thrust upon the shoulders of the Chairman, but it was consistent with the duties incumbent upon the holder of that office.

38. He therefore proposed that the words "after consultation with the Chairman" be added after the words "to add" in the operative part of Mr. Zourek's proposal, so that it would begin as follows:

> "*Decides* that any member of the International Law Commission shall have the right to add, after consultation with the Chairman, a short statement of his dissenting opinion..."

39. Mr. ZOUREK accepted Mr. Krylov's amendment.

40. Faris Bey el-KHOURI said, in explanation of his previous statement, that he did not believe the majority to be always right. He believed, however, in the democratic principle that the majority view should prevail. He had frequently voted against decisions of the Commission, but once those resolutions had been voted, he felt they should be presented in an unequivocal manner so as to ensure to the Commission the greatest possible authority in its work of codification.

41. The CHAIRMAN said that the issue under discussion was not one of vital importance. In substance, there was general agreement that all opposing views should be given due place. The issue was only one of procedure; Mr. Zourek was not satisfied with the present procedure for the recording of dissenting views.

42. If the Commission's report were submitted to the General Assembly together with the summary records, the present system of merely referring to the summary records for the reasons for dissent would produce quite satisfactory results.

43. Mr. SCELLE said that the report of the Commission was widely read, but its summary records reached only a very narrow public, consisting of a few specialists in international law.

44. Mr. GARCÍA AMADOR said that the system at present in force in the Commission acknowledged the principle of recording dissenting views. The opposition to the new procedure proposed by Mr. Zourek appeared to be that the presence of dissenting opinions in the report would create an unfavourable impression upon its readers.

45. In actual fact, the present system could produce an equally unfortunate—if not worse—impression. Thus, at its sixth session the Commission had adopted its draft Code of Offences against the Peace and Security of Mankind.[3] In doing so the following dissenting votes were put on record in a footnote:

> "Mr. Edmonds abstained from voting for reasons stated by him at the 276th meeting (A/CN.4/SR.276). Mr. Lauterpacht abstained from voting and, in particular, recorded his dissent from paragraphs 5 and 9 of article 2 and from article 4, for reasons stated at the 271st meeting (A/CN.4/SR.271). Mr. Pal abstained from voting for the reasons stated in the course of the discussions (A/CN.4/SR.276). Mr. Sandström declared that, in voting for the draft code, he wished to enter a reservation in respect of paragraph 9 of article 2 for the reasons stated at the 280th meeting (A/CN.4/SR.280)."

A footnote of that type could certainly be most damaging to the authority of a draft.

46. He thoroughly disapproved of the suggestion that the Commission itself should exercise control over the recording of dissenting views; such a system would be worse than the one at present in force. What was required was that the right of members to place their dissenting views on record should be unconditionally recognized.

47. Mr. FRANÇOIS (Rapporteur) said that some members of the Commission who had been elected in the past few years had nots een with their own eyes—as he had—the unfortunate results of the system which was embodied in Mr. Zourek's proposal. At the Commission's first session, members had been allowed to state their dissenting views and some of them had wished to

[3] "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 54, in *Yearbook of the International Law Commission, 1954*. vol. II

do so with remarkable prolixity both at that session and at the second and third sessions.

48. Efforts had been made to keep the length of those statements of dissenting opinion under control, but they had not always been successful. Proposals to entrust the Chairman with the difficult task of control had been fruitless.

49. Mr. Scelle's suggestion that dissenting members be allowed to express their considered opinions, after due reflection, following the actual decision of the Commission, appeared to him (the Rapporteur) more an argument against Mr. Zourek's proposal than anything else. It was not appropriate to place such a formidable weapon in the hands of the opposition to a resolution adopted by the Commission. Such a system would be tantamount to giving the last word—and a very strong one at that—to those members whose views had not been accepted by the Commission as a whole.

50. Mr. EDMONDS considered, for the same reasons as those given by the Rapporteur, that it would be most undesirable to accept statements of dissenting opinion prepared after the close of the discussion, particularly as they might contain views and conclusions which had never been presented in plenary meeing at all. Nor did he think it feasible to allow "short" statements because it would be impossible to decide on the proper length. The position of each member was surely adequately protected by the present practice of recording dissenting votes coupled with a reference to the relevant summary records. In future, the date of the meeting might also be added.

51. Mr. KRYLOV felt that the importance of the problem should not be exaggerated. It should be possible among reasonable people to arrange for members wishing to have a statement of a dissenting opinion inserted in the report to submit a text to the Rapporteur.

52. Mr. EDMONDS asked whether the effect of Mr. Krylov's amendment [4] would be to give the Chairman the power to veto the inclusion of any particular dissenting opinion.

53. The CHAIRMAN replied in the negative.

Mr. Zourek's draft resolution (A/CN.4/L.61), as amended, was rejected by 8 votes to 5.

54. Mr. GARCÍA AMADOR wondered nevertheless whether it might not be possible to make the present system somewhat more liberal by giving some space in the report to explanations of dissenting opinion.

55. The CHAIRMAN did not consider that that suggestion was materially different from the Commission's past practice.

56. Mr. GARCÍA AMADOR withdrew his suggestion.

57. Mr. ZOUREK observed that the summary records did not reproduce explanations of vote *in extenso,* but only in a condensed form.

58. Mr. LIANG (Secretary to the Commission) pointed out that it was open to any member, who considered that his remarks had not been adequately reported in the summary record, to submit corrections of a reasonable length.

59. The CHAIRMAN considered that such corrections should not be inordinately detailed or they would throw the record out of balance. Members had every opportunity to express their views fully during the discussion.

60. Mr. ZOUREK deplored the apparent tendency to expect that members of the Commission would abuse their rights.

61. Mr. SCELLE disagreed with the Chairman's view because members did not always expound their views at length during the discussion and sometimes opinion did not take final shape until the decision had been reached. That consideration was the main reason for admitting the inclusion of dissenting opinions, which could be of far greater importance than the views put forward during the debate.

62. Mr. SANDSTRÖM moved the closure of the discussion.

The motion was carried.

Proposal by Mr. Krylov concerning the publication of the documents of the International Law Commission (A/CN.4/L.62) (*resumed from the 322nd meeting*)

63. The CHAIRMAN called the attention of the Commission to the draft resolution (A/CN.4/L.62) [5] submitted by Mr. Krylov. The substance of the matter had been fully discussed at the previous meeting.[6]

64. Mr. LIANG (Secretary to the Commission) expressed regret for three typographical errors in the text. The title should read "Publication of the documents of the International Law Commission". In paragraph 1 of the operative part the word "printing" should be substituted for the word "including" and the words "in the juridical yearbook" should be deleted.[7]

Subject to those changes, the draft resolution submitted by Mr. Krylov (A/CN.4/L.62) was adopted unanimously.

Régime of the high seas (item 2 of the agenda) (*resumed from the 321st meeting*)

NEW DRAFT ARTICLES ON FISHERIES

(*resumed from the 306th meeting*)

Preamble

65. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Commssion had not yet taken any decision on

[4] Para. 38 above.

[5] Incorporated in /A/2934, para. 35.

[6] 322nd meeting, paras. 12–42.

[7] The document was later issued in revised form as A/CN.4/L. 62/Rev.1.

[8] 296th meeting, para. 16.

the preamble to the draft articles on fisheries submitted by Mr. García Amador.[8]

66. Mr. GARCÍA AMADOR said that as he had already explained in the course of the discussion, the preamble to his draft articles had been based on the conclusions reached in the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (the Rome Conference).[9] Paragraph 1 followed the Conference in recognizing the need for conservation owing to the development of modern techniques of exploitation. Paragraph 2 stipulated that conservation measures must be based on scientific evidence, and provision to that effect had been incorporated in article 33, paragraph 2 (*a*) of the final draft. Paragraphs 3 and 4 of the preamble reproduced decisions taken at the Rome Conference concerning the nature of the measures to be taken, and paragraph 5 stated the fundamental principle that conservation should be achieved through international co-operation.

Mr. García Amador's preamble was adopted unanimously.

67. In answer to Mr. SANDSTRÖM, Mr. FRANÇOIS (Special Rapporteur) explained that the preamble, together with the draft articles on fisheries already adopted for inclusion in the text concerning the régime of the high seas, would be reproduced in an annex to the Commission's report.[10]

The meeting rose at 12.40 p.m.

[9] A/CONF.10/6 (United Nations publication, Sales No.: 1955. II.B.2).

[10] See A/2934, Annex to Chapter II.

324th MEETING

Friday, 1 July 1955, at 10 a.m.

CONTENTS

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

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

Régime of the territorial sea (item 3 of the agenda)

(resumed from the 320th meeting)

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the draft articles on the régime of the territorial sea as revised by the Drafting Committee.

Article 1 [1]: Juridical status of the territorial sea

2. Mr. FRANÇOIS (Special Rapporteur) said that the text of article 1 remained the same as that adopted the previous year[1] except for the substitution of the word "articles" for the word "regulations".

3. Mr. ZOUREK said that he would again abstain from voting on the article because it referred to "other rules of international law". If there were such, they should be embodied in the draft.

4. Mr. KRYLOV observed that opinion differed as to what were the rules of international law. In his opinion

[1] For text of the provisional articles adopted at the sixth session, see "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 72, in *Yearbook of the International Law Commission, 1954*, vol. II.

draft articles of the kind before the Commission should be based on general principles.

Article 1 was adopted by 11 votes to none with 1 abstention.

Article 2 [2]: Juridical status of the air space over the over the territorial sea and of its bed and subsoil

5. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 2.

Article 2 was adopted unanimously.

Article 3 [3]: Breadth of the territorial sea

"*Article 3—Breadth of the territorial sea* *

"1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles.

"2. The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.

"3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles.

"* The Commission adopted the formula inserted under article 3. Before drafting the text of an article concerning the breath of the territorial sea, the Commission wishes to have the observations of governments."

6. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee had made no change whatsoever in the text concerning the breadth of the territorial sea adopted by the Commission and had only discussed the problem of its presentation. As it was not in the normal form of an article, the Committee had decided to add an explanatory footnote.

7. Mr. KRYLOV observed that given the nature of the Commission's decision about the breadth of the territorial sea, at the present stage it could not vote on the text but only on the footnote.

8. Mr. SANDSTRÖM considered the phrase "without taking any decision as to the breadth of the territorial sea within that limit" to be inappropriate in a draft article and believed that it should be omitted. The remainder of paragraph 3 would then constitute a complete statement, though taking no stand as to extensions over three miles but not beyond twelve.

9. Mr. FRANÇOIS (Special Rapporteur), pointing out that the present text was the result of a hard-won compromise, said that Mr. Sandström's point was not purely a drafting one and if pursued would entail reconsideration of the text. That would require a separate decision by a two-thirds majority.

10. Mr. SANDSTRÖM still felt that the phrase to which he objected was unnecessary, because the summary record would show that the Commission had taken no decision as to the breadth of the territorial sea. However, he would not press the matter.

11. Mr. LIANG (Secretary to the Commission) thought article 3 might be reproduced in italics in the report since its form was essentially different from that of the other draft articles.

12. Mr. FRANÇOIS (Special Rapporteur) considered that the footnote sufficed to make the nature of the text perfectly clear. Its presentation had been discussed at length by the Drafting Committee, which had decided that the text should be included among the draft articles and not elsewhere in the report because paragraph 2 embodied a very important decision, albeit provisional, and one which had the force of a draft article.

13. Mr. SALAMANCA pointed out that the text adopted by the Commission did not constitute a rule of international law. In the course of the discussion he had made clear the reasons for his objection to paragraph 3. Nevertheless, at the present stage he did not consider that the Commission should amend the text.

14. Mr. GARCÍA AMADOR said that he had argued in the Drafting Committee that the form of the text adopted concerning the breadth of the territorial sea was such as to make it impossible to include it among the draft articles. However, as it had been decided to do so, he had agreed to the insertion of a footnote, but in his opinion the footnote should bring out more clearly that the Commission's decision had been a provisional one and that it might be reconsidered in the light of the observations received from governments and the review of the whole work relating to the régime of the high seas, the régime of the territorial sea and allied topics. Thus, in order to forestall criticism of the text on the ground that it was to some extent contradictory and perhaps failed to give due weight to the legitimate interests of States, he proposed that the first sentence of the footnote be re-drafted to read: "The Commission approved the formula inserted under article 3 on a provisional basis, prior to drafting the final text."

15. Mr. FRANÇOIS (Special Rapporteur) accepted Mr. García Amador's amendment.

16. Sir Gerald FITZMAURICE, without objecting to the amendment, considered that some distinction should be drawn between the remainder of the text and paragraph 2, which represented a definitive and not a provisional conclusion reached by the Commission.

17. The CHAIRMAN, speaking in his personal capacity, agreed with the previous speaker.

18. Mr. SANDSTRÖM said that he was now uncertain of the precise meaning of the phrase "without taking any decision as to the breadth of the territorial sea within that limit" in paragraph 3. He had originally assumed that it meant that the Commission had left undecided the question whether States were obliged to recognize extensions beyond three miles but not beyond

twelve. Now it appeared, however, that even the statements made in paragraphs 1 and 2 were provisional.

19. Mr. GARCÍA AMADOR explained that his amendment, referred primarily to paragraph 3.

20. Mr. ZOUREK approved of Mr. García Amador's amendment, since all members were well aware of the imperfections of the text, which in paragraph 1 referred to international practice and in paragraph 2 to international law. The footnote, with the amendment accepted by the Special Rapporteur, would make it clear that the whole text was provisional.

21. Mr. EDMONDS said that he had understood Mr. Sandström to express a wish that the footnote refer to paragraph 3.

22. Mr. SANDSTRÖM confirmed that that was correct.

23. Mr. EDMONDS stated that, on the understanding that the footnote as amended referred primarily to paragraph 3, he could accept it as a clearer statement of the position.

24. The CHAIRMAN, speaking in his personal capacity, said that there could be no doubt that as at present drafted the footnote referred to the whole text. The question therefore arose as to whether the Commission should expressly state that paragraphs 1 and 2 embodied definite conclusions.

25. In his view the first sentence of the footnote was self-evident and should be omitted.

26. Sir Gerald FITZMAURICE suggested that the first sentence of the footnote be deleted and the words "particularly as regards paragraph 3" be added at the end of the second sentence.

The footnote to article 3, thus amended, was adopted unanimously.

27. Mr. KRYLOV announced his intention of submitting a dissenting opinion on the text of article 3, for inclusion in the final report.

Article 4 [4]: Normal base line

"Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth of territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available officially recognized by the coastal State."

28. Mr. FRANÇOIS (Special Rapporteur) observed that the text was the same as that adopted at the previous session, except that the second sentence had been deleted in accordance with the Commission's decision (316th meeting, para. 16).

Article 4 was adopted unanimously.

Article 5 [5]: Straight base lines

"1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast, and the sea area lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Base lines shall not be drawn to and from drying rocks and drying shoals.

"2. The coastal State shall give due publicity to the straight base lines drawn by it."

29. Mr. FRANÇOIS (Special Rapporteur) said that in accordance with the decision of the Commission the words "As an exception" in paragraph 1 of the original text of article 5 had been deleted (316th meeting, paras. 19 and 70). As a result of the adoption of Mr. García Amador's amendment the words "where this is justified for historical reasons" had also been replaced by the words "where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage", which were taken verbatim from the judgement of the International Court in the Fisheries Case.[2]

30. Mr. GARCÍA AMADOR said that when he had originally submitted his amendment to article 5 he had thought that the expression "the reality and importance of which are clearly evidenced by a long usage" was equivalent to the phrase "historical reasons". If that were not so, he wished to make it perfectly clear that the new text of article 5 would not in any way prejudice long-established historical rights which international law had always recognized. His sole object had been to follow the wording used by the Court as closely as possible.

31. Sir Gerald FITZMAURICE wished, without suggesting an amendment, to draw the Commission's attention to the fact that, if it were seeking to interpret the Court's conclusions, it must bear in mind the two aspects of the judgement. The Court had first considered the question whether the use of straight base lines was justified, and had decided for geographical and historical reasons that Norway was entitled to institute such a system. That decision had been correctly reflected in the original text of article 5.

32. The Court had then turned its attention to the specific base lines drawn by Norway, because it did not necessarily follow from its general conclusion that such base lines were justified in each particular instance, and in that connexion it had been guided by the four criteria enumerated in its judgement.[3] Thus, if it had been the Commission's intention to follow the Court, it

[2] *I.C.J. Reports 1951*, p. 116.

[3] *Ibid.*, p. 133.

should have retained the reference to "historical reasons" and introduced the words proposed by Mr. García Amador at the end of paragraph 1, where mention was made of the other special criteria adopted by the Court. The omission of the words "historical reasons" did not seem to him strictly consistent with the Court's views. There could be general circumstances in which, on historical grounds, base lines could be admitted without economic considerations being involved. However, for the time being the Commission might leave the text as it stood and at the next session consider whether it required revision in the light of the comments received from governments.

33. Mr. SANDSTRÖM endorsed the very cogent arguments adduced by Sir Gerald Fitzmaurice in support of his opinion, but agreed that the Commission might defer further consideration of article 5 pending the receipt of observations from governments.

34. Turning to another point he noted that the Drafting Committee had not taken into account his proposal[4] concerning the possibility of base lines being drawn between islands and a point on the coast, and suggested the insertion of the words "or between a headland and an island" after the words "appropriate points on the coast".

35. Mr. FRANÇOIS (Special Rapporteur) referring to Sir Gerald Fitzmaurice's final remark, said that there was a procedural difficulty, since the draft articles on the territorial sea adopted at the previous session had already been circulated to governments for comment. It would hardly be possible to repeat that request except when a text had been substantially changed.

36. Mr. KRYLOV pointed out that the Commission had prepared a far more complete text at the present session; it was highly probable that governments would have comments to make, particularly as the subject was of crucial importance.

37. Sir Gerald FITZMAURICE believed that governments would certainly wish to comment on the new text of article 5, which had undergone very considerable change owing to the deletion of paragraph 2.

38. Mr. FRANÇOIS (Special Rapporteur) said that according to the terms of its Statute, if the Commission wished to obtain fresh comments on any of the draft articles, it must expressly ask for them.

39. The CHAIRMAN, speaking in his personal capacity, said that some of the new provisions adopted at the present session would undoubtedly have an important bearing on the remainder of the text, and although governments were nog obliged to submit observations they would most probably do so.

40. Mr. KRYLOV hoped that the Special Rapporteur would not interpret the provisions of the Commission's Statute in too rigid a way. The covering letter to governments accompanying the draft articles should emphasize that the Commission would be reviewing all its work on maritime questions at its eighth session, in accordance with the instructions it had received from the General Assembly in resolution 899 (IX).

41. Mr. LIANG (Secretary to the Commission) agreed with the Chairman's reasons for thinking that governments would probably wish to comment on the new text. The procedural difficulty mentioned by the Special Rapporteur could be overcome by drawing their attention to specific articles.

42. Mr. GARCÍA AMADOR said that Mr. Sandström's point was already covered, because the reference to islands in the immediate vicinity of the coast in the first sentence of paragraph 1 made it clear that they could be used as terminal points for drawing base lines. However, he would have no objection to the amendment, which might serve to clarify the text.

43. Mr. SCELLE said that Mr. Sandström's point would be fully met by the deletion of the words "on the coast" in the second sentence of paragraph 1.

44. Mr. SANDSTRÖM accepted Mr. Scelle's amendment in place of his own.

45. Sir Gerald FITZMAURICE was uncertain whether he could accept Mr. Scelle's amendment, lest it obscure the important requirement that base lines must be drawn between points on land whether on the coast or on an island. Perhaps Mr. Sandström would be satisfied if the question were elucidated in the comment.

46. Mr. FRANÇOIS (Special Rapporteur) pointed out that at the previous session the Commission had, in paragraph 2, laid down certain spatial restrictions on drawing base lines. If Mr. Scelle's suggestion was adopted, then, according to the present text, base lines might be drawn from islands lying at a considerable distance from the coast, which had certainly not been the intention before and might well not have been the intention of the Court.

47. Mr. GARCÍA AMADOR considered that if article 5 were read as a whole it would not be interpreted as Sir Gerald Fitzmaurice feared it might be, even if the words "on the coast" were deleted from the second sentence, for the reference in the last sentence to drying rocks and shoals made it clear that the terminal points of base lines must lie on land.

48. Referring to the Special Rapporteur's remarks he said that the Commission had expressly decided to remove the restrictions originally laid down in paragraph 2, so as to conform with the findings of the Court.

49. Sir Gerald FITZMARUICE agreed that Mr. García Amador was correct in arguing that article 5, read as a whole, could not be interpreted as implying that base lines could have their terminal points in the water. Nevertheless the text would be much more acceptable to him if it were made clear in the comment that terminal points must be on land, so that there could be no possibility of doubt about how base lines should be

[4] 316th meeting, para. 30.

drawn, particularly in the minds of persons who were not experts in maritime law.

50. Mr. ZOUREK did not think there was any danger in Mr. Scelle's amendment, which, in the same way as the Commission's rejection of the spatial criteria in paragraph 2 of the former text, left open the question where the appropriate terminal points of base lines should lie.

51. He had some doubts about the word "deeply" in the first sentence of paragraph 1 because the Court had also admitted that base lines could be drawn in cases when there were minor curvatures of the coast.

52. Mr. FRANÇOIS (Special Rapporteur), speaking subject to correction, thought that the words "deeply indented" had been borrowed from the Court's judgement.

53. Sir Gerald FITZMAURICE said that the wording used by the Court certainly implied that it had had in mind deeply indented coasts as justifying the use of straight base lines.

54. Mr. EDMONDS said that he would ask for a statement to be included in the report to the effect that he had opposed article 5 owing to the inclusion of the words "to any appreciable extent"; as he had pointed out during the discussion, those words were very imprecise.

55. Mr. FRANÇOIS (Special Rapporteur) considered the clarification in the comment suggested by Sir Gerald Fitzmaurice to be unnecessary. It was self-evident that the terminal points of base lines could not lie in the sea. However, he would have no objection to such an addition if it would make the article more acceptable to Sir Gerald Fitzmaurice.

56. He remained disturbed by the implication of Mr. Scelle's amendment that islands far distant from the coast could be used for drawing base lines.

57. Sir Gerald FITZMAURICE observed that the safeguard against that possibility was contained in the provision that base lines must not depart to any appreciable extent from the general direction of the coast.

58. Mr. FRANÇOIS (Special Rapporteur) said that in the light of Sir Gerald Fitzmaurice's assurance he would not oppose the amendment though it weakened the text.

59. Mr. SCELLE said he would have preferred the text to have contained some explicit statement to the effect that islands could be used as terminal points for base lines only if they were in the immediate vicinity of the coast. However, the third sentence of paragraph 1 provided criteria which would enable the international juridical body dealing with the settlement of disputes to decide whether any particular base lines were acceptable.

60. He agreed that Sir Gerald Fitzmaurice's point should be clarified in the comment, particularly as the Court had not enunciated a rule of international law in its judgement but had only decided on a specific case.

Mr. Scelle's suggestion for deletion of the words "on the coast" in the second sentence of paragraph 1 was adopted by 8 votes to 4.

61. Mr. GARCÍA AMADOR said that on further examination of the Court's judgement, he found that it specifically recognized the use of straight base lines in order to simplify the delimitation of the territorial sea in cases of minor curvature of the coast. He therefore proposed that no reference should be made in article 5 to deep indentation.

62. Mr. FRANÇOIS (Special Rapporteur) said that Mr. García Amador had introduced an entirely new proposal which would call for considerable discussion.

63. Mr. GARCÍA AMADOR said that in view of the problems involved he would be prepared to withdraw his proposal.

Article 5 as amended was adopted by 7 votes to 1, with 2 abstentions.

Article 6 [6]: Outer limit of the territorial sea

64. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 6, which the Commission had already adopted at its previous session.

Article 7 [7]: Bays

"1. For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large or larger than that of the semicircle drawn on the entrance of that indentation.

"2. The waters within a bay the coasts of which belong to a single State shall be considered inland waters if the line drawn across the opening does not exceed twenty five miles measured from the low-water line.

"3. If a bay has more than one entrance, this semicircle shall be drawn on a line as long as the sum total of the length of the different entrances. Islands within a bay shall be included as if they were part of the water area of the bay.

"4. Where the entrance of a bay exceeds twenty-five miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn, that line shall be chosen which encloses the maximum water area within the bay.

"5. The provision laid down in paragraph 4 shall not apply to so-called 'historical' bays or in cases where the straight-baseline system provided for in article 5 is applicable."

Article 7 was adopted by 6 votes to none, with 4 abstentions.

Article 8 [8]: Ports

65. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 8, which the Commission had already adopted at its previous session.

Article 9 [9]: Roadsteads

"Roadsteads which are normally used for the loading, unloading and anchoring of vessels and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea are included in the territorial sea. The coastal State must give due publicity to the limits of such roadsteads."

Article 9 was adopted unanimously.

Article 10 [10]: Islands

66. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 10, which the Commission had already adopted at its previous session.

Article 11: Groups of islands

67. Mr. FRANÇOIS (Special Rapporteur) said the article on groups of islands had been deleted.

68. Mr. GARCÍA AMADOR said that deletion of article 11 had a provisional character. The aim had been to reconsider the article at the next session of the Commission.

69. It was undesirable therefore that the article should disappear altogether from the rules drawn up by the Commission. A better course would be to indicate that the provision on groups of islands had been left in abeyance, so as to leave the door open for government comments on the question.

70. Upon such comments being received, the Commission could reconsider the drafting of the article.

71. Mr. FRANÇOIS (Special Rapporteur) said that in view of the fact that a number of articles on the territorial sea had already been shown as postponed in the Commission's 1954 draft, it was undesirable to show one of the same articles as again postponed in the 1955 report.

72. The CHAIRMAN suggested that the article be shown in the report as "provisionally deleted" instead of "deleted".

73. Mr. FRANÇOIS (Special Rapporteur) and Mr. GARCÍA AMADOR accepted that solution.

The Commission agreed to insert the reference "Provisionally deleted" under the heading of article 11.

Article 12 [11]: Drying rocks and [drying] shoals

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea."

74. Mr. SCELLE said that, in the French text at least the final words[5] of the article suggested that the territorial sea was to be extended and that for that purpose the means referred to in the text could be used. It would appear more accurate to say that drying rocks and drying shoals could be used as a basis for the delimitation of the territorial sea.

75. Mr. LIANG (Secretary to the Commission) said the English text made it clear, by using the words "further extending the territorial sea", that drying rocks and drying shoals could enable the outer limit of the territorial sea to be carried further outwards than would be normally the case.

76. A mere statement that drying rocks and drying shoals could be used for the delimitation of the territorial sea would cast doubts upon the main proposition of article 12, to wit, that drying rocks and shoals could only be taken as points of departure for a further extension of the territorial sea if they were wholly or partly within the territorial sea as measured from the mainland or an island.

77. Mr. SANDSTRÖM said the English text appeared to be very clear; perhaps the French text would have to be brought into line with it.

78. Sir Gerald FITZMAURICE said that the basis principle was that drying rocks and drying shoals were not points of departure for measuring the territorial sea. However, if a drying rock or a drying shoal were to be found within the territorial sea (such territorial sea being measured as if the drying rock or shoal were not there at all), then the drying rock or shoal in question could be used in order to extend the territorial sea and project seaward its outer limit.

79. The process of extension by the use of drying rocks and shoals could be done only once; it was not permissible to jump from one drying rock to another and extend the territorial sea unduly in that manner.

80. Mr. SCELLE said that, on the understanding that the article was to be construed in the manner indicated by Sir Gerald, he would not press his point.

Article 12 was adopted unanimously.

Article 13 [12]: Delimitation of the territorial sea in straits

81. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 13, which the Commission had already adopted at its previous session.

Article 14 [13]: Delimitation of the territorial sea at the mouth of a river

"1. If a river flows directly into the sea, the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river.

"2. If the river flows into an estuary the coasts of which belong to a single State, article 7 shall apply."

82. Mr. FRANÇOIS (Special Rapporteur) said that in transmitting the draft articles to governments, the attention of the latter would be drawn to the fact that the Commission had not had at its disposal sufficient factual information on the question of estuaries and that it therefore invited comments by governments on practical

[5] They read as follows: ... *pourront servir de points de départ pour l'extension de la mer territoriale.*