United Nations Conference on the Law of the Sea

Geneva, Switzerland
24 February to 27 April 1958

Document:
A/CONF.13/C.2/SR.21-25

Summary Records of the
21st to 25th Meetings of the Second Committee

Extract from the *Official Records of the United Nations Conference on the Law of The Sea, Volume IV (Second Committee (High Seas: General Regime))*

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ARTICLE 27 (FREEDOM OF THE HIGH SEAS) (A/CONF. 13/C.2/L.3, L.6, L.7, L.15, L.21, L.29, L.32, L.34, L.45, L.63, L.65, L.68, L.70) (continued) [1]

21. Mr. BIERZANEK (Poland) reserved his delegation's right to return to its own proposal on article 27 (A/CONF.13/C.2/L.29) after a vote had been held on Yugoslavia's proposal (A/CONF.13/C.2/L.15).

22. Mr. CAMPOS ORTIZ (Mexico) withdrew paragraph 2 of his delegation's amendment (A/CONF.13/C.2/L.70), which concerned paragraph 2 (*c*) of the Yugoslav proposal.

23. The CHAIRMAN put paragraph 1 of the Yugoslav proposal (A/CONF.13/C.2/L.15) to the vote.

Paragraph 1 of the proposal was rejected by 25 votes to 19, with 12 abstentions.

24. The CHAIRMAN put paragraph 2 (*a*) of the proposal to the vote.

Paragraph 2 (a) of the proposal was rejected by 28 votes to 12, with 11 abstentions.

The meeting rose at 6 p.m.

TWENTY-FIRST MEETING

Monday, 31 March 1958, at 10.45 a.m.

Chairman: Mr. O. C. GUNDERSEN (Norway)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159) *(continued)*

ARTICLE 27 (FREEDOM OF THE HIGH SEAS) (A/CONF. 13/C.2/L.3, L.6, L.7, L.15, L.21, L.29, L.32, L.34, L.45, L.63, L.65, L.66, L.68, L.70) (continued)

1. The CHAIRMAN invited the Committee to resume the voting on the proposal of Yugoslavia (A/CONF.13/C.2/L.15), starting with paragraph 2 (*b*) for which the Yugoslav delegation accepted the text of the Mexican amendment (A/CONF.13/C.2/L.70).

Paragraph 2 (b), as amended, was rejected by 21 votes to 16, with 13 abstentions.

Paragraph 2 (c) was rejected by 25 votes to 20, with 10 abstentions.

Paragraph 3 was rejected by 27 votes to 18, with 9 abstentions.

Paragraph 4 was rejected by 21 votes to 18, with 16 abstentions.

2. The CHAIRMAN declared that, since all the paragraphs of the Yugoslav proposal had been rejected, the proposal was rejected as a whole.

3. In the light of the voting on the Yugoslav proposal, which embodied most of the points contained in a number of other proposals, he asked the sponsors of those proposals to reconsider their position. He felt that in the altered circumstances some of them might wish to withdraw their proposals.

[1] Resumed from the 16th meeting.

4. Mr. BIERZANEK (Poland) said that paragraphs 2 and 3 of the text proposed by Poland for article 27 (A/CONF.13/C.2/L.29) should be voted on separately, since they were not covered by the Yugoslav proposal, and his country attached particular importance to the principles embodied in them. Article 27 of the International Law Commission's draft was not sufficiently clear.

5. The CHAIRMAN said that the Polish proposal would be put to the vote in due course.

At the request of the Bulgarian delegation, the vote on the proposal by Albania, Bulgaria and the Union of Soviet Socialist Republics (A/CONF.13/C.2/L.32) was taken by roll-call.

Sweden, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Ceylon, Czechoslovakia, Hungary, Indonesia, Poland, Romania.

Agrainst: Sweden, Thailand, Turkey, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, France, Federal Republic of Germany, Greece, Guatemala, Haiti, Iceland, India, Ireland, Israel, Italy, Republic of Korea, Liberia, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Spain.

Abstaining: Switzerland, Venezuela, Yugoslavia, Austria, Burma, Finland, Japan, Mexico, Saudi Arabia.

The proposal was rejected by 43 votes to 13, with 9 abstentions.

6. Mr. KEÏLIN (Union of Soviet Socialist Republics) said that the work of the Committee would be simplified if, from that stage onwards, it took the draft of the International Law Commission as a basis for voting. Some delegations might wish to reconsider their proposed amendments in the light of the result of the votes already taken. The remaining proposals should be put to the vote in the order in which they had been submitted.

7. Mr. BULHOES PEDREIRA (Brazil) withdrew his delegation's proposal (A/CONF.13/C.2/L.66) which concerned the form, rather than the substance, of article 27. Since his delegation's proposal for a similar amendment to article 26 (A/CONF.13/C.2/L.67) had already been rejected, there was no longer any point in the amendment to article 27.

8. Sir Alec RANDALL (United Kingdom) said that his delegation had submitted its proposal (A/CONF.13/C.2/L.68) because it considered that it contained a more accurate statement of the position than the third sentence of paragraph 1 of the International Law Commission's commentary of article 27. However, the proposed amendment was not indispensable as its sense was already implicit in the International Law Commission's draft of article 27. The United Kingdom delegation would have been prepared to withdraw its amendment had the Polish delegation withdrawn its proposal

incorporating the third sentence of paragraph 1 of the commentary, put forward as paragraph 3 of its proposal (A/CONF.13/C.2/L.29). As, however, the Polish delegation had indicated that it wished a vote on its proposal, the United Kingdom delegation would have to ask that this proposal be voted upon.

The United Kingdom proposal (A/CONF.13/C.2/L.68) was adopted by 30 votes to 18, with 9 abstentions.

9. Mr. GIDEL (France) said that his delegation had abstained from voting on the United Kingdom proposal because it did not understand what was meant by the words " and others which are recognized by the general principles of international law ". His delegation had submitted for article 27 a text (A/CONF.13/C.2/L.6) from which the phrase "*inter alia*" was omitted. The inclusion of that phrase meant that the list which followed was incomplete and could thus lead to differences of interpretation.

The meeting rose at 11.50 a.m.

TWENTY-SECOND MEETING

Monday, 31 March 1958, at 3 p.m.

Chairman: Mr. O. C. GUNDERSEN (Norway)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159) *(continued)*

ARTICLE 27 (FREEDOM OF THE HIGH SEAS) (A/CONF.13/C.2/L.3, L.6, L.7, L.21, L.29, L.34, L.45, L.63, L.65) (concluded)

1. The CHAIRMAN, inviting the Committee to continue voting on the remaining amendments to article 27, asked whether their authors wished to maintain them. The French amendment (A/CONF.13/C.2/L.6) had been withdrawn.

2. Mr. CAMPOS ORTIZ (Mexico) did not feel able to withdraw his amendment (A/CONF.13/C.2/L.3), which was almost identical with the Commission's text, because it had been supported by the delegations of Australia, Iceland, India and the United States. He asked that his amendment be put to the vote by roll-call.

3. He regretted not being able to accept the Portuguese proposal to add a fifth freedom (A/CONF.13/C.2/L.7).

4. Mr. GARCIA-SAYAN (Peru) maintained his amendment (A/CONF/13/C.2/L.34).

5. Mr. LIU (China) withdrew his amendment (A/CONF.13/C.2/L.45) because others had the same purpose.

6. Mr. GARCIA-MIRANDA (Spain) withdrew his proposal (A/CONF.13/C.2/L.65) in the interests of simplification, but proposed that as the freedoms mentioned in article 27 were not intended to be exhaustive, they should not be numbered.

7. He supported the Portuguese proposal to add the freedom of exploration.

8. In answer to a question by the CHAIRMAN, Mr. CARDOSO (Portugal) confirmed that the Portuguese proposal (A/CONF.13/C.2/L.7) had been withdrawn with the exception of the addition contained in paragraph 2 reading: " Freedom to undertake research, experiments and exploration." He had in mind, needless to say, scientific research, but that point could be referred to the Drafting Committee. He supported the Spanish proposal not to number the freedoms listed in article 27.

9. Mr. VAN PANHUYS (Netherlands) withdrew his amendment (A/CONF.13/C.2/L.21) which was largely one of form.

10. Sir Alec RANDALL (United Kingdom) withdrew the United Kingdom amendment (A/CONF.13/C.2/L.63), as the drafting point with which it was concerned could be referred to the Drafting Committee.

11. The CHAIRMAN ruled that the amendments which had been maintained should be put to the vote in the order of their submission, because it was impossible to establish which was furthest removed from the original text of the Commission.

12. Mr. GARCIA-SAYAN (Peru) challenged the Chairman's ruling because he considered that the Peruvian amendment should be put to the vote first in accordance with rule 40 of the rules of procedure. It would be noted that the words " without prejudice to the rights of the coastal State under this convention " corresponded to the general principle contained in the proposal put forward by the delegations of Burma, the Republic of Korea, Mexico and Venezuela which the Third Committee had adopted at its 19th meeting for incorporation in article 49, 51 and 52.

The Chairman's ruling was upheld by 52 votes to 5, with 8 abstentions.

The vote was taken by roll-call on the Mexican proposal (A/CONF.13/C.2/L.3).

Sweden, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Turkey, United States of America, Uruguay, Venezuela, Argentina, Australia, Brazil, Canada, China, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Iceland, India, Indonesia, Ireland, Mexico, New Zealand, Panama, Portugal, Saudi Arabia.

Against: Sweden, Thailand, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, Yugoslavia, Albania, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Finland, France, Federal Republic of Germany, Hungary, Iran, Japan, Norway, Poland, Romania.

Abstaining: Tunisia, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, Austria, Burma, Ceylon, Chile, Cuba, Denmark, Dominican Republic, Ghana, Greece, Holy See, Iraq, Israel, Italy, Jordan, Republic of Korea, Liberia, Libya, Monaco, Netherlands, Pakistan, Peru, Philippines, Spain.

The proposal was adopted by 24 votes to 20, with 26 abstentions.

The Portuguese proposal (A/CONF.13/C.2/L.7) was rejected by 39 votes to 13, with 8 abstentions.

13. The CHAIRMAN said that the first part of the Polish proposal (A/CONF.13/C.2/L.29) had been withdrawn, and there remained only paragraphs 2 and 3. In accordance with the Polish representative's request, paragraph 3 would be put to the vote by roll-call.

Paragraph 2 of the Polish proposal was rejected by 34 votes to 20, with 8 abstentions.

A vote was taken by roll-call on paragraph 3.

Panama, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Poland, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia, Albania, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Japan.

Against: Panama, Philippines, Saudi Arabia, Spain, Thailand, Turkey, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Argentina, Australia, Brazil, Canada, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, El Salvador, France, Federal Republic of Germany, Greece, Guatemala, Haiti, Iceland, Iran, Israel, Italy, Republic of Korea, Liberia, Netherlands, New Zealand, Norway, Pakistan.

Abstaining: Peru, Portugal, Sweden, Switzerland, Tunisia, Austria, Belgium, Chile, Ecuador, Finland, Holy See, Indonesia, Iraq, Ireland, Jordan, Libya, Mexico.

Paragraph 3 of the Polish proposal was rejected by 37 votes to 14, with 17 abstentions.

14. Mr. GARCIA-SAYAN (Peru) asked for a separate vote by roll-call on the freedoms listed in his proposal (A/CONF.13/C.2/L.34).

15. The CHAIRMAN observed that it would be preferable to vote on the proposal as a whole, since the first sentence could hardly raise any objection.

16. Mr. MATINE-DAFTARY (Iran) endorsed the Peruvian representative's request.

17. The CHAIRMAN suggested in order to simplify the procedure that a roll-call vote be taken on the principle change in the Peruvian proposal — namely, the addition to sub-paragraph 2 of the International Law Commission's text.

18. Mr. GARCIA-SAYAN (Peru) accepted that suggestion.

A vote was taken by roll-call on the Peruvian amendment (A/CONF.13/C.2/L.34) to sub-paragraph 2 of the International Law Commission's text.

Israel, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Jordan, Republic of Korea, Libya, Mexico, Peru, Tunisia, Turkey, United Arab Republic, Uruguay, Argentina, Burma, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Holy See, Iceland, Iran, Iraq, Ireland.

Against: Italy, Japan, Liberia, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Albania, Australia, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Greece, Hungary, Indonesia.

Abstaining: Israel, Pakistan, Philippines, Saudi Arabia, Thailand, Venezuela, Yugoslavia, Brazil, Canada, China, Cuba, Dominican Republic, India.

The Peruvian amendment was rejected by 31 votes to 23, with 13 abstentions.

19. The CHAIRMAN put to the vote the Spanish proposal that the freedoms listed in article 27 should not be listed in separate numbered paragraphs.

The proposal was rejected by 43 votes to 4, with 13 abstentions.

20. The CHAIRMAN put to the vote the International Law Commission's text for article 27 as amended by the Mexican and United Kingdom proposals (A/CONF.13/C.2/L.3 and A/CONF.13/C.2/L.68).

The International Law Commission's text for article 27, as amended, was adopted by 50 votes to 4, with 12 abstentions.

21. Mr. KEÏLIN (Union of Soviet Socialist Republics) explained that his delegation had abstained in the final vote on article 27 because the two amendments had impaired the Commission's text. They had, moreover, been adopted by only a narrow majority. The Polish delegation's proposal, which would have radically improved the text, would have been preferable.

22. Mr. OLDENBURG (Denmark) said that as the Commission's text was on the whole satisfactory and represented a high degree of common agreement, his delegation was reluctant to accept any amendments except essential ones of substance.

23. Mr. SOLE (Union of South Africa) had been unable to vote for the text of article 27 as amended for the same reasons as the Soviet Union representative; he particularly regretted the adoption of the United Kingdom amendment (A/CONF.13/C.2/L.68) which had transposed part of the Commission's interpretation from the commentary to the text of the article and had originally been put forward as a counter-proposal to another amendment.

24. Mr. MATINE-DAFTARY (Iran) said that his delegation in principle favoured the Commission's text and would only support amendments introducing a vital new element.

25. Mr. SEDKY (United Arab Republic) said that in principle he had favoured the Commission's text and had therefore voted against the Portuguese amendment because the freedoms mentioned by the Commission were well-established. On the other hand, he had voted for paragraph 2 of the Polish proposal because it enunciated the fundamental principle of equality which the Conference by virtue of its very composition should strongly endorse. He had also supported paragraph 3 of the Polish proposal because it laid down a crucial requirement.

ARTICLES 28 (THE RIGHT OF NAVIGATION), 34 (SAFETY OF NAVIGATION), 35 (PENAL JURISDICTION IN MATTERS OF COLLISION) AND 36 (DUTY TO RENDER ASSISTANCE) (A/CONF.13/C.2/L.6, L.11, L.18, L.24 and Add.1, L.25, L.36, L.39, L.40, L.43, L.44, L.49, L.50, L.56, L.59, L.60, L.73, L.74, L.82) (continued) [1]

26. Mr. COLCLOUGH (United States of America) explained that the reasons for his delegation's amendment to article 28 (A/CONF.13/C.2/L.40) were set out in the accompanying comments. In addition, he wished to emphasize the need to prevent any misapprehension about the right of every State, whether possessing a coastline or not, to grant its nationality to ships; the Commission had failed to bring out with sufficient clarity the principles covered by article 28. The long-established usage whereby the flag flown by a ship in a certain manner was recognized as a symbol of its nationality should not be discarded.

27. There was general agreement that the safety of navigation should be fostered, but differences of opinion existed as to the method to be employed, and though the United Kingdom representative's arguments indicated that some change was necessary in article 34 he was not convinced that the remedy lay in its total suppresion, for the draft convention would be incomplete without some provision on the subject. However, to diminish the possibility of conflict with existing conventions his delegation proposed (A/CONF.13/C.2/L.43) that the article should be restricted to a statement of general principle. Such a course had the added advantage of meeting the objections raised by the representative of the International Labour Organisation during the general discussion (12th meeting) to the phrase "internationally accepted standards" in relation to labour conditions.

28. Article 35, paragraph 1 set out a generally accepted and still valid principle of international law, but to avoid any possibility of paragraph 2 being construed as going beyond the scope of paragraph 1, his delegation had submitted an amendment (A/CONF.13/C.2/L.44).

29. Article 36 was wholly acceptable provided that it did not affect the force of article 11, paragraph 2 of the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea of 1910, to which his government was a party. If he had correctly understood the statement made by Mr. François, Expert to the secretariat of the Conference, at the 13th meeting, article 36 did not conflict with existing international agreements.

30. Subject to those considerations and amendments, his delegation could accept articles 28, 34, 35 and 36.

31. Mr. KEÏLIN (Union of Soviet Socialist Republics) said that, in considering that group of articles, the essential question was whether the Committee should, as proposed by the United Kingdom, agree to replace the explicit provisions that constituted the text of articles 34, 35 and 36 by one or more resolutions containing a list of conventions and commending their acceptance to all States which were not yet parties to them.

[1] Resumed from the 19th meeting.

32. From the juridical point of view, it was obviously preferable that the instrument being prepared by the Conference should include explicit provisions on the safety of navigation, the duty to render assistance and penal jurisdiction in matters of collision.

33. There was yet another reason that militated against the United Kingdom draft resolution, that the accession of a State to any given convention depended on that State alone, and its decision was influenced by many considerations. The Soviet Union was probably a party to all the conventions listed in the United Kingdom resolution and his delegation would certainly regard with satisfaction any increase in the number of States parties to them, according to the general policy of international co-operation practised by his government; however, particularly in view of the fact that a certain number of recently-constituted States were participating in the Conference, it was not the course indicated by the United Kingdom delegation but that outlined by the International Law Commission that should be followed.

34. The U.S.S.R. delegation could not therefore accept the United Kingdom proposals (A/CONF.13/C.2/L.49 and L.50).

35. The amendment to article 35 proposed by the United States (A/CONF.13/C.2/L.44) was unacceptable, for it was far from being purely a matter of form. Under the terms of the Commission's draft, no arrest or detention of a ship could be ordered, in any place whatever, by any authorities other than those of the flag State. From the insertion of the words "on the high seas" it would necessarily be deduced, on the contrary, that in a foreign port of call a ship might be arrested or detained under pretext of the investigation of a collision that had occurred on the high seas.

36. The United States amendment to article 34 (A/CONF.13/C.2/L.43) was likewise unacceptable. The enumeration of the various matters that should be the subject of regulation was indispensable, and the deletion of sub-paragraphs (*a*), (*b*) and (*c*) would, so to speak, deprive the article of any concrete character.

37. The U.S.S.R. delegation considered that the Danish proposal concerning article 36 (A/CONF.13/C.2/L.36) was worthy of acceptance. The Soviet Union was already co-operating with several States, particularly the Scandinavian countries, for the purpose mentioned in that amendment.

38. Another proposed amendment that should encounter no objection was that of the French delegation concerning article 35 (A/CONF.13/C.2/L.6).

39. In regard to the Turkish amendment (A/CONF.13/C.2/L.73) to the United Kingdom resolution covering article 35, while appreciating the motives by which it appeared to have been inspired, he felt that the establishment of a new international body could not be fully justified.

40. As to the proposal of the Union of South Africa (A/CONF.13/C.2/L.74), it merely stated the obvious and was thus superfluous.

41. Lastly, the U.S.S.R. delegation could not accept the United States proposal for article 28 (A/CONF.13/C.2/L.40) which, far from improving the Commission's text, made it less satisfactory. Any mention in the

article of the symbolic nature of the flag might introduce an element of uncertainty in the very conception of the flag. The comments which accompanied the proposal merely bore that out. The flag must have a precise meaning that did not lend itself to varying interpretations.

42. Mr. RADOUILSKY (Bulgaria) asked what was the true significance of the French proposal on article 34 (A/CONF.13/C.2/L.6), whereby the words " the maintenance of communications " would be changed into " and means of communication ".

43. Mr. GIDEL (France) replied that, in French, the original phrase had no discernible meaning. The proposal was thus designed to clarify that the reference was to the methods whereby communications were transmitted.

44. Mr. BELLAMY (United Kingdom) said that his delegation, having carefully considered whether the existing articles 34, 35 and 36 might be amended in such a way as to enable it to withdraw the resolutions which it had proposed (A/CONF.13/C.2/L.49 and L.50), had decided that it would be prepared to accept article 36 as it stood, subject to certain possible drafting amendments. It would also support the Danish amendment on the subject of a search and rescue service (A/CONF.13/C.2/L.36).

45. With regard to article 35, dealing with penal jurisdiction in matters of collision, his delegation would be prepared to accept the existing article subject to the amendments proposed by the French delegation. The United Kingdom Government would nevertheless have to enter a reservation, as it had done for the corresponding Brussels Convention of 1952, in respect of the reciprocal arrangements which it had with certain other Commonwealth countries. Moreover, his delegation would be unable to support the amendments proposed by the delegations of Thailand (A/CONF.13/C.2/L.59) and Turkey (A/CONF.13/C.2/L.73).

46. The biggest difficulty arose in connexion with article 34. It was manifestly erroneous to refer to " internationally accepted standards ", especially in such matters as the manning of ships and the working conditions of crews. The United Kingdom Government recognized and appreciated the great work done in that field by the International Labour Organisation, but most of that agency's conventions were accepted only by a limited number of States. For that reason, his delegation could not assent to the Netherlands amendment (A/CONF. 13/C.2/L.24 and Add.1), which seemed to imply an undertaking to accept all of those conventions. In practice, no country had accepted them all and no one convention had been accepted by all countries.

47. On the other hand, the amendments proposed by the United States (A/CONF.13/C.2/L.43) and Greece (A/CONF.13/C.2/L.56) would tend to weaken the existing article unduly.

48. His delegation was therefore proposing a redraft of article 34 (A/CONF.13/C.2/L.82), which took into consideration the various points he had put forward on its behalf.

49. His delegation had also considered the various amendments submitted to article 28, but felt that the article was perfectly satisfactory as it stood.

50. Mr. LÜTEM (Turkey) regretted that article 35, which dealt with collisions and other incidents of navigation on the high seas, stipulated that jurisdiction in such cases could be exercised solely by the flag State — a principle borrowed from the Brussels Convention of 10 May 1952 — or by the State of which the accused person was a national. The International Law Commission had stated that the purpose of its proposal was to protect ships and their crews from the risks of penal proceedings before foreign courts, since such proceedings might constitute an intolerable interference with international navigation. Even if those views were accepted — and they seemed to be essentially the views of Powers with large merchant fleets — the Turkish delegation believed that the text proposed by the Commission failed to provide for all the difficulties that might arise.

51. The Turkish delegation's position was based on several considerations. First, the proposed text conflicted with the judgement of the Permanent Court of International Justice in the *Lotus* case,[1] to which his government had been a party. The Court's decision on that occasion clearly represented the only applicable rule of positive international law, for the 1952 Convention had only been ratified by very few States. Secondly, Turkish legislation contained provisions — the most important being article 6 of the Penal Code — which could not be reconciled with the principles contained in the article. And thirdly, collisions and similar incidents of navigation on the high seas raised other issues besides conflicts of jurisdiction. The most important consideration was in fact the speedy and just punishment of the culprits, which could only be achieved if the case was disposed of by a single authority. Article 35, however, seemed to imply that, in certain circumstances, a case might be investigated by one State and tried by another. The article thus seemed to lay undue stress on the prevention of conflicts of jurisdiction and failed to make adequate provision for the effective prosecution of justice.

52. The problem could only be resolved if it was clearly established that one body alone woud be competent. That purpose could be achieved in two ways: jurisdiction might be vested not in several States but in one State only, to be designated by some international committee; or a special international judicial organ might be set up, with full powers to deal with all proceedings arising out of collisions and similar incidents. Which of those alternatives to adopt was a matter solely for the Conference. The Turkish delegation would not insist on its amendment (A/CONF.13/C.2/L.73), but hoped that the article would be reshaped so as to provide a truer reflection of the accepted law in the matter.

53. Mr. GIDEL (France), explaining the various French proposals on articles 28, 34, 35 and 36 (A/CONF.13/C.2/L.6), said that the sole purpose of the new text of article 28 was to clarify the point that ships had to comply with a number of conditions in order to be entitled to fly the flag of the State concerned.

54. The reason for the proposed change in article 34, paragraph 1 (*a*) was, as he had already stated, that the

[1] *Publications of the Permanent Court of International Justice, Series A, No. 10.*

expression in the International Law Commission's draft was repugnant to a French ear.

55. With regard to the question whether the subject-matter covered by articles 34, 35 and 36 should be dealt with in the proposed convention or in a separate resolution, he recalled that he had already voiced his support for the views of the Commission and its Special Rapporteur, Mr. François.

56. The fears voiced by the Turkish representative regarding article 35 seemed somewhat exaggerated. The Turkish Government's view had been upheld by the Permanent Court of International Justice in the *Lotus* case, and it would accordingly be fully within its rights in formulating an express reservation to the article, stating that it would adhere to the provisions of its own penal code. That, however, was no reason why the provision should not be accepted by the Conference as a whole, especially since the principle of "passive jurisdiction" had in more recent years been the subject of much adverse comment and the signatories to the Brussels Convention of 1952 had agreed that continued adherence to that principle woud cause unreasonable interference with international shipping.

57. With regard to the French proposals for article 35, he stressed that the first was a purely terminological amendment, while the second (an additional paragraph) had been prompted by the firm belief that a State issuing certificates of competency thereby undertook a responsibility towards the entire international community and should consequently be free to revoke the document if the holder should prove himself lacking in the necessary qualities. The adoption of the additional paragraph would not, of course, prevent States from concluding special agreements regarding recognition of each other's certificates.

58. Lastly, his delegation had proposed the removal of the words "with all speed" from article 36 (*b*) because it believed that in such circumstances the matter should be left to the appreciation of the master mariner on the spot.

59. Mr. VAN PANHUYS (Netherlands) said that his delegation had introduced its amendment to article 36 (A/CONF.13/C.2/L.25) because it felt that the International Law Commission had only contemplated legislative measures of a general character. No State could be expected to assume absolute liability or required to provide for every individual occurrence or incidental detail.

60. Mr. DEMEUR (Holy See) said that, in dealing with the article on the right to a flag, the Committee should remember that the question of the national character of ships belonging to land-locked countries was at that time the subject of two proposals before the Fifth Committee (A/CONF.13/C.5/L.6 and L.7). At some stage, therefore, the texts adopted by the two committees would require co-ordination.

61. With regard to conditions for the recognition of nationality, he felt that the expression "genuine link" in article 29 was far too vague to put an end to the practices of ship-owners who maintained purely fictitious national attachments. He felt that in the determination of a ship's nationality the only truly decisive factor could be effective jurisdiction and control. The nationality of the owner and of the capital was too difficult to ascertain, as a vessel would normally be owned by a joint-stock corporation which could easily invest itself with any national characteristic desired. On the other hand, the nationality of the master and crew could also never be decisive, because certain States, especially the land-locked ones, would find it impossible to find enough experienced seafarers among their own citizens. His delegation would therefore support the Italian proposal on article 29 as offering the only satisfactory solution (A/CONF.13/C.2/L.28).

The meeting rose at 6 p.m.

TWENTY-THIRD MEETING

Tuesday, 1 April 1958, at 3.15 p.m.

Chairman: Mr. O. C. GUNDERSEN (Norway)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159) *(continued)*

ARTICLES 28 (THE RIGHT OF NAVIGATION), 34 (SAFETY OF NAVIGATION), 35 (PENAL JURISDICTION IN MATTERS OF COLLISION) AND 36 (DUTY TO RENDER ASSISTANCE) (A/CONF.13/C.2./L.6, L.11, L.18, L.24 and Add.1, L.25, L.36, L.39, L.40, L.43, L.44, L.56, L.59, L.60, L.73, L.74, L.82, L.88) (continued)

1. Mr. CERVENKA (Czechoslovakia) recalled that, at the preceding meeting, the representative of the Holy See had implied that there might be a conflict between the text the Second Committee would adopt on the subject covered by article 28 and the document on the rights of land-locked countries on which the Fifth Committee was engaged. That fear was without foundation, as the right of the land-locked States to fly a flag on the high seas was generally recognized, and the rule stated in article 28 applied to those States on a footing of equality with others. Any eventual co-ordination that might be needed should not be a serious problem.

2. The representative of the Holy See had also suggested that the land-locked States might find some difficulty in training the necessary personal to ensure compliance by their ships with the requirements of articles 34, 35 and 36. That notion was wholly erroneous. Czechoslovakia, as indeed several other land-locked countries, had enacted comprehensive legislation on such matters and encountered no difficulty in meeting the demands resulting from accession to several of the relevant international conventions.

3. Mr. MINTZ (Israel) said that the first half of the United States proposal on article 28 (A/CONF.13/C.2/L.40) was wholly logical, for if a ship had been granted a State's nationality, the right to fly that State's flag was a natural corollary. But the second phrase reading "and flying its flag as a symbol thereof" might prove confusing. His delegation had accordingly submitted a formal amendment (A/CONF.13/C.2/L.88) proposing that article 28 should consist solely of the first phrase proposed by the United States.

4. To be consistent with that wording for article 28, his delegation was also proposing a change in article 34, as there too the essential factor was not jurisdiction, but nationality. The Committee would also have to decide, however, what principles should be embodied in article 34, and how that could be done in a manner that would avoid difficulties in the interpretation and application of the various relevant conventions. In that connexion, his delegation believed that the safety measures envisaged need not necessarily involve legislation and that the reference to regulations should be deleted. The measures envisaged by the article were essentially those already adopted in any maritime country with a proper shipping inspection system, the purpose of which was to ensure that no ship left port without safety and load-line certificates issued in conformity with the applicable conventions. In practice, no ship would proceed on a voyage without such documents for fear of being refused the right to carry passengers or freight from foreign ports. The desired end could therefore often be attained without legislation, and many States would take merely administrative measures to ensure that certain standards were observed before certificates were issued. He did not, of course, wish to imply that legislation might not at times be the most satisfactory method of obtaining the desired result, but felt that in the matter of safety measures, as in questions such as the adequacy of the ship's crew or reasonable labour conditions, the State should be free to employ whatever means it considered most appropriate, such as arbitration awards, collective agreements and other appropriate forms of action. As to the clause requiring States to ensure reasonable labour conditions, he would support its inclusion, as proposed by the International Law Commission, on the assumption that any governmental regulation on the subject would be intended to secure the minimum standards, leaving it open to employees and employers to reach agreement upon conditions that were not below such standards. Moreover, a text less categorical than that proposed by the International Law Commission might make the whole principle of article 34 more generally acceptable.

5. The phrase in paragraph 2 of the article requiring observance of internationally accepted standards also raised the issue of the relationship between the proposed code and various multilateral conventions. His delegation believed that the addition of the words " taking account of relevent treaty provisions " would make the first sentence of paragraph 2 more consistent with other provisions of the draft, such as article 48, and would also emphasize that certain instruments, though not yet ratified by the majority of States, set standards that enjoyed wide acceptance.

6. With regard to article 35, he noted that the text departed from that of the 1952 Brussels Convention on penal jurisdiction in matters of collisions. His delegation believed that the distinction, clearly established in the Brussels Convention, should be maintained between criminal or disciplinary proceedings on the one hand, and, on the other hand, action in respect of certificates issued by a State or the prosecution of its own nationals for offences committed by them on board foreign ships. The question of disciplinary measures, however, should not be over-simplified. Such measures were not necessarily confined to the withdrawal or suspension of certificates of competency, and he hoped that the French delegation would take that point into account and modify its amendment (A/CONF.13/C.2/L.6) accordingly.

7. Another question to be considered in that connexion was whether there should not eventually be some provision authorizing a State to take action to prevent a foreign national charged with responsibility for a collision or other incident of navigation while serving on one of its ships from continuing to serve on ships under its flag. Such a provision would cover cases where the State concerned would be unable to withdraw or suspend the certificate of the person concerned because it had been issued by the authorities of some other country.

8. Lastly, his delegation felt that article 36 should be brought into line with the provisions of the Brussels Convention of 1910 on assistance and salvage at sea. The article already embodied some of the principles underlying that instrument, but failed to reflect others of considerable importance, such as the right of salvage operators to remuneration for their services. Furthermore, there should also be a clause similar to that which he had suggested for inclusion in article 34, stipulating that the provisions of the article would be applied subject to relevant treaty provisions.

9. Mr. BIERZANEK (Poland) expressed his delegation's approval of the method followed by the International Law Commission in incorporating in articles 34, 35 and 36 the principles underlying the main conventions on those subjects. Since the withdrawal of the United Kingdom proposals (A/CONF.13/C.2/L.49 and L.50), the desirability of that approach was now generally agreed and its adoption would in no way detract either from the importance of the conventions themselves or from the contribution made by the States primarily responsible for their conclusion. Poland was already a party to many of the most important relevant instruments and was closely considering the possibility of acceding to others. In that respect, therefore, his delegation fully endorsed the United Kingdom representative's views.

10. With regard to the amendments proposed to articles 34, 35 and 36, his delegation supported the Danish proposal (A/CONF.13/C.2/L.36) on a search and rescue service and regional arrangements for the promotion of safety at sea. It would also support the French proposal on article 34 (A/CONF.13/C.2/L.6) and the Yugoslav amendment to article 36 (A/CONF.13/C.2/L.18). The provisions of article 35 regarding penal jurisdiction in matters of collision would be acceptable in their present form.

11. Mr. FAY (Ireland) said that after the explanations given at the 13th meeting by Mr. François, Expert to the secretariat of the Conference, and the highly constructive debate in the Committee, most of the provisions contained in articles 34, 35 and 36 seemed largely acceptable to his government. His delegation hoped, however, that article 34 would be adopted in the form proposed by the United Kingdom (A/CONF.13/C.2/L.82), as otherwise it might be open to some doubt. With regard to article 35, his Government would have to

enter a reservation regarding certain recipocal arrangements it had made concerning the withdrawal of certificates of competency.

ARTICLES 29 (NATIONALITY OF SHIPS), 30 (STATUS OF SHIPS) AND 31 (SHIPS SAILING UNDER TWO FLAGS) (A/CONF.13/C.2/L.6, L.11, L.12/Rev.1, L.16, L.22, L.23, L.27, L.28, L.38/Rev.1, L.39, L.41, L.42, L.48, L.51, L.55, L.60, L.86)

12. Mr. FRANCHI (Italy), submitting his delegation's proposal on article 29 (A/CONF.13/C.2/L.28), recalled that many representatives had already stressed the need for a better definition of the link between the flag State and the ship claiming its nationality. Having been called upon to codify the law of the sea, the Conference could not disregard the juridical realities of modern life.

13. The International Law Commission had orginally hoped to embody in the text certain rules governing permission to fly a flag but had been forced to abandon its attempt at its eighth session. The Italian Government, whose legislation was fully consistent with the rules originally suggested by the Commission, would have been fully prepared to accept detailed proposals, but it realized that the practice of States was too diverse to allow of any common denominator acceptable to the entire international community. His delegation had therefore submitted its proposal largely in order to clarify the Commission's final draft by stressing that one of the most important factors in the determination of nationality should be effective jurisdiction and control, the twin components of the exercise of sovereignty. That formula would avoid the difficulties inherent in detailed rules, while giving a clear indication of what the link between the ship and the State should be. Finally, his delegation had made the additional proposal to substitute " lien substantiel " for " lien réel " in the French text.

14. Mr. BREUER (Federal Republic of Germany) agreed that the need for a genuine link between the ship and the State whose flag it flew was an accepted principle of the law of nations. A further important point, however, was that the existence of the link must not be a fiction created after registration but something to be established before the ship was ever registrable. His delegation had originally hoped that some agreement might be reached on the rules of registration, but in view of the manifold difficulties which had since come to light it felt that the most satisfactory acceptable standard might be that suggested in its own amendment to article 29 (A/CONF.13/C.2/L.39). The genuine link would thus have to exist not merely between the State and the ship but also between both of those and the ship-owner.

15. Mr. GIDEL (France) said that the absence of clear rules on the nationality of ships would strike at the very foundations of law and order on the high seas. A flag being evidence of a ship's national character and of the protection which it thereby enjoyed, the International Law Commission and its Special Rapporteur were to be commended for emphasizing the fact that the grant of a flag could not be a mere administrative formality with no accompanying guarantee that the ship possessed a " genuine link " with the flag State. In that connexion, he welcomed the Italian delegation's support for the French proposal that in the French version that expression should be changed to " lien substantiel ".

16. In stipulating the conditions governing nationality, a clear distinction had to be drawn between the criteria which a State could adopt for the grant of its nationality and the result which those criteria must guarantee. The criteria should be determined by the State at its own discretion and it was idle to contend that the stipulation requiring a " genuine link " was in itself incompatible with the recognition of such a discretionary power. The State was free to select its own criteria because — as had been proved at the 1896 session of the Institute of International Law and in the discussions of the International Law Commission itself — varying local conditions made the imposition of unified rules totally impossible. But the final result must in all cases be the same : the effective exercise of control over the ship by the flag State.

17. In those circumstances, his delegation welcomed the gist of the Italian proposal on article 29. It felt, however, that some further specification was needed and hoped that the Italian delegation would agree to add to its text the words " in administrative, technical and social matters ".[1] If that suggestion was accepted, the French proposal on article 29 (A/CONF.13/C.2/L.6) would be withdrawn.

18. Mr. FRANCHI (Italy) said that his delegation would accept the French suggestion.

19. Mr. GHELMEGEANU (Romania), speaking on article 31, emphasized that any ship carrying two or more flags and using them at its own convenience would be violating the rule that a ship must have a single nationality and be in a position to prove it. The International Law Commission had rightly pointed out the abuses to which such practices could give rise and had stated that a ship in such circumstances could not claim any of the nationalities in question and could be regarded by other States as a ship without nationality. For the sake of clarity, however, the Romanian delegation had proposed (A/CONF.13/C.2/L.27) that a ship should only be assimilated to one without nationality if it sailed under more than one flag on the same voyage.

20. Mr. COLCLOUGH (United States of America) said that the United States proposal on article 30 (A/CONF.13/C.2/L.41) was designed solely to clarify that article. The proposed reformulation would simplify the text without any change of substance.

21. The United States amendment to article 31 (A/CONF.13/C.2/L.42) was also a matter of pure form. It followed the terminology already used in the United States proposal on article 28 (A/CONF.13/C.2/L.40) and stressed that the central question was nationality, the flag being only a symbol.

22. Mr. SEYERSTED (Norway) said that, as in the case of the first group of articles discussed by the Committee, his delegation would vote against most of the

[1] Proposal subsequently issued as document A/CONF.13/C.2/L.93.

amendments to the second group, though not disagreeing with all of them, because, as he had stated in the general discussion (6th meeting), the Commission's draft articles on the general régime of the high seas were by and large acceptable and, having been thoroughly discussed by a group of prominent lawyers over a long period, should not lightly be modified.

23. With regard to article 29, Norway attached the greatest importance to the essential need for a genuine link between a ship and the State whose flag it flew. Ships on the high seas were considered part of the flag State's territory, so that the latter had specific obligations for the performance of which a genuine link and, in particular, effective jurisdiction and control were necessary. Thus, as explained in the commentary, the Commission had in article 29 expressed a principle of existing international law.

24. Though no delegation had dissented from the principle of the genuine link, some had criticized that term as too vague, but, as Mr. François, Expert to the secretariat of the Conference, had indicated in his statement at the 13th meeting, general terms often had to be used in national legislation and could not be dispended with in international law either. For example, the term " genuine connexion " had been used by the International Court of Justice as a basis for its judgement in the Nottebohm case,[1] and the Committee itself had recently (21st meeting) adopted a United Kingdom amendment to article 27 which included the words " with reasonable regard ", a term which had first been suggested by the United States and which, although no more precise, had been found acceptable.

25. In the present instance, however, he believed greater precision could be introduced by adopting the Italian amendment, since there was general agreement that effective jurisdiction and control were an indispensable feature of the genuine link. There were others, such as the nationality or domicile of the owner, his principal place of business, the nationality of the officers and crew and the extent to which parties suing the shipowners could effectively have recourse to the courts of the flag State, but it would be difficult to single out any one of them as indispensable. It was the sum total of all those elements which mattered. Therefore, it would be futile to seek a more detailed definition. Nor would that be necessary on practical grounds, for article 29 as it stood would suffice to determine whether there was a genuine link or not, no less than other general terms employed in national legislation and international conventions.

26. A few delegations had proposed to take article 29 out of the draft. However, the task of the Conference was to codify the international law of the sea in a form which would at once be authoritative and convenient for reference purposes. Even if it were impossible to combine the whole of the Commission's draft in a single instrument, at least all the articles on the general régime of the high seas should be kept together so as to give them equal legal force. He was not sure whether a convention to be ratified by the several States would be the most suitable instrument for the latter purpose, and suggested that a code or declaration might be preferable.

27. His delegation reserved its position on all the other amendments to article 29, including the French amendment to the Italian amendment.

28. Sir Alec RANDALL (United Kingdom) said his delegation had already indicated in the general discussion (4th meeting) that article 29 was acceptable as a statement of principle and that no attempt should be made to define the genuine link in greater detail ; that was a specialized task for another body with more time and greater knowledge of the issues. It would, in any event, be extremely difficult to establish a comprehensive definition because of the great diversity of municipal legislation and regulations concerning the ownership of ships.

29. While he would not presume to comment on the substitution of " lien substantiel " for " lien réel " advocated in the French text by the representatives of France and Italy, he was glad to note that it was not proposed to change the term " genuine link " used in the International Law Commission's text of article 29.

30. Though effective jurisdiction and control were important, he rebutted the contention that nationality was specially linked to control in a particular domain such as safety regulations. For example, there must be a means of redress when such rules were ignored, but that would be impossible if the only link were a company with its head office in another country.

31. For those reasons, the only amendment to article 29, paragraph 1 which his delegation could support was that of the Italian delegation, and possibly the French amendment to it, because the former elaborated the principle contained in that paragraph in a general way.

32. The United Kingdom amendment to article 29, paragraph 2 (A/CONF.13/C.2/L.86) was designed to remove the ambiguity of the original, which did not indicate whether the documents issued by the authorities of the State were conclusive or *prima facie* evidence of the right to fly a flag, and to eliminate the grammatically clumsy expression " is evidenced ".

33. The United Kingdom amendment to article 30 (A/CONF.13/C.2/L.48) only introduced some minor changes.

34. Mr. OZORES (Panama) said that the Commission's text for article 29 was unacceptable because it was open to conflicting interpretations which would be conducive to international friction and disputes. It was a contradiction to lay down as it did that each State fixed the conditions for the grant of its nationality and then to require that for that nationality to be recognized by other States there should be a genuine link between the State and the ship. Nor could the Commission specify what should be that genuine link because like everybody else it did not know. Such lack of precision must be avoided in a text which aimed at establishing in clear terms the rights and obligations of States. Moreover, the term " genuine link " would encourage States to interfere in the internal affairs of others. If one State were to dispute the nationality of a ship granted the right to fly the flag of another, and that ship continued to sail the high seas, such chal-

[1] *I.C.J. Reports, 1955,* p. 23.

lenges would clearly be ineffective. If, on the other hand, the ship in question had to remain in port until the issue was settled, who would be responsible and pay compensation for the financial loss incurred by the shipowner?

35. He agreed, however, with the requirement that the flag State must exercise effective control and jurisdiction, and therefore supported the Liberian amendment (A/CONF.13/C.2/L.12/Rev.1), provided that mention were made in the first sentence of the right of each State to withdraw its nationality from a ship.[1]

36. In essence, the Brazilian proposal (A/CONF.13/C.2/L.11) followed the recommendation adopted at the Preparatory Technical Maritime Conference of the ILO (London, 1956), which laid down a series of requirements aimed at ensuring a closer connexion between the ship and its country of registration. Such requirements, however, would be difficult to enforce in practice.

37. Mr. RUEGGER (Switzerland) agreed with the Norwegian representative that as little change as possible should be made in the Commission's text, which was the outcome of long and arduous discussion. He strongly endorsed Mr. François' remarks (13th meeting) about the use of general terms. The representative of France was, of course, correct in observing that the expression " lien substantiel " in the French text would be stronger and more precise, but the Commission's version should be retained in the English text. His delegation supported the Italian amendment because of the importance of emphasizing the flag State's international responsibility.

38. Explaining the way in which his government had solved the legal and practical problems involved, he said that up to the second world war Switzerland had operated on the high seas with chartered ships of foreign nationality. In 1941 a Swiss marine law had been enacted, but it had been completely revised in September 1953. Where the relationship of the ship to its owner was concerned, the Swiss system was based on the principle of effective jurisdiction and full control through genuine national ownership. Thus if the owner was an individual he must be a Swiss citizen domiciled in Switzerland. If the ship was the property of a company, all its shareholders must be Swiss, the shares must be issued in the name of each individual shareholder who must be included in the shareholding register, and three-quarters of the shareholders must reside permanently in Switzerland. The money invested in the ship must be of Swiss origin, etc. Of course, such exceedingly stringent conditions could not be laid down for universal application.

39. Special provision could be made for the registration of ships serving philanthropic, humanitarian and scientific purposes ; that exception, under strict control, had been made in the interests of the International Committee of the Red Cross.

40. Thus, his country was anxious that any ship flying the Swiss flag should be genuinely Swiss owned and managed. The flag should be an absolutely unequivocal sign of real property and nationality, and the principle of the genuine link must exclude all fictitious ownership or nationality.

41. His delegation would have favoured more definite rules explaining the meaning of that principle, but as that did not appear feasible at the present conference the kind of conditions that might be proposed, purely permissively, for clarifying the definition should be embodied in an annex to the convention. In the meantime, the enunciation of the principle was a real step forward in the development of international law and it could be left to another body in the future to elaborate, if necessary, detailed rules for its application, rules which would otherwise be built up through custom and possibly arbitral decisions.

42. Mr. GARCIA-MIRANDA (Spain) withdrew his proposal for article 29 (A/CONF.13/C.2/L.60) in favour of the Italian amendment, which fulfilled the same purpose.

43. Mr. WEEKS (Liberia) said that he would make some preliminary comments reserving his right to intervene again during the general discussion on the group of articles under consideration. The purpose of his proposal (A/CONF.13/C.2/L.12/Rev.1) was to eliminate the expression " genuine link ", to which valid objections had been raised on the ground that it would lead to confusion, and to ensure that the flag State exercised effective and constant control over its ships. The proposal was also intended to eliminate the " principle of non-recognition " enunciated in the third sentence of article 29, paragraph 1 in the Commission's text, because it would lead to international friction. He wondered what nationality a ship would be deemed to have if one State refused to recognize documents authenticated by another. He also wondered whether the effect of the Commission's draft might not be to enable a country other than the original country or registration to challenge a genuine transfer of registration.

44. As for the other amendments to article 29, he considered the Brazilian text unacceptable because it sought to specify in detail what the concept of the genuine link implied. Nor could he accept the Netherlands text (A/CONF.13/C.2/L.22) for the provision in the second sentence of paragraph 1 would lead to anarchy, and even greater imprecision would be introduced by the use of the words " in particular " in the first sentence. The Italian amendment was satisfactory but would not effect the elemination of the unacceptable " principle of non-recognition " in the third sentence of the Commission's text.

45. The United Kingdom amendment to paragraph 2, which was certainly open to improvement, introduced a new principle of international law which would do more harm than good.

46. The aim in codifying the law of the sea should be to promote international harmony ; hence, he had sought to enunciate uncontroversial principles in his proposal. He accepted the amendment to it proposed by the representative of Panama.

47. Mr. HANIDIS (Greece) explained that the Greek amendment (A/CONF.13/C.2/L.55) to article 30 combined the two elements contained in the United Kingdom amendment (A/CONF.13/C.2/L.48) and would

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[1] Panama subsequently submitted an amendment to the Liberian proposal, issued as document A/CONF.13/C.2/L.104.

not alter the substance of the Commission's text or conflict with municipal legislation.

48. Mr. EDELSTAM (Sweden) said that the principle of the genuine link was almost self-evident, since without it ships on the high seas would not be subject to the authority of any State. It was also obvious that the right to fly a flag was not enough and must be coupled with registration, nor could there be any question that effective control and jurisdiction were an indispensable element in that principle. Any attempt to define control and jurisdiction in more detail was unlikely to result in greater precision at the present juncture. Though there was a general consensus about what was the responsibility of ships, which had been reflected in article 34, it was difficult to go further without a risk of confusing two different things, namely, the enforcement of the observance by ships of national regulations and international conventions and the means whereby that could be done, which was a matter for national action and unsuitable for regulation in an international convention.

49. His delegation therefore supported the Commission's text for article 29, as amended by the Italian delegation, and reserved its position on all the other amendments including that of France.

50. Mr. VAN PANHUYS (Netherlands) said that, as a seafaring nation, the Netherlands attached great importance to the principle of a genuine link, but felt that article 29 could be made more precise by the addition contained in the Netherlands amendment (A/CONF.13/C.2/L.22) reading " implying in particular the exercise of effective jurisdiction and control over the ship ".

51. In answer to the Liberian representative's objection, he pointed out that the words " in particular " meant in that context "' above all ".

52. He could not subscribe to the contention that the term used by the Commission was too general and would lead to confusion. On the contrary, without the principle of the genuine link there would be a legal vacuum, since the counterpart of freedom of navigation must be the obligation of the flag State to maintain order on the high seas. Difficulty of definition in no way invalidated the force of a principle and, after all, even fundamental constitutional principles of different countries sometimes required interpretation by the courts.

53. Though he preferred his own text, he would be prepared to accept the Italian amendment which was substantially similar, but he could not express an opinion on the French amendment to the Italian amendment before seeing it in writing.

54. The purpose of the Netherlands text for paragraph 2 was to make it plain that the ship's documents only certified its right to fly its flag under the municipal law of the flag State but were not conclusive evidence of a genuine link with that State. If the United Kingdom amendment to that paragraph covered the same point he would consider withdrawing his own.

55. Mr. SOLE (Union of South Africa) suggested that the drafting committee might consider combining articles 30 and 31 because both dealt with the status of ships, the latter assimilating ships sailing under more than one flag to ships without nationality. He believed that would be more in keeping with the object of the provisions and would have the advantage of suppressing the title of article 31, which gave the unfortunate impression that it was admissible for ships to sail under two flags.

The meeting rose at 5.50 p.m.

TWENTY-FOURTH MEETING

Wednesday, 2 April 1958, at 3.20 p.m.

Chairman : Mr. O. C. GUNDERSEN (Norway)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159) *(continued)*

ARTICLES 29 (NATIONALITY OF SHIPS), 30 (STATUS OF SHIPS) AND 31 (SHIPS SAILING UNDER TWO FLAGS) (A/CONF.13/C.2/L.6, L.11, L.12/Rev.1, L.16, L.22, L.23, L.27, L.28, L.38/Rev.1, L.39, L.41, L.42, L.48, L.51, L.55, L.60, L.86, L.87, L.93) (continued)

1. Mr. CARDOSO (Portugal) said that he supported the Italian proposal relating to article 29 (A/CONF.13/C.2/L.28). The principle of the " genuine link " had been evolved by the International Law Commission, and was now widely accepted. Although it was not possible for the Conference to say exactly what form the genuine link should take, the purpose of the stipulation had been stated in the International Law Commission's commentary on article 29, and the Commission's words were echoed in the Italian amendment.

2. Mr. COLCLOUGH (United States of America) said that the possibility that one State might unilaterally refuse to recognize the nationality of another State's ships was implicit in the third sentence of article 29, paragraph 1. Admittedly, the right of a State to sail vessels on the high seas carried with it the corresponding duty to exercise control and effective jurisdiction over those vessels in the interests of order on the high seas ; but no evidence had been advanced to show that there were any cases where effective jurisdiction was not exercised by the flag State. The third sentence of article 29, paragraph 1, raised many questions. Did it merely mean that, if a particular State decided that a ship sailing under the flag of another State had no genuine link with the flag State, the first State was not required to allow the flag State to afford diplomatic protection to its ship ? Or did it mean that such a ship would become stateless, with all the attendant disadvantages ?

3. In addition to producing direct consequences in public international law, non-recognition would also produce consequences in private international law, for it would affect property rights, the validity of contracts executed under the laws of the flag State, and maritime insurance.

4. The only principle which had been advanced as the basis for the concept of non-recognition was that of the " genuine link ". But the International Law Commission itself had admitted that the genuine link was a vague criterion, and that vagueness was not removed by the addition of the words " effective jurisdiction and control ". Effective jurisdiction and control did not

constitute a criterion, but an objective, and hence did nothing to clarify the term " genuine link ".

5. In effect, it was proposed that States should be told at one and the same time that the Conference did not know what the genuine link was, but that if they found that the genuine link did not exist, in a particular case, they were free not to recognize the nationality of the ship concerned. Such a principle in international law was inherently dangerous, and he urged the Committee to reject the third sentence of article 29, paragraph 1, and any similar proposal.

6. Mr. WAITE (New Zealand) said that every State enjoyed a wide discretion in the matter of fixing the conditions governing the grant of its nationality to ships, but, in the interests of the international community as a whole, there had to be some limit to that discretion. The International Law Commission had provided such a limit in its concept of the " genuine link ".

7. Elaboration of that concept might fail to take account of differing national practices. The object was to state a guiding principle, rather than to eliminate particular conflicts of law. The principle did not necessarily aggravate the danger of disputes between States. International law must rely upon the application of guiding principles to give direction and consistency to the findings of international tribunals and to the practice of States.

8. He referred to the decision of the International Court of Justice in the Nottebohm case,[1] and stated that an analogy could be drawn from that decision. If any State purported to confer its nationality upon an individual, that action would not, in ordinary circumstances, be questioned by other States. But, in the exceptional case, other States had the right to look behind the form and to examine the substance. The principle of the " genuine link " embodied a parallel rule in regard to the nationality of ships, and the granting of a flag must not be a mere administrative formality.

9. Several national and international bodies which were working for the improvement of safety standards and working conditions at sea attached great importance to the principle of the " genuine link ". They believed that the standards envisaged in article 34 of the International Law Commission's draft could not easily be attained unless there were a sufficient bond between the ship and the State whose flag it flew. The New Zealand Government supported that view.

10. His delegation would support article 29 as drafted by the International Law Commission, but believed that the United Kingdom amendment to paragraph 2 (A/CONF.13/C.2/L.86) added clarity to the text. He would study sympathetically the Italian proposal — amplified during the previous meeting at the suggestion of Italy — but reserved his delegation's final position with regard to it.

11. Mr. VRTACNIK (Yugoslavia) said that the principle of the " genuine link " was essential for the maintenance of order on the high seas. He believed that article 29 of the International Law Commission's draft was satisfactory, but he accepted the amendments proposed by Italy and the United Kingdom.

[1] *I.C.J. Reports, 1955,* p. 4.

12. He also thought that the Commission's draft of article 30 was satisfactory, but was prepared to accept the amendments of Brazil (A/CONF.13/C.2/L.11), the United States of America (A/CONF.13/C.2/L.41) and the United Kingdom (A/CONF.13/C.2/L.48).

13. His own delegation's amendment to article 31 (A/CONF.13/C.2/L.16) made it clear that that article referred to the high seas. In the territorial sea, it was the right of the coastal State to decide which of two flags it would recognize or whether a ship should be assimilated to a ship without nationality.

14. He felt that the phrase " during the same voyage " in the Romanian amendment (A/CONF.13/C.2/L.27) to article 31 was open to more than one interpretation. The proposal submitted jointly by Mexico, Norway, the United Arab Republic and Yugoslavia (A/CONF.13/C.2/L.51) would make it easier for ships to sail under the flag of the United Nations or other international organizations ; it thus gave expression to the views which certain delegations had put forward in the general debate.

15. Mr. MINTZ (Israel) said that the second sentence of article 30 raised a serious problem. It implied that a ship might change its flag during the voyage in the case of transfer of ownership or a change of registry. Many States prohibited a change of ownership of ships of their nationality without due authorization. Moreover, article 30 made it possible for a ship's nationality to be changed while it was still under the same ownership. His delegation therefore had reservations concerning the International Law Commission's draft of article 30.

16. The Brazilian amendment was, to some extent, an answer to the problem he had mentioned. That amendment might, however, be improved if the words " and in accordance with the laws of the States concerned " were inserted between the words " in fact " and " the loss of one nationality ". He left it to the Brazilian delegation to decide whether or not it wished to accept his proposed insertion.

17. He accepted paragraphs 1 and 3 of the United States proposal for article 30 (A/CONF.13/C.2/L.41), but he thought that paragraph 2 would be improved if the words " in the case of a real transfer of ownership or change of documentation " were replaced by the words " in accordance with the laws of the States concerned ".

18. He expressed support for the four-power proposal (A/CONF.13/C.2/L.51).

19. Mr. BULHOES PEDREIRA (Brazil) said that his delegation, in its amendment to articles 29 and 30 (A/CONF.13/C.2/L.11), proposed that the reference to a ship's right to fly a given flag should be replaced by a reference to the nationality of the ship, the flag being no more than an external sign of the ship's nationality.

20. His delegation's amendment to article 29 provided not only for the right of every State to lay down the conditions governing the grant of its nationality to ships, but also its right to lay down conditions governing the loss of such nationality. A ship, once having acquired a State's nationality, was under the jurisdiction of that State, and could not lose its nationality except in the cases provided for in the State's legislation or in the case of confiscation mentioned in paragraph 4 (*b*) of the Brazilian proposal for article 29.

21. His delegation could not accept the International Law Commission's draft of article 29, since it laid down that the " genuine link " was a condition for the recognition of the nationality of one State's ships by other States. Although Brazilian law was very strict in the matter of the grant of the right to fly the Brazilian flag, he did not think that the " genuine link " should be a condition of the recognition of nationality, since such a rule would lead to disputes between States. A decision on whether a genuine link existed would require not only knowledge of the extent to which the legislation of every State conformed to international law, but also knowledge of the administrative acts applying such legislation.

22. Nevertheless, the Brazilian delegation was prepared to withdraw part of its proposal for article 29, from the words " in particular conditions regarding " in paragraph 2 to the end of paragraph 3.

23. Paragraph 5 of the Brazilian proposal for article 29 contained a new version of paragraph 2 of that article. It provided that not only merchant ships but all other ships, except warships, could prove their right to fly the flag of a State by means of documents issued by the authorities of the flag State. Moreover, the new version avoided the use of the expression " merchant ship ", which was imprecise, whereas the term " warship " was defined in article 32.

24. The Brazilian amendment to article 30 differed in three respects from the International Law Commission's draft. Firstly, the mandatory provision concerning a single nationality was transferred to article 29. Secondly, a reference was made to the nationality which a ship used for the purposes of navigation. If international law guaranteed the right of every State to lay down conditions for granting its nationality, it would not be possible to avoid cases of double nationality completely, for nationality depended on the provisions of municipal law which were not uniform. Therefore, international law should be concerned with preventing the use of more than one nationality, rather than with the existence of double nationality. Thirdly, the Brazilian amendment substituted " the loss of one nationality and the acquisition of another ", as a condition for any change of flag during the voyage, for the International Law Commission's conditions of " a real transfer of ownership or change of registry ", which did not always imply a change of nationality.

25. Mr. CHAO (China) said that the right of a ship to fly the flag of a State depended on the grant of the State's nationality to the ship and on the registration of the ship in its territory. There must be a genuine link between the ship and the State before the grant of nationality and the registration could take place. In paragraph 3 of its commentary on article 29, the International Law Commission said that in view the divergence of existing practice it had confined itself to stating the general principle of the necessity of a genuine link. His delegation thought that use of the bare term " a genuine link " might lead to a great variety of relationships between State and ship. The link should be such as to enable the State to exercise control and jurisdiction over the ship. For that reason his delegation supported the Italian amendment (A/CONF.13/C.2/L.28).

26. Mr. OLDENBURG (Denmark) said that his delegation supported article 29 of the International Law Commission's draft as amended by the Italian proposal; he emphasized that registration should not be a mere formality but that the State should assume some control over the ship.

27. He hoped that the admirable statement made by the representative of the International Labour Organisation in the general debate (12th meeting), which had touched on the question of safety measures and social conditions in ships, would be noted in the report of the Committee's proceedings.

28. The amendment of the Federal Republic of Germany (A/CONF.13/C.2/L.39) was acceptable in substance, but should be omitted in order to avoid unnecessary complication. Commenting on the United Kingdom proposal (A/CONF.13/C.2/L.86) and on the Netherlands proposal (A/CONF.13/C.2/L.22) regarding article 29, paragraph 2, he said that the Netherlands proposal was the better of the two ; his delegation was inclined to support it. His delegation was not able to support any of the other amendments to article 29.

29. His delegation was reluctant to accept any changes in articles 30 and 31. It might support the United Kingdom proposal (A/CONF.13/C.2/L.48). It did not see the necessity of the Portuguese proposal (A/CONF.13/C.2/L.38/Rev.1) and in any case the classification of ships was more properly a matter for the First Committee.

30. His delegation would support the four-power proposal (A/CONF.13/C.2/L.51), but the Danish Government reserved its position on the substance of the problem of ships employed by inter-governmental organizations.

31. Mr. KEÏLIN (Union of Soviet Socialist Republics) said that his delegation would vote in favour of the Romanian amendment to article 31 (A/CONF.13/C.2/L.27), which it considered an essential addition in that it made the text more precise.

32. His delegation could not, however, accept the United Kingdom amendment to article 29 (A/CONF./13/C.2/L.86) ; were it adopted, the result would be that a ship's documents would lose their authentic value and, in violation of the essential rules of international law, documents issued by the competent authorities of the flag State, certifying a ship's right to fly its flag, could be subjected to verification in foreign ports. That was in fact the meaning of the Latin term *prima facie,* which the United Kingdom proposed inserting in the text. There were perhaps two categories of evidence in England, *prima facie* evidence and conclusive evidence, the difference being that the former could be refuted by any other kind of evidence while the latter was irrefutable. If the validity of the documents certifying a ship's right to fly its flag could be challenged in foreign ports, many difficulties and complications would obviously ensue in international commercial navigation. Unnecessary conflicts might arise between the governmental organs of various countries over the validity or irregularity of the documents issued.

33. The United States amendment to article 30 (A/CONF.13/C.2/L.41) was unsatisfactory from a juridical point of view, for paragraph 2 implied that a ship

changed its nationality and flag whenever it changed its papers. The change of a ship's papers was, however, a consequence of the change of registry. Therefore the International Law Commission's text seemed preferable from the juridical point of view.

34. The new article on the classification of ships proposed by the Portuguese delegation (A/CONF.13/C.2/L.38/Rev.1) was contrary to the laws of logic, which required any classification to be based on fixed criteria. In the proposed classification, the criterion of ownership was applied in the first category of ships and that of purpose (whether or not the ship was engaged in commercial transport) in the second. It was not difficult to surmise the reasons for that amendment. As it was impossible, without infringing the principles of international law, to deny immunity to state-owned merchant ships, the authors of the amendment had had the idea of considering state-owned merchant ships as not being State ships. Any such attempt to deny immunity to state-owned merchant ships was a distortion of the very rules of logic. The U.S.S.R. delegation would therefore vote against the Portuguese proposal.

35. Mr. BREUER (Federal Republic of Germany) emphasized that his delegation was in favour of an exact definition of the genuine link between the ship and the State of nationality. Rules should be drawn up concerning the registration of ships, for it was registration which established the link between State and ship. In the law of almost all maritime States, that link was formed by the nationality and residence of the owner. For that reason his delegation had made its proposal (A/CONF.13/C.2/L.39), which referred to the owner. Moreover, adequate control over the ship must be ensured, and his delegation would therefore support the Italian proposal (A/CONF.13/C.2/L.28).

36. Mr. VAN PANHUYS (Netherlands) said that his delegation maintained its proposal (A/CONF.13/C.2/L.22) regarding article 29, paragraph 2. In principle, his delegation supported the United Kingdom proposal (A/CONF.13/C.2/L.86), since article 29, paragraph 2, of the International Law Commission draft gave the impression that the documents issued by the flag State were conclusive evidence. However, to say that they were *prima facie* evidence, as the United Kingdom proposal did, might lead to difficulties, because the law on evidence varied from country to country. His delegation wished to replace the words " evidencing this right " in paragraph 2 of its proposal by the words " to that effect ". He asked if the United Kingdom delegation would reconsider the Netherlands proposal on that basis.

37. Mr. BELLAMY (United Kingdom) said that his delegation supported the French amendment (A/CONF.13/C.2/L.93). It also supported the Netherlands amendment to article 29, as just revised orally by the Netherlands representative, and withdrew its own proposal (A/CONF.13/C.2/L.86).

38. Commenting on the statement of the United States representative at the beginning of the meeting, he said that article 29 did not introduce a new element into international law, but formally established a recognized principle.

39. His delegation supported the four-power proposal, but suggested that the words " consideration of " should be inserted after the word " prejudice ".

40. Mr. SEYERSTED (Norway) said, with reference to the four-power proposal for a new article 31 A, that it would have been natural to treat the subject of ships employed by intergovernmental organizations in the articles under discussion, but that it was not possible to examine the problem in substance at the present Conference. The purpose of the proposal was merely to make sure that the provisions of articles 28 to 31, which referred only to state flags, did not prejudice the question of ships flying the flag of intergovernmental organizations.

41. His delegation would support the International Law Commission's draft article 29, with the Italian amendment (A/CONF.13/C.2/L.28) and the French amendment (A/CONF.13/C.2/L.93).

42. In reply to the statement of the Liberian representative that all delegations agreed that the phrase " a genuine link " was too vague, he said that the Norwegian delegation did not agree. The Committee had adopted an equally vague phrase — " reasonable regard " — in article 27.

43. His delegation supported the Netherlands proposal for article 29, paragraph 2, as amended orally.

44. Referring to the Portuguese proposal (A/CONF.13/C.2/L.38/Rev.1), he agreed that the terms used in the classification of ships should be defined and used consistently, but it was wrong to do that before the substance had been decided. The problem should be taken up at the end of the discussion, in consultation with the First Committee.

45. Mr. CAMPOS ORTIZ (Mexico) said that the reasons behind the four-power proposal for the insertion of a new article after article 31 (A/CONF.13/C.2/L.51) were made clear by the secretariat note on the " Use of the United Nations flag on vessels " (A/CONF.13/C.2/L.87). The proposal had been deliberately drafted in general terms which allowed each particular case to be judged on its merits.

Articles 32 (Immunity of warships) and 33 (Immunity of other government ships) (A/CONF.13/C.2/L.5, L.17, L.37, L.76, L.83, L.85)

46. Mr. VASQUEZ ROCHA (Colombia) said that the effect of his delegation's amendment to article 33 (A/CONF.13/C.2/L.5) would be to exclude commercial government ships from the immunity provided for in that article. He believed that the proposed provisions expressed the general legal principle under which the State was assimilated to a person in private law and subject to ordinary jurisdiction in cases in which it engaged in activities which could be carried out by private persons. That principle had been recognized by the Brussels Convention of 1926, the Buenos Aires Conference of 1936 and the Eighth International Conference of American States (Lima, 1938). In addition, article 22 of the International Law Commission's draft concerning government ships operated for commercial purposes was in contradiction to article 33.

47. Some delegations opposed the Colombian amendment because the majority of their ships were either

state property or belonged to companies in which the State had a substantial interest; those delegations naturally wished those ships to enjoy every possible privilege and immunity. However, there was a general mistrust of state-owned ships, since it was realized that any claims against such ships would have to be prosecuted against States. Such mistrust had an adverse influence on trade.

48. He welcomed the amendments to article 33 proposed by the United States (A/CONF.13/C.2/L.76) and the Federal Republic of Germany (A/CONF.13/C.2/L.85), which broadly corresponded to the Colombian amendment. He could not accept the Yugoslav amendment (A/CONF.13/C.2/L.17), which provided for the immunity of ships on commercial government service except in special zones, which it did not specify, and in cases of hot pursuit. The Portuguese amendment (A/CONF.13/C.2/L.37) was also unacceptable to his delegation, because the single article which it proposed in lieu of articles 32 and 33 of the International Law Commission's draft reproduced the substance of articles 32 and 33 of the rule embodied in article 33 of the draft.

The meeting rose at 5.5 p.m.

TWENTY-FIFTH MEETING

Thursday, 3 April 1958, at 10.30 a.m.

Chairman: Mr. O. C. GUNDERSEN (Norway)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (A/3159) *(continued)*

ARTICLES 32 (IMMUNITY OF WARSHIPS) AND 33 (IMMUNITY OF OTHER GOVERNMENT SHIPS) (A/CONF.13/C.2/L.5, L.17, L.37, L.76, L.83, L.85) (continued)

1. Mr. BELLAMY (United Kingdom) said that his delegation had proposed its amendment to article 33 (A/CONF.13/C.2/L.83) because it was firmly opposed to state vessels used for commercial purposes being assimilated to warships, especially since such assimilation would presumably confer immunity not only from interference on account of suspected activities of the kind mentioned in article 46, but also from action to prevent and punish infringements of regulations in the contiguous zone (article 66). In those cases, there should be no distinction between state ships used for commercial purposes and other ships used for commercial purposes.

2. A definition of the expression "government ships operated for non-commercial purposes" was contained in his delegation's proposal to the First Committee for a new article 20 A (A/CONF.13/C.2/L.37).

3. His delegation was attracted by the suggestion in the commentary attached to the proposal of the Federal Republic of Germany regarding article 32 (A/CONF.13/C.2/L.85) that there might be a general defining clause at the very beginning of the convention. That suggestion should be placed before the Drafting Committee. On the other hand, since the First Committee had a heavy agenda, he was opposed to the idea that article 32, paragraph 2 should be referred to that committee as proposed by the Federal Republic of Germany; the Second Committee should vote on the substance of that paragraph.

4. He did not think that the definitions of the terms "state ship" and "merchant ship" proposed by the Portuguese delegation (A/CONF.13/C.2/L.38/Rev.1) were satisfactory.

5. His delegation was in general in favour of the provision in article 47, paragraph 4 that the right of hot pursuit might be exercised "by warships or military aircraft, or other ships or aircraft on government service". It therefore opposed both the Yugoslav proposal (A/CONF.13/C.2/L.17), and the Colombian proposal (A/CONF.13/C.2/L.5) to the effect that only warships might exercise policing rights.

6. He was prepared to withdraw his delegation's proposal regarding article 33 in favour of the United States proposal (A/CONF.13/C.2/L.76), since the two proposals were similar in substance, and since the wording of the latter proposal was, he thought, preferable.

7. Mr. FRANCHI (Italy) said that the International Law Commission's draft article 33 seemed to be more concerned with preventing international friction than with principles of international law. Since the Commission's text would, nonetheless, cause friction in practice if it were adopted, and since it was unfair to lay down that private merchant ships should not enjoy privileges accorded to state-owned or state-operated merchant ships, he would vote for proposals which excluded state ships operated for commercial purposes from the immunity for which article 33 provided.

8. Mr. COLCLOUGH (United States of America) said he strongly supported article 32 as drafted by the International Law Commission, because it confirmed an established rule of international law and, in addition, contained a good and entirely acceptable definition of the term "warship".

9. His delegation could not, however, support the Commission's draft article 33. In the first place, the words "For all purposes connected with the exercise of powers on the high seas" might be taken to mean that state ships other than warships should have policing rights. His delegation was not opposed to the last sentence of the Colombian proposal but considered its own text, which would have the same effect, more explicit and hence preferable. Secondly, for the cogent reasons explained by other representatives, his delegation opposed the idea that state ships used for commercial purposes should enjoy the benefit of the immunity for which article 33 provided. The criterion for assimilating ships owned or operated by a State to the category of warships for the purposes of immunity, should be use or service rather than government ownership. Those were the considerations underlying the United States proposal regarding article 33.

10. Mr. CAMPOS ORTIZ (Mexico) said that state ships used for commercial purposes should, in his delegation's opinion, enjoy the immunity for which article 33 provided. The International Law Commission had agreed

that they should do so, even though fully aware of the provision in the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Sea-going Ships to the effect that state ships used for commercial purposes should be assimilated to private merchant vessels. The Commission had decided that that provision was not a general rule of international law. States were, of course, free to apply that provision in their mutual relations, but it would be wrong to include a provision of that kind in the draft under discussion. The adoption of the proposal that state ships used for commercial purposes should be assimilated to other merchant vessels would give rise in practice to many serious difficulties; firstly, in its relations with other states, a state — because it could not waive its sovereign rights — could not divide its personality, as it could where domestic affairs were concerned; secondly, state ships might be used simultaneously both for commercial purposes and on government service; and thirdly, it was wrong to treat ships which were not operated for gainful purposes in exactly the same way as ships which were so operated. For those reasons, the criterion for assimilating ships owned or operated by a State to the category of warships, for the purposes of immunity, should be government ownership rather than use. He would vote for the text submitted by the International Law Commission.

11. Mr. SEYERSTED (Norway) said that while the grant of the immunity provided for in article 33 to state ships used for commercial purposes was not likely to have much practical effect so far as the articles relating to piracy, the slave trade and cases of ships not flying the flag of their nationality were concerned, it would have an important and regrettable effect in practice on the application of the article on the contiguous zone, especially if, as proposed by Canada to the First Committee (A/CONF.13/C.1/L.77/Rev.1), that article was extended to cover fishing. He did not think that state ships used for commercial purposes could be immune from hot pursuit. For those reasons, he was in favour of the text of article 33 proposed by the United States delegation. He took it that the word "commercial" in that text covered fishing vessels. He would vote against the Colombian delegation's proposal that it should be laid down that "only warships may exercise policing rights", which, as the United Kingdom representative had said, was inconsistent with the provisions of article 47.

12. Mr. VRTACNIK (Yugoslavia) withdrew his delegation's proposal (A/CONF.13/C.2/L.17).

13. Mr. BOOTH (Canada) said that since, for the reasons explained by the United States and other representatives, it did not consider that state ships used for commercial purposes should enjoy the immunity provided for in the International Law Commission's article 33, his delegation would vote for the United States proposal.

14. Mr. BREUER (Federal Republic of Germany), referring to his delegation's proposal regarding article 32 (A/CONF.13/C.2/L.85), said that, in view of the United Kingdom representative's remarks, he was prepared to discuss the definition of the term "warship" at meetings of the Second Committee, but considered it most desirable that the definition should form part of a general defining clause at the very beginning of the draft convention.

15. He might withdraw his delegation's proposal regarding article 33 in favour of the United States proposal. The only part of the Colombian proposal with which he did not agree was the clause to the effect that only warships should have policing rights. His government was party to a number of agreements containing clauses to the effect that state ships other than warships should have such rights.

16. Mr. KEÏLIN (Union of Soviet Socialist Republics) said that, in considering the fourth group of articles, his delegation felt it particularly necessary to stress the fact that the immunity of government ships, including those operated for commercial purposes, was one of the oldest-established principles of international law. It was based on the generally accepted respect for the sovereignty of foreign States, in virtue of which no State was entitled to exercise jurisdiction over another State; the time-honoured principle was expressed in the maxim: *par in parem non habet imperium.*

17. The immunity of government ships, including those operated for commercial purposes, was admitted in the legal practice of many States, among them States whose representatives in the Committee were opposed to that principle. There was an obvious contradiction between the statements of their representatives and the position adopted by certain States which, when their own interests were directly affected, pleaded the immunity in question.

18. Almost 150 years previously, the immunity of government ships had been recognized by the United States Supreme Court in the famous judgement delivered in 1812 in the case of the schooner *Exchange.* The same principle of conceding immunity to government ships engaged in the commercial carriage of passengers and cargo had formed the basis of a judgement of the English Court of Appeal in 1880 in the case of a collision off Dover between the Belgian government ship *Parlement belge* and a British tugboat. That decision had established a precedent, followed in a number of subsequent decisions of English courts in such cases as those of the vessels *Jassy, Esposende, Quilmark, Gagara* and *Porto-Alexandre,* among others.

19. In 1938, the principle of the immunity of government ships operating for commercial purposes had been discussed and reaffirmed by the House of Lords in the case of the vessel *Cristina.* That decision had stated two universally accepted principles as a basis for subsequent decisions in cases affecting foreign government ships. Firstly, the courts should not countenance legal proceedings involving a sovereign foreign State against its will, irrespective of whether the proceedings were instituted directly against that State or with the purpose of depriving it of property or obtaining any monetary compensation from it. Secondly, whether or not the sovereign foreign State was a party to the proceedings, the courts should not arrest or detain property belonging to or under the control of a sovereign foreign State.

20. The Judicial Committee of the Privy Council, deciding a case in 1954 in which the Indonesian Government had claimed immunity, had failed to recognize immunity, but only on the grounds that the Indonesian Government's ownership of the vessel had not been proven.

21. In the United States of America, the immunity of government ships, including those operated for commercial purposes, had also been conceded in a series of judgements. In the case of the Chilean Government ship *Maipo,* a United States court had ruled that, if the government of any State regarded transport of cargo as one of its functions, that was for the State concerned to decide, and the courts could not require that a foreign State was subject to their jurisdiction on the same basis as a private ship-owner.

22. In the well-known judgement of the United States Supreme Court in the case of the Italian government commercial vessel *Pesaro,* it had been conceded that the principles of immunity applied equally to all ships owned and employed by any government for public purposes and that ships acquired, equipped and operated by a government for commercial transport in order to develop trade or increase the national income must be regarded as government ships in the same sense as warships. The Supreme Court had also stated in its judgement that it was unaware of any international rule under which the maintenance and development of a nation's prosperity in time of peace could be considered a less important social cause than the maintenance of naval forces.

23. In the *Navemar* case, the Supreme Court had ruled that ships belonging to a friendly foreign State, owned and used by it, should be considered to be government ships even if engaged in the carriage of merchandise.

24. Similarly, in 1943 in the case of a Peruvian government ship carrying sugar from Peru to New York, which had claimed immunity, a United States court had ruled that the judicial seizure of a ship belonging to a friendly foreign State would constitute a grave derogation of that State's dignity, and was likely to jeopardize friendly relations.

25. In France, a judgement of the *Cour de cassation* in 1849 had established the principle that a foreign State was beyond the jurisdiction of the French courts.

26. The Brussels Convention of 1926 had suffered an unenviable fate: it had been ratified by only a small number of States, despite the fact that over thirty years had elapsed since it had been concluded. Neither the United States of America nor Great Britain had ratified it. The fact that it had been concluded by a very limited number of States proved only that it represented an exception to the general rule. But it was evident that such an exception could affect only the ships of those States which were parties to the convention, and that its provisions could not be applicable to other ships.

27. In recent years, the United States of America had been trying to introduce a restrictive interpretation of immunity by differentiating between the functions exercised by a State in public and in private international law. But the protagonist of such an interpretation could not show any grounds for it. Indeed, it would be an inadmissible interference in the domestic affairs of a foreign State for any judicial organ to lay down which functions of the foreign State were exercised in public law and which in private law. It would surely be a violation of international law if national courts were to try to distinguish between the sovereign and non-sovereign acts of a foreign State, particularly since in some countries commercial vessels were state-owned and the operation of commercial navigation constituted a function of the State.

28. The immunity of government ships operated for commercial purposes was generally recognized as a principle of international law, and no deviation from that principle was possible without the agreement of the State concerned. That was borne out by the inclusion in a number of trade agreements between the United States and other countries of provisions waiving immunity. The Swiss jurist Lalive, in a lecture at the Academy of International Law in 1953, had referred to agreements of that nature concluded between the United States of America and Italy, Colombia, Denmark, Greece, Ireland, Israel and Uruguay.[1]

29. The reasons for that attempt to restrict the immunity of government ships operated for commercial purposes were not difficult to surmise. On the one hand, there was a completely unfounded fear that to concede such immunity might place privately owned ships at a disadvantage in international trade by comparison with government ships. On the other hand, the question was being confused, possibly deliberately. The conception of immunity was being replaced by one of irresponsibility, although the immunity of government commercial ships in no wise implied any irresponsibility. There had never been a case in which any valid claims in respect of Soviet Union ships had not been settled. Certain questions concerning suits brought against U.S.S.R. government commercial ships, and suits brought by such ships against foreign ships, had been and were being considered, to the satisfaction of the parties in dispute, by the Maritime Arbitration Commission of the Soviet Union, established some thirty years previously.

30. Established institutions of international law, such as the immunity of government ships, including those operated for commercial purposes, should be respected. The observance of that immunity did not encroach upon the interests of privately owned ships. For those reasons, the Soviet Union delegation objected to any restriction of the immunity of government ships, a restriction which ran counter to international law, and would vote for the adoption of article 33 of the International Law Commission's draft.

The meeting rose at 11.50 a.m.

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[1] *Académie de droit international, Recueil des cours,* 1953-III, pp. 209 *et seq.*