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Summary Records of the 26th to 30th Meetings of the Second Committee

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TWENTY-SIXTH MEETING

Tuesday, 8 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 32 (IMMUNITY OF WARSHIPS) AND 33 (IMMUNITY OF OTHER GOVERNMENT SHIPS) (A/CONF.13/C.2/L.5, L.37, L.76, L.83, L.85, L.113) (continued)

1. Mr. GLASER (Romania) said he would confine his statement to clarifying the scope of the Brussels Convention of 1926, of which Romania was a signatory, and which had been the subject of comments. The convention did not, as had been averred, lay down a new rule superseding the old rule of the immunity of government ships without any distinction. On the contrary, it was an exception to the traditional law which still governed relations among non-signatories of the convention on the one hand, and between signatories and non-signatories on the other hand. It followed from the terms of article 6 of the convention that its provisions were applicable solely to the contracting parties, and it was further stipulated that non-contracting parties should not benefit by it or should benefit by it only on condition of reciprocity. Accordingly, non-signatories were subject to other rules — namely, the rules of law which had existed prior to, and had not been changed by, the convention. Those were the traditional principles of the immunity of government ships without any discrimination. Besides, inasmuch as the signatory States were not very numerous, the immunity of government ships remained the rule for the majority of States. While it was, of course, open to a State to waive its immunity voluntarily by treaty, a non-signatory State could not be prevented from enjoying immunity in respect of its government ships.

2. The Romanian delegation therefore considered that the International Law Commission had correctly stated the traditional principle of immunity in article 33. That view was supported by Mr. François, Expert to the secretariat of the Conference, in his statement to the Committee at its 13th meeting.

3. If it was admitted that the Brussels Convention of 1926 had not resulted in any change of the principles of international law in the matter, those principles should be specified. The legal status of government ships was governed by the principle of equal sovereignty of States, and the immunity of the State and its property from foreign jurisdiction was a corollary of that generally accepted principle. In any event, immunity of government property was justified by the exigencies of international practice, for if the property of a State were liable to seizure, that State would have no guarantee in the conduct of its activities abroad, would not be able to maintain normal international relations and could not admit the activities of other States in its territory. Government ships were state property and, as such, must enjoy immunity on the same basis as all other state property.

4. An attempt had been made to introduce an artificial distinction between different types of government property, on the basis of the criterion of use instead of that of ownership. According to that theory, state property used for commercial purposes and not for government purposes should not enjoy immunity, on the grounds that to accord immunity to such property would cause discrimination between States and private individuals. That argument was fallacious, however, since the principle involved was that of the sovereign equality of States, which would be violated if government ships used for commercial purposes were denied immunity. In that connexion, Sir Gerald Fitzmaurice had written that a sovereign State did not cease to be sovereign because it performed acts which a private citizen might perform, and that any attempt to make it answerable for its actions before foreign courts was inconsistent with its sovereignty.[1]

5. Finally, from the practical point of view, a State could not be placed on the same footing as a private trader, against whom certain measures of security and even of constraint might have to be taken at any time. The State represented a permanent guarantee of the performance of contractual commitments. A clause providing for the immunity of government ships could never be meant or construed as a means of evading the satisfaction of debts; rather, such a provision would simply respect the general and recognized principle of the equal sovereignty of States.

6. Mr. COLCLOUGH (United States of America) said he could not agree with the U.S.S.R. representative's statement made at the previous meeting that delegations which opposed the International Law Commission's draft of article 33 had assumed an inconsistent position and that their States recognized the principle of complete immunity of all state-owned vessels. In support of his contention, the U.S.S.R. representative had cited decisions of the United States Supreme Court, but had ignored the issue before the Committee, which was whether the Conference should adopt as a principle of international law the granting of complete immunity to state-owned vessels used for commercial purposes.

7. There was no more complete immunity in the law of nations than that possessed by warships, to which it was proposed to assimilate all other state-owned vessels. But it was not that type of immunity to which the U.S.S.R. representative had referred. The cases he had cited reflected the state of domestic law as it had existed at the time of the judicial decisions in question. The development of international law should, however, be taken into account.

8. A study of the law of sovereign immunity revealed the development of two conflicting concepts, that of the classical theory of absolute immunity and the modern or restricted theory, under which immunity was recognized with regard to sovereign or public acts of the State (*jus imperii*), but not with regard to private acts (*jus gestionis*). Before the twentieth century, it would have been virtually impossible to find any act of a sovereign State which was not the exercise of *jus imperii*, and hence immune from the jurisdiction of any other State. The advent of new political philosophies, however, had resulted in increasing inroads by the State

[1] *The British Year Book of International Law*, 1933, p. 121.

into the private and commercial field; those inroads had been most marked in the case of the Soviet Union and other countries. International law had recognized the challenge of such new situations, and the creation of new States was contributing to that trend in international law. Thus, with regard to the case of the *Pesaro,* Justice Frankfurter of the United States Supreme Court had stated that the implications of that decision should be reconsidered in the light of subsequent events.

9. The U.S.S.R. representative had referred to the case of the schooner *Exchange* as a basis for the application of the concept of the absolute immunity of government ships. But the *Exchange* had been a warship, and such vessels by general consent enjoyed absolute immunity. The United States continued to recognize the principle of immunity in the case of warships, but owing to the increase of the conduct of commercial affairs by sovereign States, the courts had begun to qualify such absolute rights for state-owned ships engaged in commercial trade.

10. In 1952, the Department of State of the United States had decided that the granting of immunity to state-owned commercial ships in United States courts was inconsistent with the Government's long-established policy of not claiming immunity in foreign jurisdictions for its own merchant vessels. The State Department had concluded that the increasing practice of governments of engaging in commercial activities made it necessary to enable persons doing business with them to have their rights determined in the courts and that its policy would henceforth follow the restrictive theory of sovereign immunity. Consequently, the courts would be guided by the policies of the government department in charge of the conduct of foreign relations. According to Chief Justice Stone in the *Republic v. Hoffman* case, it was not for the courts to deny an immunity which the Government had seen fit to allow, or to allow an immunity on new grounds which the Government had not seen fit to recognize.

11. In keeping with the development of the law, the United States Congress had enacted legislation in 1920 under which the State could be sued by private parties for injuries suffered through the acts of government vessels.

12. Since the present attitude of the United States Government was completely different from the classical and absolute theory of sovereign immunity, it could not be seriously contended that the United States proposal (A/CONF.13/C.2/L.76) was inconsistent with its law and policy. If the law of nations was to remain responsive to the requirements of international relations, definite principles should be agreed upon and should be designed to safeguard and promote private commercial transactions, rather than to jeopardize and retard them by providing an unlimited advantage for state ownership.

13. Mr. VAN PANHUYS (Netherlands) said that his government saw no reason to grant immunity to state ships operated exclusively for commercial purposes, for such ships should not have an advantage over privately owned vessels. His delegation, which had also expressed that view in 1955, had been struck by the fact that no differentiation was made between the immunity of ships in the territorial sea and that of ships on the high seas. Since other delegations had referred to immunity in territorial waters, he would also make some remarks on the subject.

14. The Netherlands Government had drawn attention in its comments on the provision now contained in article 33 [1] to the general modern trend to limit the immunity of ships and had referred in that connexion to the Convention and Statute respecting the international régime for Maritime Ports of 1923, to the Brussels Convention of 1926, to the convention drafted by The Hague Codification Conference of 1930 and to the article which had become 22 of the International Law Commission's draft. The same trend was apparent in state practice, as was evident from the statement published in 1952 by the Department of State of the United States of America. [2] All instruments and treaties concluded with a view to restricting immunity should be regarded as symptoms of a general practice. It was erroneous to limit the argument to the jurisprudence of the United States and the United Kingdom, as the U.S.S.R. representative had done; the Netherlands attached due importance to the case-law of Anglo-Saxon countries, but could not regard it as an exclusive authority. The general modern trend towards restrictive immunity should be taken into account. In that connexion, he referred to the careful and impartial analysis of state practice and case-law contained in the remarkable lecture given by Mr. Lalive at the Academy of International Law in 1953. [3]

15. He pointed out that the debate had been more or less confined to questions of private law, whereas the powers from which immunity should derive protection fell within the sphere of public law also. Thus, while the Brussels Convention of 1926 accorded immunity to government ships properly so called, it could not be assumed that it also provided protection for acts prejudicial to the interests of the coastal State. It was self-evident that States should take the necessary measures for securing their interests in such matters as the transport of weapons and measures provided for in the articles concerning hot pursuit and powers exercisable in the contiguous zone.

16. Finally, the Committee was not concerned only with the codification of international law; it was also in duty bound to try to draft the best possible international law for the future. There was therefore no reason to give an extra advantage to state-owned ships engaged in purely private trade.

17. Mr. CARDOSO (Portugal) said that his delegation, after having listened to the debate on the immunity of government ships, had come to the conclusion that its proposal for a new article headed "Classification of ships" (A/CONF.13/C.2/L.38/Rev.1) should be revised, since the term "state ships" might give rise to confusion, especially when translated into French. The revised proposal would divide ships into three cate-

[1] *Yearbook of the International Law Commission,* 1956, Vol. II (A/CN.4/SER.A/1956/Add.1), pp. 63 and 64 (*ad* article 8).

[2] *The Department of State Bulletin,* Vol. XXVI, No. 678, 23 June 1952, p. 984.

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

gories: warships, government ships and merchant ships. [1]

18. Firstly, ships would be classified according to function rather than according to ownership. "Government ships" would include ships owned and operated by a government for the sole purpose of carrying out what were known as "government functions". Inside the areas subject to the jurisdiction of a State — i.e., not only in the territorial waters but also in the contiguous zone — only that State should be competent to rule whether or not a ship was carrying out government functions and was entitled to immunity. As to the criteria for recognizing "government functions", he considered that the United Kingdom delegation had suggested a satisfactory definition in its proposal for an additional article 20 A (A/CONF.13/C.1/L.37) submitted to the First Committee.

19. Secondly, the revised Portuguese proposal would reflect paragraph 2 of the International Law Commission's commentary on article 33.

20. Apart from those two points of substance, the Portuguese proposal would present some advantages from the point of view of drafting; for instance, cumbersome expressions such as "for non-commercial purposes" would disappear, and fishing vessels would be included in the broad category of merchant ships.

21. There was no valid argument against the theory that, within the territorial waters and contiguous zone, the immunity of a foreign ship must depend on its functions. The situation was different on the high seas: As the International Law Commission had considered, if a ship on the high seas came under the exclusive jurisdiction of the flag State, it should automatically enjoy immunity whatever its functions. Article 30, however, provided for exceptions to the rule of the exclusive jurisdiction of the flag State over ships on the high seas. Such exceptions could occur under articles 43, 46 and 47. Those articles would become inoperative in the case of States which declared that all their ships were government ships or warships. Consequently, and for the sake of uniformity and clarity, government ships should be clearly defined, as proposed by Portugal, and their immunity should be governed by the same rules whether they were on the high seas or in territorial waters.

22. He requested that the new article proposed by his delegation should be voted on at the end of the Committee's work, since it was a matter of nomenclature that could only then be settled definitely.

23. Mr. KEÏLIN (Union of Soviet Socialist Republics), referring to the statements of certain representatives, wished to make some brief observations.

24. A careful study of the judicial practice of Great Britain and the United States of America fully supported the assertions of the Soviet Union delegation that the judicial decisions of those countries continued to uphold the immunity of government ships operated for commercial purposes. Those assertions were also confirmed in the literature of jurisprudence, particularly in the yearbook *Annuaire de l'Institut de droit international* devoted to the session of the Institute held at Siena in 1952.

25. In that connexion, a judgement of the House of Lords pronounced in November 1957 was not without interest, although it was not directly concerned with merchant vessels, being of wider purport; in it, one of the peers had stated that the principle of sovereign immunity was not founded on any technical rules of law, but on broad considerations of public policy, international law and comity. [2]

26. It was obvious that the problem of the immunity of foreign States was far from simple. It was under consideration by the Institute of International Law, which had discussed it at the two sessions at Siena and later at the session at Aix-en-Provence. It had also been considered at the session of the International Law Association at Lucerne.

27. As to the distinction between acts *jure gestionis* and acts *jure imperii* to which he had referred at the previous meeting, the literature of jurisprudence showed that distinction to be unfounded. He would mention only the conclusion reached by Lauterpacht, published in the *Year Book of International Law*, [3] that the solution of the problem could not be found in the distinction between acts *jure gestionis* and acts *jure imperii*.

28. In view of all that had been said, the question arose as to whether it was advisable for the Committee to discuss or take any decisions at all on the subject of immunity; the differences of opinion which had been revealed showed that such a course might only complicate the Committee's work and lead to difficulties in drawing up the document of international law which was the common goal. The question of the immunity of government ships was not indissolubly linked to the régime of the high seas, which was the immediate subject of the Committee's deliberations; it would therefore be quite appropriate to put aside the question of immunity without taking any decisions on it.

29. Sir Alec RANDALL (United Kingdom) said that at the previous meeting, in supporting the text of article 33 as drafted by the International Law Commission, the representative of the Union of Soviet Socialist Republics had cited cases decided in the courts of the United States of America and England in the nineteenth century. It should be noted that most of those cases had been decided long before States had begun to engage in commerce. It was true that the judgements in question were still followed in the English courts; as a result, the domestic law of his country conferred a greater immunity on foreign ships than was required by international law. It even permitted ships of other States to engage in cabotage along the coasts of the United Kingdom. Surely the representative of the Union of Soviet Socialist Republics would not argue that, consequently, every State would have the right to engage in cabotage along the coasts of all other States?

30. For those reasons, his delegation continued to support the United States proposal (A/CONF.13/C.2/L.76), and the definition of the term "government ships operated for non-commercial purposes" proposed by

[1] This revised version of the Portuguese proposal was subsequently issued as document A/CONF.13/C.2/L.38/Rev.2.

[2] *The All-England Law Reports*, 1957, Vol. 3, part 8, p. 452.

[3] *The British Year Book of International Law*, 1951, p. 222.

his delegation to the First Committee (A/CONF.13/C.1/L.37, article 20 A) still stood.

31. Mr. FRANCHI (Italy) said that the statement of the United States representative had made it unnecessary for him to comment further on the *Pesaro* case. He would merely point out that the case was not strictly relevant to the debate on article 33, for it had involved a request made in 1926 by a private person that a seizure be carried out in a United States port, whereas article 33 related to the high seas. In any event, since 1926 Italy had waived any right it might have had to immunity for Italian state ships used for commercial purposes. In 1926, moreover, a law had been enacted empowering the Italian authorities to seize property belonging to another State, including ships.

32. Mr. MINTZ (Israel) said that he was in favour of the suggestion made by the delegation of the Federal Republic of Germany (A/CONF.13/C.2/L.85) to the effect that a general definitions clause should be inserted at the beginning of the draft convention. The suggestion might be referred to the Drafting Committee.

33. Mr. RADOUILSKY (Bulgaria) considered that the International Law Commission's draft of article 33 stated an existing principle of international law. He referred to the statement in Oppenheim's *International Law*,[1] concerning the increasing practice of governments of owning or controlling merchant ships, either for purposes connected with public services such as the carriage of the mails or the management of railways, or simply for the purpose of trade. It appeared that the United Kingdom and the United States still maintained the practice of granting immunity to government ships engaged in trade, but that a number of States had ratified the Brussels Convention of 1926, which derogated from that privilege so far as the contracting powers were concerned. It followed that the principle of the immunity of state-owned merchant ships existed in international law and that the Brussels Convention derogated from that privilege in respect of the signatory Powers only. The convention had certainly not introduced a general rule; it was a contractual instrument binding solely on the signatories. The general principle was that of the immunity of government ships and its validity was not affected by the Brussels Convention.

34. It had been recognized by so distinguished an authority as Professor Hyde that the status of a ship as a government ship was not affected by the fact that the ship was carrying out functions similar to those usually performed by privately owned ships. It was true that Hyde had gone on to say that when a large number of ships were engaged in commercial operations, such as foreign trade under government control, there were grounds for denying them immunity, but he had offered no evidence in support of that thesis.[2]

35. The aversion shown by some delegations to state-owned commercial ships was purely subjective. From an objective point of view, it was in the interests of many new States to set up their merchant fleets on the basis of government ownership only, and many land-locked countries would establish and develop their fleets on the same basis. To assimilate the legal status of government commercial ships to that of private vessels would hamper the development of the merchant fleets of many States. Furthermore, it should be borne in mind that the State, as owner of merchant ships, provided the most stable guarantee of the performance of the obligations imposed upon ship-owners by international law.

36. In the light of those considerations, the Bulgarian delegation would vote for the International Law Commission's text of article 33.

ARTICLE 28 (THE RIGHT OF NAVIGATION) (A/CONF.13/C.2/L.6, L.11, L.39, L.40, L.60, L.88) (concluded) [3]

37. The CHAIRMAN announced that the Spanish proposal regarding article 28 (A/CONF.13/C.2/L.60) had been withdrawn.

38. Mr. BREUER (Federal Republic of Germany) requested that paragraph 1 of the text for article 28 proposed by Brazil (A/CONF.13/C.2/L.11) be put to the vote separately.

The paragraph was rejected by 35 votes to 4, with 13 abstentions.

Paragraphs 2 and 3 of the same text were rejected by 40 votes to 3, with 10 abstentions.

The United States proposal (A/CONF.13/C.2/L.40) was rejected by 28 votes to 14, with 13 abstentions.

39. Mr. GIDEL (France) withdrew his delegation's proposal regarding article 28 (A/CONF.13/C.2/L.6).

The Israel proposal (A/CONF.13/C.2/L.88) was rejected by 44 votes to 5, with 6 abstentions.

The proposal of the Federal Republic of Germany (A/CONF.13/C.2/L.39) was rejected by 41 votes to 5, with 11 abstentions.

The text of article 28 as submitted by the International Law Commission was adopted unanimously.

ARTICLE 29 (NATIONALITY OF SHIPS) (A/CONF.13/C.2/L.11/Rev.1, L.12/Rev.1, L.22, L.28, L.38/Rev.1, L.39, L.93, L.104) (concluded) [4]

40. The CHAIRMAN said that, as the representative of Portugal had suggested, the Portuguese proposal for an additional article (A/CONF.13/C.2/L.38/Rev.1) would be considered at the end of the Committee's work.

41. Mr. BREUER (Federal Republic of Germany) requested that paragraph 2 of the text for article 29 proposed by Brazil (A/CONF.13/C.2/L.11/Rev.1) be put to the vote separately.

The paragraph was rejected by 39 votes to 2, with 16 abstentions.

Paragraphs 1, 3 and 4 of the same text were rejected by 39 votes to 1, with 15 abstentions.

42. Mr. VAN PANHUYS (Netherlands) withdrew paragraph 1 of the text proposed by his delegation for article 29 (A/CONF.13/C.2/L.22). He recalled that

[1] Eighth ed. (Lauterpacht), 1955, Vol. I, p. 856.

[2] Hyde, *International Law, chiefly as interpreted and applied by the United States*, Vol. I (1922), paras. 256 and 257.

[3] Resumed from the 23rd meeting.

[4] Resumed from the 24th meeting.

paragraph 2 of that text had been amended at the 24th meeting, the words " to that effect " having been substituted for the words " evidencing this right ".

The text proposed by the Netherlands as paragraph 2 of article 29 was adopted by 21 votes to 10, with 23 abstentions.

43. Mr. OZORES (Panama) asked for a vote to be taken by roll-call on the amendment proposed by his delegation (A/CONF.13/C.2/L.104) to the Liberian proposal (A/CONF.13/C.2/L.12/Rev.1).

A vote was taken by roll-call.

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

In favour : Honduras, Liberia, Panama, Colombia, Cuba, Ecuador, Ghana.

Against : Hungary, Iceland, India, Indonesia, Iran, Ireland, Italy, Japan, Jordan, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, Uruguay, Yugoslavia, Australia, Austria, Belgium, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany.

Abstaining : Israel, Republic of Korea, Mexico, Philippines, United States of America, Venezuela, Argentina, Brazil, China, Costa Rica, Dominican Republic, Greece, Guatemala.

The amendment of Panama to the Liberian proposal was rejected by 41 votes to 7, with 13 abstentions.

The Liberian proposal (A/CONF.13/C.2/L.12/Rev.1) was rejected by 36 votes to 16, with 6 abstentions.

The proposal of the Federal Republic of Germany (A/CONF.13/C.2/L.39) was rejected by 43 votes to 2, with 10 abstentions.

The French amendment (A/CONF.13/C.2/L.93) to the Italian proposal was adopted by 24 votes to 16, with 14 abstentions.

The Italian proposal (A/CONF.13/C.2/L.28), as amended, was adopted by 34 votes to 4, with 17 abstentions.

44. Mr. WEEKS (Liberia) requested that the words in article 29, paragraph 1 as submitted by the International Law Commission " for purposes of recognition of the national character of the ship by other States " be put to the vote separately.

The words in question were adopted by 39 votes to 13, with 6 abstentions.

The whole of the text of article 29 submitted by the International Law Commission, as amended, was adopted by 40 votes to 7, with 11 abstentions.

ARTICLE 30 (STATUS OF SHIPS) (A/CONF.13/C.2/L.11/Rev.1, L.23, L.41, L.48, L.55, L.60) (concluded) [1]

45. The CHAIRMAN announced that the Spanish proposal regarding article 30 (A/CONF.13/C.2/L.60) had been withdrawn.

46. Mr. VAN PANHUYS (Netherlands) said that he woud be content if that part of his delegation's proposal (A/CONF.13/C.2/L.23) which constituted a suggestion that articles 30 and 31 be combined were left to be dealt with by the Drafting Committee.

47. He proposed that the last sentence of article 30 be deleted.

The Netherlands proposal that the last sentence of article 30 be deleted was rejected by 29 votes to 2, with 15 abstentions.

The United States proposal (A/CONF.13/C.2/L.41) was rejected by 28 votes to 10, with 18 abstentions.

The Brazilian proposal regarding article 30 (A/CONF.13/C.2/L.11/Rev.1) was rejected by 27 votes to 11, with 13 abstentions.

48. Mr. CARDOSO (Portugal) requested that the part of the United Kingdom proposal (A/CONF.13/C.2/L.48) which consisted of the substitution of the word " authority " for the word " jurisdiction " be put to the vote separately, and that the part of that proposal which consisted of the deletion of the words " during a voyage or while in a port of call " be likewise put to the vote separately.

49. Mr. LEAVEY (Canada) objected to the request.

50. The CHAIRMAN put the request to the vote.

The request was not accepted, 17 votes being cast in favour and 17 against, with 18 abstentions.

The United Kingdom proposal (A/CONF.13/C.2/L.48) was rejected by 34 votes to 12, with 8 abstentions.

The Greek proposal (A/CONF.13/C.2/L.55) was rejected by 37 votes to 5, with 12 abstentions.

The text of article 30 as submitted by the International Law Commission was adopted unanimously.

ARTICLE 31 (SHIPS SAILING UNDER TWO FLAGS) (A/CONF.13/C.2/L.16, L.23, L.27, L.42) (concluded)

51. Mr. COLCLOUGH (United States of America) withdrew his delegation's proposal (A/CONF.13/C.2/L.42) in favour of the text submitted by the International Law Commission.

52. Mr. VAN PANHUYS (Netherlands) withdrew his delegation's remaining proposal regarding article 31 (the second sentence of the text in document (A/CONF.13/C.2/L.23)), on the understanding that it would be referred to the Drafting Committee.

The Yugoslav proposal (A/CONF.13/C.2/L.16) was not adopted, only one vote being cast in favour.

The Romanian proposal (A/CONF.13/C.2/L.27) was rejected by 40 votes to 7, with 7 abstentions.

The text of article 31 as submitted by the International Law Commission was adopted unanimously.

The meeting rose at 6.40 p.m.

[1] Resumed from the 24th meeting.

TWENTY-SEVENTH MEETING

Wednesday, 9 April 1958, at 10.15 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)*

ADDITIONAL ARTICLE 31 A (A/CONF.13/C.2/L.51) (concluded)

1. Mr. KEÏLIN (Union of Soviet Socialist Republics) said that the proposal for an additional article 31 A submitted by Mexico, Norway, the United Arab Republic and Yugoslavia (A/CONF.13/C.2/L.51) was not at all clear. It was stated in that text that the provisions of the preceding articles did not prejudice the question of ships in the service of intergovernmental organizations. But that question had not previously been mentioned, and in the view of the Soviet Union delegation the proposed article was devoid of substance. It was immaterial whether it was adopted or not, and for that reason its adoption would be meaningless.

2. He added that it would be possible to raise many matters which were not germane to the work of the Committee, but to do so would merely complicate the work and hinder agreement.

The additional article 31 A proposed by Mexico, Norway, the United Arab Republic and Yugoslavia was adopted by 24 votes to 12, with 14 abstentions.

ARTICLE 32 (IMMUNITY OF WARSHIPS) (A/CONF.13/C.2/L.37, L.85) (concluded)

3. Mr. CARDOSO (Portugal) withdrew his country's proposal (A/CONF.13/C.2/L.37).

4. Mr. BREUER (Federal Republic of Germany) withdrew the amendment proposed by his delegation to article 32 (A/CONF.13/C.2/L.85).

The text of article 32 as submitted by the International Law Commission was adopted by 56 votes to none.

ARTICLE 33 (IMMUNITY OF OTHER GOVERNMENT SHIPS) (A/CONF.13/C.2/L.5, L.76, L.85) (concluded)

5. Mr. GLASER (Romania) felt that article 33 should not be voted on in the Second Committee but should be considered by the First Committee in conjunction with article 22, which dealt with the right of passage enjoyed by government ships operated for commercial purposes. The connexion between the two articles was self-evident, and unless they were voted on by the same committee the results might be very embarrassing. For example, the Romanian delegation had submitted an amendment to article 22 (A/CONF.13/C.1/L.44) proposing that government ships on commercial ventures should enjoy immunity from civil jurisdiction in territorial waters, while other delegations had proposed amendments to article 33 which would deny such immunity in certain circumstances, even on the high seas. If both those proposals happened to be approved, the situation would clearly be paradoxical.

6. Furthermore, the close link between the two texts was confirmed by the United Kingdom delegation's proposal for an additional article 33 A (A/CONF.13/C.2/L.113). Not only did the United Kingdom text purport to define non-commercial government ships, and hence *a contrario* commercial vessels as well, but the note thereto clearly stated that a definition in identical terms had also been submitted to the First Committee (A/CONF.13/C.1/L.37).

7. Lastly, he stressed that every case concerning the immunity of a government ship other than a warship ever decided by the courts had arisen out of an incident occurring within territorial waters or in port.

8. He therefore formally proposed, on his delegation's behalf, that article 33 be referred to the First Committee.

9. Sir Alec RANDALL (United Kingdom) said that article 33 had been discussed in great detail and urged that it be put to the vote without further prevarication.

10. Mr. COLCLOUGH (United States of America) also opposed the Romanian proposal. Much time having already been devoted to article 33 and the issues involved being perfectly clear, it would be most unfortunate to disregard the recommendations approved by the General Committee at its 3rd meeting (A/CONF. 13/L.8) calling for despatch, and to cause further delay.

11. Mr. KEÏLIN (Union of Soviet Socialist Republics) felt that the Romanian proposal was both rational and consistent with the General Committee's recommendations. If article 33 was referred to the First Committee, the question of the immunity of government ships would de dealt with as a single whole, in its logical context, and would thus stand a better chance of solution.

The Romanian proposal to refer article 33 to the First Committee was rejected by 41 votes to 11, with 2 abstentions.

12. Mr. VASQUEZ ROCHA (Colombia) and Mr. BREUER (Federal Republic of Germany) withdrew the proposals made by their delegations for article 33 (A/CONF.13/C.2/L.5 and A/CONF.13/C.2/L.85) in favour of the proposal of the United States of America (A/CONF.13/C.2/L.76).

The text of article 33 proposed by the United States of America (A/CONF.13/C.2/L.76) was adopted by 46 votes to 9, with 2 abstentions.

ADDITIONAL ARTICLE 33 A (A/CONF.13/C.2/L.113)

13. Mr. KEÏLIN (Union of Soviet Socialist Republics) pointed out that the additional article 33 A proposed by the United Kingdom (A/CONF.13/C.2/L.113) could not be put to the vote as it had been submitted at the last minute and had not been discussed in the Committee. It was surprising that those delegations which had just stressed the importance of expediting the work in accordance with the recommendations of the General Committee should now submit a new article which required most careful consideration.

The additional article 33 A proposed by the United Kingdom was adopted by 24 votes to 14, with 21 abstentions.

14. Mr. SOLE (Union of South Africa) said that he had opposed article 33 A because it was altogether contrary to any rules of procedure to vote on an article containing definitions after a decision had been taken on the substantive article to which those definitions related. Had the proper order been observed, he would have supported article 33 A.

ARTICLE 34 (SAFETY OF NAVIGATION) (A/CONF.13/C.2/L.6, L.43, L.56, L.88, L.114) (concluded) [1]

15. The CHAIRMAN said that he had admitted the new proposal submitted by the delegations of the Netherlands and the United Kingdom (A/CONF.13/C.2/L.114) because it would simplify the proceedings by eliminating the amendments previously proposed by those delegations individually (A/CONF.13/C.2/L.24 and Add.1, and A/CONF.13/C.2/L.82).

16. Mr. GLASER (Romania) asked why the new draft amendment referred only to "labour conditions" and not, as the International Law Commission's text did, of "reasonable labour conditions". He asked whether it was the intention of the sponsors that only the best possible conditions should be permissible.

17. Sir Alec RANDALL (United Kingdom) replied that, in the opinion of the sponsors, the word "reasonable" was excessively vague and the welfare of crews would be better safeguarded by the reference to the "applicable international labour instruments" in paragraph 1 (*b*) and to "accepted international standards" in paragraph 2.

18. Mr. HANIDIS (Greece) and Mr. MINTZ (Israel) withdrew the amendments to article 34 submitted by their delegations (A/CONF.13/C.2/L.56 and A/CONF.13/C.2/L.88).

19. Mr. GIDEL (France) withdrew his country's amendment to article 34 (A/CONF.13/C.2/L.6), but hoped that the French version of the term "maintenance of communications" in sub-paragraph (*a*) would be amended to read "l'entretien des communications."

20. The CHAIRMAN replied that such matters would be dealt with by the Drafting Committee.

The text of article 34 proposed by the Netherlands and the United Kingdom (A/CONF.13/C.2/L.114) was adopted by 26 votes to 7, with 22 abstentions.

21. Mr. KEÏLIN (Union of Soviet Socialist Republics) explained that he had abstained from voting on the joint proposal because the International Law Commission's text seemed both clearer and more accurate.

22. The CHAIRMAN said that, since the Committee had adopted a text for article 34, no decision was required on the United States proposal (A/CONF.13/C.2/L.43), which concerned the text submitted by the International Law Commission.

ARTICLE 35 (PENAL JURISDICTION IN MATTERS OF COLLISION) (A/CONF.13/C.2/L.6, L.44, L.59, L.74, L.88) (concluded) [1]

23. Mr. SOLE (Union of South Africa) said that his delegation would withdraw its amendment to article 35 (A/CONF.13/C.2/L.74), but only on the express understanding that his government retained its right to waive jurisdiction over its nationals whenever it wished to do so. Several States had indeed made express statutory provision for such cases.

24. Sir Alec RANDALL (United Kingdom) said that his government would be unable to accede to any instrument containing a provision along the lines of article 35 without entering a reservation similar to that which it had made to article 1 of the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collisions.

25. Mr. WYNES (Australia) associated himself with the statements of the South African and United Kingdom representatives.

The French proposal that the words "accused person" in paragraph 1 of article 35 should be changed to "incriminated person" (A/CONF.13/C.2/L.6) was adopted by 24 votes to 8, with 17 abstentions.

The additional paragraph proposed by France (A/CONF.13/C.2/L.6) was adopted by 30 votes to 2, with 19 abstentions.

26. Mr. SRIJAYANTA (Thailand) withdrew his delegation's amendment (A/CONF.13/C.2/L.59).

The United States amendment (A/CONF.13/C.2/L.44) was adopted by 22 votes to 17, with 18 abstentions.

27. Mr. MINTZ (Israel) withdrew his delegation's amendment (A/CONF.13/C.2/L.88), but reserved his government's position on the final text of the article.

The text of article 35 submitted by the International Law Commission, as amended, was adopted by 39 votes to 1, with 16 abstentions.

28. Mr. LÜTEM (Turkey) explained that he had voted against article 35 because it was contrary to a well-known judgement of the Permanent Court of International Justice (which he had mentioned at the 22nd meeting) and to the municipal legislation of his own country, and would adversely affect the exercise of penal jurisdiction. His government earnestly hoped that the United Nations would establish a single international organ to setlle disputes about competence in regard to cases arising from collisions or other incidents of navigation on the high seas.

ARTICLE 36 (DUTY TO RENDER ASSISTANCE) (A/CONF.13/C.2/L.6, L.18, L.25, L.36, L.88) (concluded) [1]

29. The CHAIRMAN put to the vote the amendments to article 36.

The Netherlands amendment (A/CONF.13/C.2/L.25) was rejected by 22 votes to 7, with 25 abstentions.

The French amendment (A/CONF.13/C.2/L.6) was rejected by 23 votes to 18, with 13 abstentions.

The Yugoslav amendment (A/CONF.13/C.2/L.18) was adopted by 39 votes to 3, with 12 abstentions.

[1] Resumed from the 23rd meeting.

The Danish amendment (A/CONF.13/C.2/L.36) was adopted by 33 votes to none, with 20 abstentions.

The Israeli amendment (A/CONF.13/C.2/L.88) was rejected by 30 votes to 4, with 19 abstentions.

The text of article 36 submitted by the International Law Commission, as amended, was adopted by 55 votes to none.

30. Mr. COLCLOUGH (United States of America) explained that he had supported article 35 as a whole but had abstained from voting on the Danish amendment because although, as the representative of a country with one of the most efficient search and rescue organizations in the world, he fully sympathized with its purpose, he considered that the words "shall promote" should have been replaced by the words "undertakes to ensure" in order to bring the amendment into line with chapter V, regulation 15 of the 1948 Convention for the Safety of Life at Sea. He assumed that the regional arrangements referred to in the Danish amendment were not intended to conflict with or supplant other intergovernmental arrangements on a broader basis such as those pursuant to the provisions of annex 12 to the Convention on International Civil Aviation, article 29, paragraph (*c*) of the Convention on the Inter-Governmental Maritime Consultative Organization and regulation 15 of the 1948 Convention for the Safety of Life at Sea.

ARTICLES 37 (SLAVE TRADE) AND 38 TO 45 (PIRACY) (A/CONF.13/C.2/L.10, L.13, L.19, L.45, L.46, L.52/Rev.1, L.57, L.62, L.77, L.78, L.80, L.81, L.83, L.84)

31. Mr. DE CASTRO (Philippines) explained that the purpose of his delegation's amendment (A/CONF.13/C.2/L.13) was to bring article 37 into line with the Convention concerning the Abolition of Forced Labour, adopted by the International Labour Organisation and signed by eighty-one countries, most of which were represented at the present conference. His delegation had been prompted by the consideration that the slave trade was almost a thing of the past, but that there was a very real danger at the present time of forced or compulsory labour.

2. Mr. POMES (Uruguay) said that his delegation had proposed (A/CONF.13/C.2/L.78) the deletion *in toto* of articles 38 to 45 because piracy no longer constituted a general problem, and its suppression was already the subject of numerous international treaties with which the Commission's articles might conflict.

33. Mr. CERVENKA (Czechoslovakia), introducing the joint Albanian and Czechoslovak amendment (A/CONF.13/C.2/L.46), pointed out that the definition of piracy in article 39 of the Commission's draft did not accord with existing rules of international law and failed to enumerate all the categories of acts which in theory and practice were encompassed by that concept. Furthermore, the definition erroneously included acts committed on *terra nullius*, and was equally mistaken in excluding attacks made in the territorial sea or on the mainland by vessels coming from the high seas and afterwards escaping thither. Finally, the most serious omission was the failure to mention piracy for political reasons. In fact, the notion of piracy put forward in articles 39 to 42 was an obsolete one, and no attempt had been made to legislate for the dangerous forms which it could take at the present time. Though it would have been desirable to elaborate a new definition, his delegation realized that that would be impossible in the time available; hence, the joint amendment had been drafted in such a manner as to cover all acts of piracy that were liable to prosecution under the municipal legislation of all States. The text also laid down the generally recognized principle that it was the duty of States to co-operate in suppressing piracy, a principle which should be supplemented by the maintenance of articles 44 and 45 in the Commission's draft.

34. A final argument in support of the joint amendment was that it would be out of all proportion for the present draft to contain eight articles dealing with an eighteenth century concept.

35. Mr. BELLAMY (United Kingdom) said that the United Kingdom amendments (A/CONF.13/C.2/L.83) were designed to clarify rather than alter the substance of the Commission's text. His delegation could not support the Uruguayan amendment because any comprehensive convention on the law of the sea must deal with the important issue of piracy and should be explicit; it followed that the joint amendment was not acceptable either.

36. The purpose of the United Kingdom amendment to article 38 was to distinguish between the definition of piracy in municipal and international law and to make it plain that the articles only covered the latter.

37. The amendments to article 39 were partly consequential to the amendment to article 38 and partly designed to render the attempt to commit an act of piracy unlawful as well as the act itself, in accordance with the decision of the Judicial Committee of the Privy Council in the case *In re Piracy jure gentium* of 1934 which, as far as he was aware, had never been challenged. On the other hand, the provision contained in article 39, paragraph 3 was imprecise and would unacceptably widen the definition; his delegation had accordingly proposed its deletion.

38. It had proposed an amendment to article 41 because the concept of intention to commit an act of piracy was too indefinite.

39. His delegation supported the United States amendment (A/CONF.13/C.2/L.77) and the Thailand amendment (A/CONF.13/C.2/L.10) but would need an explanation of the Italian amendment (A/CONF.13/C.2/L.80) and the Chinese amendment (A/CONF.13/C.2/L.45) before deciding whether they were acceptable.

40. Mr. CARROZ (International Civil Aviation Organization) suggested that the Drafting Committee's attention might be drawn to the fact that the 1944 Convention on International Civil Aviation referred only to civil and state aircraft, defining the latter as aircraft used for military, customs and police services.

41. He asked whether article 45 was intended to stipulate that seizure could only be carried out by military aircraft.

42. Mr. GHELMEGEANU (Romania) considered that the International Law Commission had been mistaken

in devoting so many articles to piracy, which was no longer a very real problem. He had, therefore, been impressed by the Uruguyan representative's argument. States could be relied upon to take the necessary steps for protecting navigation on the high seas and he would accordingly support the joint Albanian and Czechoslovak amendment.

43. Mr. FRANCHI (Italy) explained that the purpose of the Italian amendment (A/CONF.13/C.2/L.80) to article 39 was to fill a gap in the Commission's text by extending the definition in sub-paragraphs (*a*) and (*b*) to acts committed against aircraft.

44. The Italian amendment to article 41 (A/CONF.13/C.2/L.81) had been submitted in the interests of greater precision.

45. Mr. CARDOSO (Portugal) said that the first Portuguese amendment (A/CONF.13/C.2/L.52/Rev.1) dealt with a drafting point which would have to be taken up in connexion with the definitions at a later stage. The second amendment was also of a drafting character and had already been mentioned by the representative of ICAO. No further action need therefore be taken by the Committee on those amendments at the moment.

46. Mr. KEÏLIN (Union of Soviet Socialist Republics), supporting the Uruguayan and the joint Albanian-Czechoslovak amendments, observed that the virtual absence of discussion in the Committee on those amendments testified to the fact that a majority of the Committee members were in favour of excluding rules dealing with piracy from the draft convention. His delegation shared that point of view.

47. Mr. VRTACNIK (Yugoslavia) explained that the purpose of the Yugoslav amendment to article 40 (A/CONF.13/C.2/L.19) was to make the provision more comprehensive and to distinguish between government ships and warships; that would be consistent with both theory and practice.

48. He opposed both the amendment proposed by Uruguay and that submitted jointly by Albania and Czechoslovakia. Nor could he support the Thailand amendment because he agreed with the International Law Commission that only warships were entitled to carry out seizures on account of piracy. Moreover, under the provisions of article 47, a distinction must be made between the right of visit on the high seas and the right of hot pursuit for an act committed in the territorial sea. The Philippine amendment was unacceptable because the new paragraph proposed for inclusion in article 37 was not a rule of existing international law.

49. After a short discussion in which Mr. FAY (Ireland), Mr. CARDOSO (Portugal) and Mr. COLCLOUGH (United States of America) took part, the CHAIRMAN put to the vote a motion that articles 46 and 47, and if possible article 48, should be considered at the following meeting.

The motion was carried by 36 votes to none, with 14 abstentions.

The meeting rose at 12.30 p.m.

TWENTY-EIGHTH MEETING

Wednesday, 9 April 1958, at 8.15 p.m.

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

In the absence of the Chairman, Mr. Glaser (Romania), Vice-Chairman, took the Chair.

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

ARTICLES 46 (RIGHTS OF VISIT) AND 47 (RIGHT OF HOT PURSUIT) (A/CONF.13/C.2/L.4, L.20/Rev.1 and L.61/Rev.1, L.35, L.53, L.69, L.89, L.94, L.95, L.96/Rev.1, L.98, L.99, L.105, L.115, L.116, L.117)

1. Mr. GRANT (United Kingdom) said that he supported the International Law Commission's text for article 46.

2. He could not, however, vote for the whole of the Commission's text for article 47, because his delegation was of the opinion that it should be possible to commence hot pursuit only when the foreign ship was within the internal waters or the territorial sea of the pursuing State, and that it should not be possible to do so when the foreign ship was in the contiguous zone for which article 66 provided or in any other part of the sea over which the State did not have full sovereignty. The last sentence of paragraph 1 of article 47, which read: "If the foreign ship is within a contiguous zone, as defined in article 66, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established", was not consistent with the second sentence of that paragraph, which read: "Such pursuit must be commenced when the foreign ship is within the internal waters or the territorial sea of the pursuing State..." He would draw attention to the sentence in paragraph 2 (*a*) of the Commission's commentary on the article reading: "Acts committed in the contiguous zone cannot confer upon the coastal State a right of hot pursuit." For those reasons, his delegation had proposed the deletion of the last sentence of paragraph 1 of article 47 (A/CONF.13/C.2/L.96/Rev.1). But in view of the opinions expressed on the subject, his delegation had decided to withdraw that proposal in favour of the text proposed by the Netherlands delegation (A/CONF.13/C.2/L.98), which was much more explicit than the Commission's text.

3. There were a number of proposals before the Committee to the effect that the Commission's text should be amended to make it possible for hot pursuit to be commenced if it were established by radar or other electronic means that the foreign ship or one of its boats was within the limits of the territorial sea. He was opposed to those proposals because such devices were not completely reliable, especially when operated on small craft in rough weather.

4. The reasons why his delegation had proposed the addition of a new paragraph 7 (A/CONF.13/C.2/L.96/Rev.1) were obvious. A clause providing for the payment of compensation for loss or damage sustained in circumstances which did not justify the exercise of the right of hot pursuit was just as necessary in article 47 as in article 46.

5. Mr. OLDENBURG (Denmark) said the Danish proposal relating to article 47 (A/CONF.13/C.2/L.99) consisted of three parts. The texts proposed had been drafted in the light of the need to prevent abuses.

6. The purpose of the first proposed addition was to make it possible for a State to engage at any moment in hot pursuit of a ship on account of offences committed by that ship at any time during the preceding two years. That was a matter which the Commission had left in doubt.

7. The purpose of the second addition was to make it possible to resume pursuit of a ship which sought refuge in the territorial sea of a State other than the pursuing State if it remained there within sight of the pursuer for less than six hours without anchoring or mooring and then quit that sea.

8. He withdrew the third part of the Danish proposal in favour of the United States proposal (A/CONF.13/C.2/L.105).

9. Mr. VAN PANHUYS (Netherlands) said that his delegation's proposal relating to article 47 (A/CONF.13/C.2/L.98) was mainly of a drafting nature. The structure of the text submitted by the Commission made it difficult to understand; to remedy that defect, it was necessary to recast the text completely. In addition, his delegation had incorporated the substance of the Commission's comment that "acts committed in the contiguous zone cannot confer upon the coastal State a right of hot pursuit".

10. The CHAIRMAN suggested that it would be best to leave to the drafting committee, which it was expected would be set up, that part of the Netherlands proposal which concerned only drafting.

11. Mr. RADOUILSKY (Bulgaria) said that his delegation had proposed the addition of a new paragraph to article 46 reading "The provisions of paragraphs 1 to 3 of this article shall not apply to government ships operated for commercial purposes" (A/CONF.13/C.2/L.117) after the Committee had decided (27th meeting) to exclude from article 33 the provision that state ships used for commercial purposes should enjoy immunity on the high seas. He agreed with the statement made by Mr. François at the 13th meeting that the immunity for which the Commission's text for article 33 provided consisted solely of immunity from visit and from hot pursuit, and was still firmly of the opinion that such ships should enjoy both kinds of immunity; but, the Committee having decided otherwise, he hoped that it would at least agree to their being granted immunity from hot pursuit.

12. Mr. HAMEED (Pakistan) said that his delegation had proposed the addition at the end of paragraph 2 of article 47 of the words "but where possible, the extradition of the offender may be secured through bilateral treaties" (A/CONF.13/C.2/L.94), because neither the Commission's text for article 47 nor its commentary thereto suggested any way of solving the problems which would arise when a ship unsuccessfully engaged in hot pursuit. If article 57 provided for the settlement of disputes regarding fishing rights and article 73 for the settlement of disputes regarding continental shelves, the article under discussion should provide for the settlement of disputes arising out of cases of unsuccessful hot pursuit. International recognition of a wrong suffered by a State was virtually futile unless sanctions were provided for redressing that wrong. The reparation of wrongs on account of which a State engaged in hot pursuit should not be dependent solely on timely action being taken or on fortuitous geographical circumstances.

13. Mr. COLCLOUGH (United States of America) said that his delegation supported the Commission's text for article 46. It had, however, proposed (A/CONF.13/C.2/L.105) that article 47 be amended to make it possible to begin hot pursuit where it was established by means of radar, loran, decca or some similar device that the offending ship was in the territorial sea or the contiguous zone, as the case might be. He did not agree with what the United Kingdom representative had said on that point; seafarers could prove that such modern devices had made it easier for small craft to fix their position.

14. He disagreed with the statement in paragraph 2 (*a*) of the Commission's commentary that "acts committed in the contiguous zone cannot confer upon the coastal State a right of hot pursuit". He would vote for the joint proposal of Poland and Yugoslavia (A/CONF.13/C.2/L.20/Rev.1 and L.61/Rev.1) which, if adopted, would nullify that statement.

15. Mr. SAFWAT (United Arab Republic) said that his delegation had proposed (A/CONF.13/C.2/L.69) the deletion of sub-paragraph 1 (*b*) of article 46 because there was no justification for that provision, which would allow warships to board ships suspected of engaging in the slave trade in the maritime zones treated as suspect in the international conventions relating to the abolition of that trade. The General Act of Brussels of 1890 contained a provision to the same effect, except that it applied only to ships of less than 500 tons, whereas the Commission's text applied to all ships. That had perhaps been justified in the nineteenth century, but conditions had since changed. There was no such provision in the Convention of Saint-Germain-en-Laye of 1919, in the Slavery Convention of 1926 or in the Supplementary Slavery Convention of 1956. At the diplomatic conferences at which those several conventions had been drawn up, a proposal to include a provision similar to that of sub-paragraph 1 (*b*) of article 46 had been heavily defeated. The clause in question would be susceptible to abuse, and it was therefore a potential source of international disputes.

16. Mr. KNACKSTEDT (Federal Republic of Germany) said that his delegation had felt it necessary to propose (A/CONF.13/C.2/L.115) the insertion of the words "or one of its boats" in the second sentence of paragraph 1 of article 47, because that sentence was not consistent with the first sentence of paragraph 3, which read: "Hot pursuit is not deemed to have begun unless... the ship pursued or one of its boats is within the limits of the territorial sea...." That inconsistency could be eliminated either by deleting the phrase "or one of its boats" in paragraph 3 or by inserting it in paragraph 1, as his delegation suggested. The phrase was necessary in paragraph 1 in order to make it clear that the right of hot pursuit would also exist in a case

where the ship itself remained outside the territorial sea while one of its boats was committing an illegal act within the territorial sea. The result of the alternative solution — to exclude the phrase from both paragraphs — would be that, if a foreign ship remaining beyond the territorial sea sent one of its boats inside the territorial sea to commit an illegal act, neither the ship nor the boat, after it had regained its mother ship, could be pursued.

17. His delegation did not think it necessary to specify the means by which a pursuing ship should satisfy itself that the ship pursued or one of its boats was within the limits of the territorial sea; it therefore proposed that the words "bearings, sextant angles or other like means" in paragraph 3 be replaced by the words "appropriate means". But it would consider withdrawing that proposal in favour of the United States proposal.

18. Mr. VRTACNIK (Yugoslavia) said that the joint Polish-Yugoslav proposal (A/CONF.13/C.2/L.20/Rev.1 and L.61/Rev.1) that the words "or the contiguous zone" be inserted in four places in article 47 was intended to empower coastal States to preserve their rights in the contiguous zone by engaging therein in hot pursuit of foreign ships violating those rights.

19. He supported the proposal of the United Arab Republic (A/CONF.13/C.2/L.69) for reasons similar to those given by the representative of that country.

20. Mr. CAMPOS ORTIZ (Mexico) said that the purpose of the first part of his delegation's proposal concerning article 47 (A/CONF.13/C.2/L.4) was to give States the right of hot pursuit within conservation zones established unilaterally by them in accordance with the terms or article 55, as well as in their territorial sea and its contiguous zone.

21. When drafting its text for article 47, the Commission had been in agreement that a ship was liable for the actions of its boats. But it had left a gap in its text by failing to include a clause conferring on the coastal State the right of hot pursuit in respect of ships which, though not themselves actually within the State's territorial sea or contiguous zone, or sending any of their boats into those areas, were none the less engaging in illicit acts therein for which boats other than their own were being used. The second part of his delegation's proposal provided a suitable means of filling the gap.

22. Mr. OLAFSSON (Iceland) said that the main purpose of that part of his delegation's proposal (A/CONF.13/C.2/L.89) which related to paragraphs 1 and 3 of article 47 was to make it possible to commence hot pursuit of an offending ship at a time when it was not within the territorial sea. It should be remembered that the right of hot pursuit had been recognized for the purpose of enabling the pursuing State to deal with violations of its laws in its territorial sea. His country's courts had always considered the question of whether the pursued ship was in the territorial sea when pursuit began to be immaterial.

23. His delegation had proposed its additions to sub-paragraph 5 (*b*) of article 47 because it considered that either an aircraft or a ship should be entitled to take over pursuit begun by an aircraft.

24. The new sub-paragraph 5 (*c*) had been proposed because his delegation was of the opinion that it should be possible, in cases where pursuit was initiated by an aircraft, to arrest an offending ship even though the pursuit had been interrupted.

25. Those changes were rendered necessary by technical progress.

26. Mr. LEE (Korea) supported the Commission's recommendation that ships should be allowed to engage in hot pursuit to protect their rights in their territorial sea and contiguous zone. He would vote for the Mexican and Peruvian proposals (A/CONF.13/C.2/L.4 and A/CONF.13/C.2/L.35). If coastal States were granted the rights specified in article 66 in respect of the contiguous zone, and fisheries conservation rights in a conservation zone off their coasts, they should be given the necessary power to enforce those rights, including that of hot pursuit of vessels which violated them. It would be illogical to grant coastal States conservation rights without allowing them to exercise the jurisdiction and control necessary to safeguard them.

27. Mr. SEYERSTED (Norway), pointing out that there was no mention in article 46 of the right of visit which would be conferred on States by article 47, or of the right of visit which would be conferred on them by article 66, said that article 46 would be misleading unless that deficiency was made good. The matter might, however, be left to the drafting committee which it was expected would be set up.

28. In the compensation clause in article 44, relating to piracy, the words "without adequate grounds" were used, whereas in the corresponding clause in article 46 the words "if the suspicions prove to be unfounded" were used; moreover, article 44 provided for compensation to be paid "to the State", whereas article 46 provided for "the ship" to "be compensated". The International Law Commission had, therefore, at its eighth session, decided to bring those two articles into line,[1] but had forgotten to do so. That was what his delegation had proposed in its amendment to article 44 (A/CONF.13/C.2/L.84). Even if that proposal was adopted, it would still be necessary to replace the words "it shall be compensated" in article 46 by the words "compensation shall be paid". That matter also might be left to the drafting committee.

29. Mr. PUSHKIN (Ukrainian Soviet Socialist Republic) supported the Bulgarian proposal (A/CONF.13/C.2/L.117) because it provided a practical method of avoiding the visiting of government commercial ships on the high seas.

30. His delegation had already pointed out that article 37 on the slave trade was anachronistic. The same applied to paragraph 1 (*b*) of article 46. There had formerly been a need for special provisions to suppress slave trading, and there had been grounds for admitting the right of warships to visit suspect ships, although the warships of some countries had abused that right to control certain seaways in their own interests, contrary to international law. It had since been acknowledged, however, in the Slavery Convention of 1926 and the

[1] *Yearbook of the International Law Commission, 1956*, Vol. I (A/CN.4/SER.A/1956), 343rd meeting, para. 66.

Supplementary Convention on Slavery of 1956, that the grant of such rights to warships was no longer essential. Accordingly, the Ukranian delegation would vote for the proposal of the United Arab Republic.

31. Mr. MINTZ (Israel), introducing the Israeli proposal concerning article 47 (A/CONF.13/C.2/L.116), said that the right of pursuit, imposing a limitation on the freedom of navigation on the high seas, should be exercised subject to judicial safeguards. That was the aim of the amendments proposed by his delegation.

32. As to the amendment to paragraph 1, he said that, although the principle that the laws and regulations concerned should be in conformity with international law was implicitly recognized in article 47, his delegation considered that it should be stated explicitly in the text.

33. The purpose of the first amendment to paragraph 3 was to show that the question of assessing whether hot pursuit had been begun legitimately would arise only if and after the issue became controversial and that it accordingly could not be left to the pursuing ship, but must be left to the appropriate tribunal. The second amendment to paragraph 3 was self-explanatory from the text.

34. Lastly, Israel proposed the inclusion in article 47 of the principle stated in paragraph 3 of article 46, providing for payment of compensation in the event of unjustified detention of the ship in case of visit; the application of that principle was justified on similar grounds in the case of hot pursuit.

35. Mr. BIERZANEK (Poland), introducing the amendment submitted jointly by the Polish and Yugoslav delegations (A/CONF.13/C.2/L.20/Rev.1 and 61/Rev.1), said that its purpose was to provide a definite solution to the question whether the coastal State's right to begin hot pursuit was confined to the territorial sea or extended also to the contiguous zone. The Polish delegation considered that the nature of the right was complementary to and consequential upon the rights of coastal States over adjacent zones. The theory that hot pursuit must begin in the territorial sea dated back to a time when no contiguous zone had been admitted; now that that doctrine had evolved, it should be acknowledged that hot pursuit could begin in the contiguous zone. If the rights of the coastal State were limited to initiating hot pursuit in the territorial sea, it would be difficult for States to enforce customs regulations, to protect which the contiguous zone had been established. In support of his argument, he cited opinions expressed at The Hague Codification Conference of 1930, article 9 of the Helsingfors Treaty, concluded in 1925 between certain Baltic States, and various decisions of United States courts; he also recalled that the United States Government had rejected the Canadian Government's argument that pursuit should begin in the territorial sea. While it might be concluded from the International Law Commission's text that hot pursuit could begin in the contiguous zone, the principle was vitiated by paragraph 2 (*a*) of the commentary. The Polish and Yugoslav delegations had therefore thought it wise to make appropriate provision in the article itself.

36. Mr. JHIRAD (India), introducing his delegation's proposal (A/CONF.13/C.2/L.95), observed that an analysis of paragraph 1 of article 47 showed that the conditions under which hot pursuit might be undertaken were: first, in cases of the violation of laws and regulations in matters unconnected with the contiguous zone; and secondly, if the foreign ship had reached the contiguous zone, only in cases of violation of the rights for which that zone had been established. But according to paragraph 2 (*a*) of the International Law Commission's commentary, offences giving rise to hot pursuit must always have been committed in internal waters or in the territorial sea. Accordingly, while the article did not embody the latter principle, it was obvious that it could be interpreted in the sense of the commentary. Furthermore, although the foreign ship did not necessarily have to be in territorial waters at the time when the order to stop was given, no such provision was made concerning the position of the pursuing ship in the contiguous zone.

37. There seemed to be no point in establishing a contiguous zone if the rights for which it had been established could not be enforced by pursuit. A foreign ship might hover outside the territorial sea in the contiguous zone and engage in smuggling *via* other craft. The only action that the coastal State could take in such a case would be to "prevent smuggling" in accordance with article 66. Furthermore, with regard to the position of the pursuing vessel when beginning pursuit, there should be no differentiation between the territorial sea and the contiguous zone.

38. The Indian proposal for paragraph 1 of article 47 was intended not only to remedy that situation, but also to extend the strict rules laid down in that connexion. It provided that pursuit could be begun in the contiguous zone even if the offence had been committed in the territorial sea if the foreign ship had entered the contiguous zone after committing the offence. In the cases of countries such as India, which had long coastlines and broad territorial seas and contiguous zones for customs purposes, it was impossible to maintain two separate categories of patrol ships, and the principle of the freedom of the high seas placed the pursuing ship at a great disadvantage. The doctrine of hot pursuit, under which the high seas became a sanctuary, was not always right; the time had come to modify the existing rules, which had been formulated at a time when contiguous zones had not been widely recognized. For example, if a collision involving criminal responsibility took place on the boundary of the territorial sea and the pursued ship was outside that boundary when the order to stop was given, it would be unfair to expect the pursuing ship to look on helplessly while it escaped. Finally, the importance of keeping the territorial sea as narrow as possible, to prevent encroachment upon the high seas, should be taken into account; and if the right of hot pursuit were denied in the contiguous zone, certain countries would be compelled to extend their territorial seas.

39. The purpose of the Indian amendment to paragraph 3 was to allow all practical methods to be used for ascertaining the position of the ship pursued. Bearings, sextant angles and other means were not always adequate in broad territorial seas.

40. Mr. KEÏLIN (Union of Soviet Socialist Republics) said he unreservedly supported the proposal of the

United Arab Republic that paragraph 1 (*b*) of article 6 be deleted, and would vote for it. That deletion was necessary for various reasons. In the first place, would it not be discriminatory automatically to regard certain maritime zones as suspect in the matter of the slave trade? It was well known which countries had warships cruising in those neighbourhoods and had interests which would be served by the right of visit thus established. Secondly, it was inadmissible and unjustified to presume that ships in the " suspect " zones were engaged in the slave trade; such a suspicion would probably only be a pretext for controlling maritime trade in violation of the principle of the freedom of the high seas. Thirdly, the sub-paragraph was in no way necessary for effectively combating the slave trade, and it seemed that the International Law Commission had allowed itself to be influenced by happenings in a former age in an entirely different set of circumstances, of which the memory lay sleeping in the dust of archives. Finally, the provision ran counter to the Supplementary Convention on Slavery of 1956, article 3 of which laid down that the transport or attempted transport of slaves from one country to another was a penal offence and that persons found guilty of such offences were liable to severe penalties. The suppression of such offences could and should be undertaken by the States of which the flag was flown by the ships attempting to engage in the transport of slaves.

41. He also supported the Bulgarian proposal to add a new paragraph to article 46. The arguments put forward by the Bulgarian representative required no comment.

42. The many amendments to article 47 might be divided into groups, according to the issues raised in them.

43. One of those groups concerned the question whether the right of hot pursuit arose when ships were outside the limits of territorial sea. The joint proposal of Poland and Yugoslavia and the Indian proposal aimed at extending the right of hot pursuit to the contiguous zone defined in article 66. It should be recalled that that solution was already provided for in the International Law Commission's draft, but only partially, namely, in cases in which there had been an infringement of the rights which the establishment of the contiguous zone was intended to protect. Basing itself on its general concept of the question, his delegation would not raise any objection to those delegations, amendments. That was, however, not the case with regard to the amendments of delegations which wished to go still further and recognize a right of hot pursuit arising even when the foreign ship was in the zone to which article 55 referred. Quite apart from what his delegation thought about those zones in general, it could not consent to such an extension of the right of hot pursuit, which would allow that right to arise within those zones and would permit pursuit beyond them.

44. A further group of amendments would have the effect of weakening the notion of the right of hot pursuit. That group included the proposals of the United States (A/CONF.13/C.2/L.105) and other delegations which all, far from rendering the International Law Commission's text more precise, introduced a regrettable uncertainty. The United States proposed to amend paragraph 3 of the more or less precise text of the International Law Commission by substituting for it a formula of which the meaning was completely vague — namely, " an accepted method of piloting or navigation ". The same could be said of the Danish proposal to introduce a two-year period and a six-hour time-limit (A/CONF.13/C.2/L.99). The adoption of those amendments might in practice cause useless complications.

45. The Soviet Union considered it preferable to keep the wording of article 47 as it appeared in the International Law Commission's draft, merely making the additions resulting from the joint amendment of Poland and Yugoslavia, and from the Indian amendment.

46. Mr. ASANTE (Ghana) said that his delegation, which felt strongly about the slave trade for historical reasons, would have been prepared to propose that warships should have the right to board ships suspected of slaving wherever they might be. It had, however, found some difficulty in drafting a suitable amendment and, since it considered paragraph 1 (*b*) of article 46 to be discriminatory, would abstain from voting on the proposal of the United Arab Republic.

The meeting rose at 10.30 p.m.

TWENTY-NINTH MEETING

Thursday, 10 April 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 37 (SLAVE TRADE) (A/CONF.13/C.2/L.13, A/CONF.13/C.2/L.77) (concluded) [1]

1. Mr. COLCLOUGH (United States of America) said that he would be satisfied if his delegation's amendment to article 37 (A/CONF.13/C.2/L.77) were referred to the drafting committee.

The Philippine proposal (A/CONF.13/C.2/L.13) was rejected by 18 votes to 1, with 32 abstentions.

The text of article 37 as submitted by the International Law Commission was adopted unanimously.

ARTICLES 38 TO 45 (PIRACY) (A/CONF.13/C.2/L.10, L.19, L.45, L.46, L.57, L.62, L.77, L.78, L.80, L.81, L.83, L.84) (continued) [1]

2. Mr. KRISPIS (Greece) withdrew his delegation's proposal for article 41 (A/CONF.13/C.2/L.57) in favour of the United Kingdom proposal (A/CONF.13/C.2/L.83).

3. He would also be prepared to withdraw the Greek proposal to delete the word " illegal " from article 39 (A/CONF.13/C.2/L.62) if the United Kingdom would agree to accept the same change in its own amendment. Illegality must be qualified by some system of law; in the absence of international regulations on the subject,

[1] Resumed from the 27th meeting.

there would be no other interpretation of illegality than that covered by national law, and the legal confusion that would arise might make it impossible to punish a ship which had engaged in piracy.

4. Mr. GRANT (United Kingdom) regretted that his delegation could not accept the Greek proposal.

The Uruguayan proposal to delete articles 38 to 45 (A/CONF.13/C.2/L.78) was rejected by 33 votes to 12, with 3 abstentions.

The Albanian-Czechoslovak joint proposal (A/CONF. 13/C.2/L.46) was rejected by 37 votes to 11, with 1 abstention.

Article 38

The United Kingdom proposal (A/CONF.13/C.2/ L.83) was rejected by 15 votes to 14, with 19 abstentions.

The text of article 38 as submitted by the International Law Commission was adopted by 51 votes to none, with 2 abstentions.

Article 39

5. Mr. CHAO (China) withdrew his delegation's amendment (A/CONF.13/C.2/L.45).

The Greek proposal to delete the word "illegal" in paragraph 1 (A/CONF.13/C.2/L.62) was rejected by 30 votes to 4, with 16 abstentions.

The Italian proposal (A/CONF.13/C.2/L.80) was adopted by 18 votes to 16, with 19 abstentions.

The United Kingdom proposal for the opening phrase and paragraph 1 (A/CONF.13/C.2/L.83) was rejected by 22 votes to 13, with 17 abstentions.

The United Kingdom proposal to delete paragraph 3 was rejected by 36 votes to 3, with 13 abstentions.

The text of article 39 submitted by the International Law Commission, as amended, was adopted by 45 votes to 7, with 3 abstentions.

Article 40

The text of article 40 proposed by Yugoslavia (A/ CONF.13/C.2/L.19) was adopted by 23 votes to 11, with 15 abstentions.

Article 41

The United Kingdom proposal (A/CONF.13/C.2/ L.83) was rejected by 29 votes to 7, with 17 abstentions.

The Italian proposal (A/CONF.13/C.2/L.81) was rejected by 29 votes to 15, with 10 abstentions.

The text of article 41 submitted by the International Law Commission was adopted by 45 votes to 7, with 5 abstentions.

Article 42

The text of article 42 submitted by the International Law Commission was adopted by 41 votes to 8, with 1 abstention.

Article 43

The text of article 43 submitted by the International Law Commission was adopted by 46 votes to 7, with 1 abstention.

Article 44

The Norwegian proposal (A/CONF.13/C.2/L.84) was rejected by 19 votes to 13, with 20 abstentions.

The text of article 44 submitted by the International Law Commission was adopted by 41 votes to 7, with 5 abstentions.

Article 45

The Thai proposal (A/CONF.13/C.2/L.10) was adopted by 26 votes to 15, with 17 abstentions.

The text of article 45 submitted by the International Law Commission, as amended, was adopted by 47 votes to 8.

ARTICLE 48 (POLLUTION OF THE HIGH SEAS) (A/CONF. 13/C.2/L.6, L.79, L.96/Rev.1, L.103, L.106, L.107, L.115, L.118, L.119)

6. Mr. POMÉS (Uruguay) said that the purpose of his delegation's amendment (A/CONF.13/C.2/L.79) was to rectify an omission in the International Law Commission's draft of article 48. Exploration, which necessarily preceded exploitation, could also cause harmful pollution.

7. Mr. VRTACNIK (Yugoslavia) said that his delegation was opposed to the United Kingdom and United States proposal (A/CONF.13/C.2/L.96/Rev.1, L.106, L.107) to replace the various paragraphs of article 48 by resolutions. In the first place, the basic regulations on the law of the sea should mention all relevant questions, even though part of the subject-matter was already dealt with in the 1954 International Convention for the Prevention of Pollution of the Sea by Oil. Secondly, they should give rise to conventions and other agreements dealing with the relevant subjects in greater detail. Thirdly, not all States had signed, ratified or acceded to the 1954 Convention, whereas the regulations on the law of the sea should be binding upon all States.

8. His delegation would also vote against the Italian amendment (A/CONF.13/C.2/L.103), because it unduly compressed the article, and because technical developments made it necessary to retain paragraphs 2 and 3 of the original draft. It would support the International Law Commission's text and the French and Uruguayan amendments thereto (A/CONF.13/C.2/ L.6 and A/CONF.13/C.2/L.79). Should, however, the United Kingdom and United States proposals be adopted, the Yugoslav delegation would move its own amendment (A/CONF.13/C.2/L.119) to the United Kingdom draft resolution (A/CONF.13/C.2/L.96/Rev.1).

9. Mr. COLCLOUGH (United States of America) observed that international action to prevent or minimize pollution of the high seas by oil was a vast and technical subject and had been dealt with only experimentally in the 1954 Convention. It was noteworthy that, although the 1954 Conference had recommended a further conference within three years, no such conference had been called because of lack of sufficient experience. The United States had been a leading proponent of

anti-pollution programmes for over thirty years and had evolved measures which were taken in the coastal waters of the United States and Europe where the problem was most acute. Nevertheless, his delegation agreed with the International Law Commission that it would be unwise to consider subjects already under study by the United Nations and specialized agencies and subjects of a technical nature ; oil pollution was being examined by the Transport and Communications Commission of the United Nations and the Economic Commission for Europe, which had called for studies by the World Health Organization and the Food and Agriculture Organization.

10. With regard to paragraphs 2 and 3 of article 48, it was well known that too great a concentration of radio-isotopes in the body and in air and water had harmful results. Accordingly, the benefits of the increased use of atomic energy for peaceful purposes entailed a responsibility for the disposal of dangerous materials. Traditional practice in the dumping of unwanted materials might suggest that radio-active wastes could be disposed of in the high seas. But world knowledge of the subject was insufficient to warrant a decision on such disposal, particularly with regard to long-lived radio-active wastes ; much research would be required before a solution could be found.

11. The United States delegation considered that the three principles to be followed in the matter were : first, that there should be no interference with the work of technically competent agencies studying all aspects of atomic energy ; second, that there must be international co-operation in the study of the effects of the release or disposal of radio-active materials ; and third, that as a result of the progress made through international co-operation and study, States must exercise adequate control over the release of radio-active materials into the sea. The International Atomic Energy Agency was actively concerned with the matter, and might be expected to reach a workable solution. The United States and United Kingdom delegations had therefore proposed a resolution (A/CONF.12/C.2/L.107) encouraging the Atomic Energy Agency to continue its studies, since they believed that the Commission's draft of paragraphs 2 and 3, which called for efforts by individual States, might lead to lack of co-ordination, duplication of effort and delay in finding a solution.

12. Mr. GIDEL (France) said that his delegation was in general agreement with the International Law Commission's text, but had submitted its amendment (A/CONF.13/C.2/L.6) for the sake of clarity. Having ratified the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, France endorsed paragraph 1, but considered that the statement in paragraph 3 of the commentary, that pollution of the sea by the dumping of radio-active waste " should be put on the same footing as pollution by oil ", was mistaken ; there could be no doubt that pollution by radio-active substances was much more serious than pollution by oil. The French delegation had therefore tried to strengthen the article by replacing the words " the dumping of radio-active waste " by " contamination by radio-active substances ".

13. Otherwise, the Commission's text provided a satisfactory general framework for subsequent national and international regulations which would take into account the work of various technical bodies, especially the United Nations Scientific Committee on the Effect of Atomic Radiation.

14. Mr. RADOUILSKY (Bulgaria) observed that the problem of the pollution of the sea had reached a stage at which it could be solved only by international measures. As long ago as 1926, an international conference of experts on the problem had been convened at Washington, but the London Convention had not been signed until 1954 and would enter into force on 26 July 1958. Paragraph 1 of the International Law Commission's draft was based on the principles of that convention and was acceptable. The Uruguayan proposal was a useful addition.

15. However, the question of the pollution of the sea and the superjacent air space by radio-active waste was far more important, since the danger to life and health was greater than in the case of oil. Indeed, radio-active pollution should be prohibited categorically and immediately. To adopt the United Kingdom-United States proposal (A/CONF.13/C.2/L.107) might mean delaying a solution for years.

16. The question of pollution by radio-active wastes was closely connected with that of the prohibition of nuclear tests in the high seas. The Bulgarian Government fully endorsed the Decree of the Supreme Soviet of the U.S.S.R. of 31 March 1958 concerning the unilateral cessation of nuclear tests, and appealed to other States to take similar action. Although Bulgaria was in favour of any other practical measures which might limit nuclear tests and the resulting pollution, its vote for such measures would not mean that it condoned nuclear tests in principle.

17. In conclusion, he would vote for the Czechoslovak proposal (A/CONF.13/C.2/L.118) which reflected the steps needed to combat pollution better than the International Law Commission's text did.

18. Mr. VITELLI (Italy) said his delegation supported the principles on which the Commission's text for article 48 was based, but it thought it unnecessary to mention specifically in the article different types of pollution. It had therefore proposed a text worded in more general terms (A/CONF.13/C.2/L.103). The words " any persistent pollution whatsoever " in that text should be taken to mean every type of serious and persistent pollution, including pollution with oil. If the text proposed by his delegation were adopted, all States would remain free to enter into international agreements regarding any type of serious and persistent pollution of the high seas or the superjacent air space.

19. He thought the Committee should adopt the draft resolution proposed jointly by the United States and United Kingdom delegations, as well as his delegation's text for the article.

20. Mr. CERVENKA (Czechoslovakia) felt that the wording of the Comission's text for article 48 was unsatisfactory in so far as it related to the problem of pollution of the seas by radio-active materials and waste. It was obvious from that text and from the commentary on it that the Commission had failed to take full account of the rapid development of the use of atomic energy for peaceful purposes. The pernicious effects

on human health of polluting the seas with radio-active materials and waste could not be compared with the damage caused by pollution of the seas with oil. Pollution of the seas with radio-active materials had restricted the use which could be made of the high seas, and it was tantamount to a violation of the freedom of the high seas. Despite the fact that that had been known at the time the Commission drafted its text for the article, the Commission had put pollution of the seas by oil on the same footing as pollution of the seas by radio-active waste. But the latter problem was by far the more important. Paragraph 3 of article 48 was very vague ; if it were adopted, the taking of action to ensure effective international co-operation would remain entitrely optional. His delegation had proposed a text for paragraphs 2 and 3 of the article (A/CONF.13/C.2/L.118) which laid upon States the duty of taking definite action to prevent pollution of the seas with radio-active materials and waste.

21. Some representatives, among them the United States representative, had stated that their governments were able to ensure that effective steps would be taken to prevent pollution of the seas with radio-active waste. If they were able to do so, they should corroborate their statements by agreeing to accept the definite obligation advocated by his delegation. The acceptance of that obligation by States would certainly contribute more to the solution of the problem than simply referring the problem to other bodies, as the United States and United Kingdom delegations had, in effect, proposed in putting forward their draft resolution.

22. Mr. SOLE (Union of South Africa) said that at the most recent meeting of the Board of Governors of the International Atomic Energy Agency (IAEA) held in March, there had been some discussion on article 48, and the fear had been expressed that at the current conference there would be adopted articles which would prejudge and prejudice the work which the Agency intended to carry out on problems under consideration by it, in particular the problem of the disposal of radio-active waste. At the first General Conference of the Agency, which had been attended by representatives of sixty-one governments, that problem, which would obviously become more complicated and serious, had been given high priority. It would be most regrettable if the current conference adopted articles which would prejudge and prejudice the Agency's work on it and which might not be in accordance with the latest results of scientific research. It seemed that the Commission had not given the problem all the attention it deserved. As he was anxious that the question should be referred to IAEA, which was the organization primarily responsible for dealing with atomic energy problems, and as all States should adopt common standards for the disposal of radio-active waste, he would vote for the United States and United Kingdom joint proposal.

23. Mr. GHELMEGEANU (Romania) said that he would vote against the United States and United Kingdom joint proposal, since its adoption would completely nullify the main recommendation, made by the Commission after long and careful study, to the effect that States should enter into a legal obligation to carry out concerted measures to prevent pollution of the seas with radio-active materials. There was no valid reason why that recommendation should not be followed and a request at the same time made to IAEA for appropriate action. He would vote for the proposals of the Uruguayan and Czechoslovak delegations, since they were in accordance with that Commission's recommendation, and their adoption would improve its text.

24. Mr. DUPONT-WILLEMIN (Guatemala) said that he would vote for the draft resolution submitted jointly by the United States and the United Kingdom. In his capacity as adviser to the Guatemalan Government, he had attended the most recent meeting of the Board of Governors of the International Atomic Energy Agency, and could therefore confirm the statement made at the current meeting by the representative of the Union of South Africa.

25. Mr. KEÏLIN (Union of Soviet Socialist Republics) considered that the Czechoslovak proposal (A/CONF. 13/C.2/L.118) relating to article 48 was of great value. The amendment to paragraph 2 would make the text more concise and categorical. It was essential to impose on the State the obligation to prohibit the dumping of radio-active elements and waste in the sea. Further, the change introduced in paragraph 3 would delete from the International Law Commission's text the reference to experiments or activities with radio-active materials. That deletion was necessary if it were really desired that the sea and the air space above it should cease to be a source of destruction of living resources and of the spreading of terrible diseases.

26. Other amendments to article 48 could be made to concord with that of Czechoslovakia : for instance, the amendment of Uruguay (A/CONF.13/C.2/L.79), which related to paragraph 1, and that of France (A/CONF. 13/C.2/L.6), which was merely one of form.

27. Some attention should be given to the consideration of the United States and United Kingdom proposals (A/CONF.13/C.2/L.96/Rev.1, L.106, L.107). The delegations of those two countries proposed to replace the explicit clauses of the International Law Commission's draft by resolutions couched in vague terms. In the case of paragraphs 2 and 3, they were submitting a joint draft, whereas in the case of paragraph 1, they were proposing different texts. Those draft resolutions served an entirely different purpose from that of the International Law Commission's text, and, to an even greater extent, from that of the Czechoslovak amendment. They were not aimed at preventing the dumping of radio-active materials, nor at avoiding pollution of the sea ; on the contrary, they would recognize the right to dump radio-active materials in the sea and to pollute it. That appeared to be the only possible interpertation of the joint resolution of the United Kingdom and the United States (A/CONF.13/C.2/L.107), which openly envisaged the adoption or regulations, standards and measures governing the dumping of radio-active materials in the sea. The United States resolution (A/CONF.13/ C.2/L.106), which merely vaguely advocated the establishment of " national programmes " designed to minimize the possibility of pollution of the sea, must be placed in the same category.

28. Those draft resolutions could in no way promote the interests of international shipping ; his delegation would therefore vote against their adoption.

29. Sir Alec RANDALL (United Kingdom) adhered to the view that his delegation's proposals afforded the best way of dealing with the problem. He was, needless to say, in favour of the principles on which paragraph 1 of the Commission's article was based, since the United Kingdom was playing a leading part in the action being taken to prevent pollution of the sea with oil. If, however, the majority of States were opposed to the United Kingdom proposal for paragraph 1 (A/CONF.13/C.2/L.96/Rev.1), his delegation would consider withdrawing it and voting for paragraph 1 of the Commission's text.

30. Referring to the United Kingdom and United States joint proposal (A/CONF.13/C.2/L.107), he observed that his country already had much experience of discharging or releasing radio-active materials in the sea. For many countries it would be quite impractical to prohibit, as the Czechoslovak delegation had proposed, the disposal of radio-active waste in the sea, since they could dispose of it nowhere else. He was convinced of the need for international consultation as to the best means of disposing of such waste, and he was equally convinced that such consultation could best be arranged by IAEA. The statements just made by representatives who had attended the most recent meeting of the Board of Governors of IAEA had strengthened him in that conviction.

31. Mr. BIERZANEK (Poland) did not propose to repeat what he had said regarding article 48 during the general debate (6th meeting). The Committee had already decided to devote one-third of the text it was adopting to the subject of piracy, which for a long time had not been a real problem, and not to include in the draft articles a provision which would help to solve the important problem of nuclear tests on the high seas ; if it also failed to include in the draft articles any provisions relating to the presing problems of pollution of the sea by oil and by the disposal of radio-active waste, the results of its work would not be of historical interest. It was true that those problems were both difficult and delicate, but that was no reason why action on them should be postponed indefinitely. He would point out that more countries were represented at the current conference than at meetings of the bodies to which the United States and United Kingdom delegations were urging the Committee to refer the problems.

32. Mr. PUSHKIN (Ukrainian Soviet Socialist Republic) said that the problem to which paragraph 3 of article 48 related — namely, the problem caused by the testing of nuclear weapon on the high seas — would be completely solved only if all such tests were prohibited. Those tests constituted a dreadful menace to mankind. The International Law Commission, which had recognized, in principle, the need to put an end to such tests, had, by recommending that all States should co-operate in drawing up regulations to prevent pollution of the seas or the air space above as a result of experiments or activities with radio-active materials, gone a little way towards meeting the demand of the public throughout the world that such tests should cease ; but it had not gone as far as it should have done. The Committee should include in article 48 a clause prohibiting such tests. If it failed to do so, the freedom which should exist on the high seas would be incomplete. The inclusion of such a clause was a prerequisite for ensuring that IAEA and other technical organizations would do the work required of them where that problem was concerned. He would vote against the United Kingdom and United States joint proposal, since its adoption would nullify what was useful in paragraph 3. He would vote for the part of the Czechoslovak proposal relating to paragraph 3.

33. He agreed with what the French representative had said about paragraph 3 of the commentary on article 48, which expressed the Commission's view that the problem caused by the dumping of radio-active waste in the sea should be put on the same footing as pollution of the sea by oil. The former problem was much more serious, since the dumping of radio-active waste seriously affected the living resources of the sea and any human beings who consumed the resources of the sea so affected. There should be no dumping of radio-active waste in the sea. Paragraph 2 of article 48 was not sufficiently explicit. It might be held to mean that such dumping would be permissible provided safety measures were taken ; but such measures could not in themselves prevent pollution of the sea by waste. He would therefore vote for the part of the Czechoslovak proposal relating to that paragraph.

The meeting rose at 5.15 p.m.

THIRTIETH MEETING

Friday, 11 April 1958, at 10.20 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)*

ADDITIONAL ARTICLE PROPOSED BY DENMARK (A/CONF.13/C.2/L.100)

1. Mr. RIEMANN (Denmark) said that the text of his proposal could be found in the comments by the Danish Government on the International Law Commission's draft article 66 (A/CONF.13/5, section 6) ; the matter had also been raised by the Danish delegation in the Sixth Committee of the General Assembly at its eleventh session,[1] and had received favourable comment from Mr. François, the Special Rapporteur of the International Law Commission.[2] He was submitting the proposal to the Second Committee rather than to the First, because it was not connected with the territorial sea or the contiguous zone. Its purpose was to safeguard unhampered passage on the high seas.

2. The waters around the Danish coast were comparatively shallow, containing many shoals and reefs which

[1] See *Official Reports of the General Assembly, Eleventh Session, Sixth Committee*, 496th meeting, para. 50.

[2] *Ibid.*, 500th meeting, para. 38.

constituted a danger to navigation. The Danish Government, partly by virtue of long-established practice and partly in pursuance of article II of the Treaty for the Redemption of the Sound Dues of 14 March 1857, had assumed responsibility for marking the fairways in those waters by light vessels, buoys, beacons, etc. In order to meet that responsibility, the Danish authorities had to be in a position to ensure that the relevant regulations could be enforced against anyone navigating those waters. Those regulations included the prohibition of jettisoning rubbish and destroying or damaging established markings ; other rules concerned the placing of pound net stakes where they might constitute a danger to navigation, and the removal and salvaging of wrecks ; in the latter case, rules were needed in order to ensure that salvage contractors paid due attention to the safety of navigation and provided the necessary depth of water over any remaining wreckage. Experience had shown the need for supervision and regulation of salvaging of wrecks by foreign contractors in those parts of the high seas where Denmark had assumed responsibility for buoying the fairways. Under the general rules of international law, such relations could be enforced against Danish nationals even outside the Danish territorial sea, but the efficiency of the regulations would be materially impaired if objections were raised to their enforcement against foreign nationals.

3. He did not think that the problem should be solved by an extension of the sovereign rights of the coastal State which, in many cases, would go far beyond the territorial sea and the contiguous zone. The Danish proposal was merely aimed at granting a very limited authority to States which had assumed the responsibility for marking fairways in the high seas for the sole purpose of enabling those States to carry out their responsibilities efficiently in the interests of all seafarers.

4. Mr. GIDEL (France), while fully appreciating the practice usefulness of the Danish proposal and the juridical considerations underlying it, remarked that it concerned a very special case and would require thorough consideration ; any immediate decision would perforce be in the nature of an improvization.

5. Mr. KEÏLIN (Union of Soviet Socialist Republics) agreed with the representative of France. The International Law Commission had been right to omit the point raised in the Danish proposal from its draft ; there was no need to include the question in the document which the Conference was preparing. Furthermore, if it was considered at all, the matter fell within the competence of the First Committee, since it dealt with circumstances directly connected with the territorial sea although, on occasion, going beyond it.

6. Mr. GLASER (Romania) remarked that, in effect, the Danish proposal sought to establish a contiguous zone for certain specialized purposes. Accordingly, it was not within the competence of the Second Committee, but of the First Committee. Before the Committee proceeded to discuss it, the question of competence should be decided by a vote.

7. Mr. COLCLOUGH (United States) proposed that, in order to give delegations sufficient time to study the Danish proposal, consideration of it should be deferred until the Committee had completed its discussions on the articles referred to it.

It was so decided.

Articles 38 to 45 (Piracy) (A/CONF.13/C.2/L.19) (concluded)

8. Mr. KNACKSTEDT (Federal Republic of Germany) stated that, during the voting on article 40 at the preceding meeting, he had voted against the Yugoslav proposal (A/CONF.13/C.2/L.19) for three reasons. First, it was impossible, in practice, to determine from a distance whether or not the crew of a ship had mutinied ; and under international law a warship could not be stopped in order to verify the situation. Secondly, a warship was generally armed. An attempt to stop it in the case of a suspected mutiny might lead to very serious consequences, particularly if the suspicion was unfounded. Finally, in peace time, the crew of a warship was extremely unlikely to munity for the purpose of engaging in piracy ; the risk of such a situation was disproportionately small compared with that of armed conflict resulting from an attempt to interfere with the passage of a warship.

Articles 61 to 65 (Submarine cables and pipelines) (A/CONF.13/C.2/L.58, L.83, L.97/Rev.1, L.101, L.102, L.108 to L.112)

9. Mr. VAN PANHUYS (Netherlands) introduced his proposal (A/CONF.13/C.2/L.97/Rev.1) to insert in article 62, between the words " the breaking or injury " and the words " of a submarine cable ", the phrase " by a ship flying its flag or by a person subject to its jurisdiction ". He remarked that article 62 raised questions of international penal law. It was clearly not the intention of the article to enable any State to take legislative measures against nationals of another State causing injury to a submarine cable. The International Law Commission's commentary spoke of legislative measures taken by States to ensure that their nationals complied with the regulations. In his view, based on article 8 of the Convention of 14 March 1884, the scope of the article should be extended to include ships flying the flag of the State concerned. Furthermore, the phrase " person subject to its jurisdiction " was preferable to the term " national ", because it made it clear that the matter was governed by the general principles of penal jurisdiction.

10. Mr. COLCLOUGH (United States) said that his proposal on article 61 (A/CONF.13/C.2/L.108), which was similar to the Italian proposal (A/CONF.13/C.2/L.102), was intended merely to bring the text of the article more closely into conformity with those of articles 27 and 70.

11. Articles 62 to 65, which the United States delegation sought to delete (A/CONF.13/C.2/L.109, L.110, L.111, L.112), differed from article 61 in that they reproduced some of the implementing provisions of the 1884 Convention rather than its basic principle. That principle, embodied in paragraph 1 of article 61, had,

unquestionably, to be restricted to a certain extent by reason of intervening technological developments. The United States delegation would support such a restriction, but only in so far as it was necessary. Paragraph 2 of article 61 was entirely adequate in that respect; moreover, it corresponded to the text of article 70 adopted by the Fourth Committee.

12. Articles 62 to 65, on the other hand, were not necessary or even desirable. The inclusion of some, but not all, of the technical implementing provisions of the 1884 Convention might be interpreted to mean that its other provisions had been rejected. Yet, to include all the provisions of the Convention would be tantamount to re-enacting it, which was hardly necessary.

13. Article 64, in particular, was fraught with danger. The London Conference of 1913 had adopted a resolution for the guidance of the trawling industry without suggesting that States should set up compulsory standards of trawling equipment. If any regulation to that effect was needed at all — which was doubtful — the standard adopted should be a uniform one decided upon by a specialized technical conference. States should not be required to set up standards which were likely to vary widely, causing confusion and friction.

14. Commenting on the Venezuelan proposal (A/CONF.13/C.2/L.58), he pointed out that the Commission's text of article 61, paragraph 2, which provided for " reasonable measures ", was broader and more flexible than the Venezuelan proposal which would limit those measures exclusively to the routing of cables of pipelines. In some circumstances, the use of buoys and marking of cables might be a more reasonable measure than the control of routing.

15. Mr. GLASER (Romania) was not convinced by the arguments advanced by the United States representative in favour of the deletion of articles 62 to 65. Similar proposals for the deletion of articles 34, 35 and 36 had failed to receive the Committee's support. It was casuistry to suggest that the fact that certain provisions of the 1884 Convention were not reproduced in the articles implied their repudiation. The International Law Commission had extracted certain main principles from the Convention in order to re-affirm them, and not in order to diminish the force of those it did not reproduce. The 1884 Convention had been signed by only thirty-five States, whereas the present conference was attended by eighty-seven States. The States which had not signed the Convention could not be asked to endorse it in its entirety, but only to accept its most general and fundamental principles. For those reasons, the Romanian delegation would vote against the United States proposals (A/CONF.13/C.2/L.109, L.110, L.111, L.112).

16. Mr. GIDEL (France) suggested that, in paragraph 1 of article 61, it might be more appropriate to speak of telecommunication cables instead of telephone and telegraph cables, and of power cables instead of high-voltage power cables, since it was impossible to foresee what voltage would be used for power transmission in the future. He also drew attention to article 70, which referred only to submarine cables and not to pipelines; pipelines were only mentioned in a very tentative manner in paragraph 2 of the International Law Commission's commentary on that article.

17. Mr. VRTACNIK (Yugoslavia) opposed the deletion of articles 61 to 65 proposed by the United States representative. International law could only be enforced if domestic legislations contained adequate provisions for the punishment of its violators. That was the object of the articles in question.

18. Mr. VITELLI (Italy) said that with respect to articles 61 and 62, his delegation's proposal (A/CONF. 13/C.2/L.102) sought to replace a specific enumeration of different types of submarine cables by a more general wording, thus allowing for possible technical developments in the future. The proposal relating to article 63 was motivated by the consideration that the regular functioning of a telegraph or telephone cable might be impaired if another high-tension cable was placed in its proximity without actually breaking or injuring it. The purpose of the proposal regarding article 64 was to facilitate the implementation of the article by reducing the danger of fouling to a minimum.

19. Sir Alec RANDALL (United Kingdom) did not agree with the United States representative that the adoption of some of the provisions of the 1884 Convention would detract from the validity of its other provisions. However, in order to obviate any such risk, he would submit to the Committee a proposal (A/CONF. 13/C.2/L.120) for a new article to be inserted after article 65, worded as follows:

" The foregoing articles 61 to 65 shall not affect the provisions of the existing relevant conventions in the relations of the parties to them."

20. Mr. RIEMANN (Denmark) introduced his proposals (A/CONF.13/C.2/L.101) relating to articles 61 and 63. The purpose of that part of the proposal which related to article 61 was self-evident; that relating to article 63 was intended to make it clear that persons causing a break or injury to a cable or pipeline should be liable to pay for its repair only, and not for any loss of profits incurred as a result. Moreover, the liability mentioned in article 63 would operate only in cases of fault and negligence and not in the case of accidents; that interpretation was borne out by article 4 of the 1884 Convention.

21. Mr. KEÏLIN (Union of Soviet Socialist Republics) considered that articles 61 to 65 should be adopted as they stood in the International Law Commission's draft. His delegation could not agree with the proposal to delete articles 62 to 65, for which there seemed to be no justification. The purpose of those articles was to ensure that each State would take the necessary legislative measures to protect submarine cables and pipelines against damage and to provide for the payment of compensation for loss and for the cost of repairs. In the opinion of his delegation, satisfactory provision was made in articles 62 to 65 for the protection of submarine cables, and the articles were similar to the principal measures contained in the 1884 Convention.

22. Mr. ROJAS (Venezuela) said that the amendment to article 61 proposed by his delegation (A/CONF.13/C.2/L.58) derived from the commentary to article 70 in the International Law Commission's draft, which stated that the coastal State might impose conditions

concerning the route to be followed by submarine cables. It was clear that the coastal State and other States which laid cables or pipelines had a great interest in seeing that they were laid in such a manner that they did not affect the performance of those already installed or the exploration and exploitation of the continental shelf. High-voltage power cables and pipelines, if injured or broken, caused extensive damage to the living resources of the sea over a wide area, and their laying should thus be carefully regulated.

23. The Venezuelan amendment recognized that States wishing to install new cables or pipelines must respect the routing of those which had already been installed. In addition, the amendment recognized the coastal State's obligation not to impede the laying or maintenance of cables and pipelines on the continental shelf. Articles 62 to 65 of the International Law Commission's draft obliged the coastal State to legislate on such matters as the breaking and injury of submarine cables, their repair, the construction and use of fishing gear and compensation for loss of such gear. It was, therefore, entitled to be consulted on the proposed route of all submarine cables and pipelines. That, he stressed, was a provision which went no further than what had been stated by the International Law Commission itself in paragraph 1 of its commentary to article 70.

24. Mr. HEKMAT (Iran) agreed with the arguments advanced against the proposed United States amendments to articles 62 to 65. The International Law Commission, in whose proceedings he had taken part, had not forgotten the existence of the 1884 Convention when it drew up articles 62 to 65. It had nevertheless felt that the provisions embodied in those articles were more in line with twentieth-century conditions. The group of Afro-Asian States now numbered more than thirty, whereas in 1884 there had not been more than five or six independent States in that part of the world. In the days of the 1884 Convention, international law had been largely a matter of concern to western countries. It was important that it should now be applicable and accepted on a world-wide basis. His delegation would, therefore, vote for the International Law Commission's draft of articles 62 to 65 as they stood.

25. Mr. COLCLOUGH (United States of America) said that, as there seemed to be general agreement that the provisions of the 1884 Convention would not be regarded as repealed by the International Law Commission's draft articles 62 to 65, and in view of the new proposal of which the United Kingdom delegation had given notice, he was prepared to withdraw his delegation's amendments to articles 62, 63 and 65.

26. The provisions of the draft article 64, however, did not come under the 1884 Convention, but under resolution I of the 1913 London Conference. He felt it to be essential that a uniform standard be adopted for trawling equipment and thus wished to make it clear that he did not withdraw the United States amendment to article 64 (A/CONF.13/C.2/L.111).

The meeting rose at 11.35 a.m.

THIRTY-FIRST MEETING

Friday, 11 April 1958, at 8.35 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 46 (RIGHT OF VISIT) (A/CONF.13/C.2/L.69, A/CONF.13/C.2/L.117) (concluded) [1]

1. The CHAIRMAN put to the vote the amendments to article 46.

The proposal of the United Arab Republic (A/CONF. 13/C.2/L.69) to delete sub-paragraph (b) of paragraph 1 was rejected by 22 votes to 16, with 11 abstentions.

The Bulgarian proposal (A/CONF.13/C.2/L.117) was rejected by 36 votes to 11, with 4 abstentions.

2. The CHAIRMAN, in reply to Mr. Grant (United Kingdom), suggested that any redrafting of article 46 necessary as a result of the amendment to article 45, adopted at the 29th meeting, could be left to the drafting committee.

The text of article 46 as submitted by the International Law Commission was adopted by 39 votes to 4, with 9 abstentions.

ARTICLE 47 (RIGHT OF HOT PURSUIT) (A/CONF.13/C. 2/L.4, L.20/Rev.1 and L.61/Rev.1, L.35, L.53, L.89, L.94, L.95, L.96/Rev.1, L.98, L.99, L.105, L.115, L.116) (concluded) [1]

3. The CHAIRMAN made the following suggestions for the organization of voting on the proposals relating to article 47. The only logical arrangement appeared to be to break up the proposals into two or more parts according to the separate amendments contained therein, and to group together the amendments to the same paragraph of the International Law Commission's draft. The Netherlands proposal (A/CONF.13/C.2/L.98) — being of a different nature from the other proposals — would, however, be put to the vote as a whole.

4. Mr. KNACKSTEDT (Federal Republic of Germany) proposed that the vote on article 47 be postponed until the First Committee had agreed upon the text of article 66, since it was necessary to know the extent of the contiguous zone and the rights which the coastal State would exercise within it. There would be no reason for a right of hot pursuit in the contiguous zone if the First Committee adopted article 66 of the International Law Commission's draft.

5. The CHAIRMAN said that this point should have been submitted during debate ; nevertheless, he would put it to the vote.

The German proposal to postpone the voting on article 47 was rejected by 25 votes to 5, with 14 abstentions.

[1] Resumed from the 28th meeting.