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**Proposal by Mr. Edmonds (Regarding article 21) - incorporated in the summary record of the
289th meeting, para. 15**

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

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

11. With regard to the right of approach, Charles Rousseau in his *Droit international public* stated:

... En haute mer, le navire ne relève que de l'Etat auquel il ressortit. Un Etat ne peut même pas saisir un criminel en haute mer sur un navire qui ne porte pas son pavillon. L'Amirauté britannique revendiquait autrefois le droit d'arrêter à bord des navires étrangers les sujets réfractaires au service de la marine royale. Employé aux XVII^e et XVIII^e siècles, ce procédé, connu sous le nom de "presse" des matelots, donna lieu à de vives protestations de la part des Etats tiers; il fut la cause de la guerre de 1812 entre l'Angleterre et les Etats-Unis. En haute mer le navire de commerce reste soumis à ses autorités nationales, c'est-à-dire à la police des navires de guerre de sa nationalité, qui peuvent exercer à son égard un droit de visite et de perquisition (visit and search). Mais tout navire de guerre a le droit de vérifier le pavillon (right of approach) d'un navire de commerce quelconque qui lui paraît suspect. Cette mesure a pour but de constater la nationalité du navire et son droit au pavillon qu'il arbore (enquête sur le pavillon); ordre est donné au navire de s'arrêter par porte-voix, signaux optiques ou radioélectriques, ordre qui sera éventuellement appuyé par un coup de canon de semonce et, si le navire refuse de stopper, par un coup de canon dans les avants; si le navire obéit, le bâtiment de guerre vérifie ses papiers de bord pour connaître sa nationalité.⁵

12. Knowing the energy and conviction with which Mr. Scelle defended the freedom of the high seas, he had given the most serious consideration to his proposal, and was convinced that students of international law would wonder why the Commission had omitted any general provision about the policing of the high seas, and why it had confined itself solely to special measures connected with the suppression of piracy and slavery.

13. Mr. FRANÇOIS (Special Rapporteur) wished to make clear that he had said only that none of the authors whom he had consulted since the previous meeting shared Mr. Scelle's opinion. Mr. Sandström's perusal of Oppenheim had led him to the opposite conclusion to that reached by Mr. Amado. He (the Special Rapporteur) had based his views on the passage from Oppenheim's *International Law* quoted in his second report (A/CN.4/42),⁶ from which it was clear that Oppenheim only recognized the right to verify the flag when piracy was suspected. He must reiterate that he could not admit that there was any general rule of international law of the kind claimed by Mr. Scelle.

14. Mr. KRYLOV said that the time had come for the Commission to take a decision. He had studied Rousseau, but still agreed with the Special Rapporteur that at present there was no general rule in international law concerning the policing of the high seas in general. However, he would be prepared to accept the

provisions of article 21 for the two special cases of piracy and slavery.

15. Mr. EDMONDS said that most authorities, though not all, were of the same opinion as the Special Rapporteur. Oppenheim only admitted verification of the flag when there was reasonable ground for suspecting the vessel of being engaged in piracy or the slave trade. He considered that the third contingency mentioned by Mr. García Amador at the previous meeting should also be covered, and therefore proposed the addition at the end of the first sentence in article 21 of the words: "or, during times of imminent peril to the security of the State, in activities hostile to the State of the warship".

16. Mr. ZOUREK said that the arguments adduced at the present meeting proved that there was no generally recognized rule in international law concerning the policing of the high seas. Even the exponents of Mr. Scelle's thesis only admitted the right of approach when there was a well-founded suspicion of piracy or slavery. The lengthy discussion had arisen partly because the Special Rapporteur had failed to draft an introductory paragraph to article 21 stipulating that merchant ships on the high seas were subject only to the jurisdiction of the flag State. The exceptions to that rule should then be stated in a second paragraph. Unless the article were formulated in that manner, difficulties of interpretation would be inevitable.

17. He was also in favour of qualifying the reference to the slave trade by re-introducing some such wording as "as in the maritime zone in which it still exists", which the Special Rapporteur had used in his second report.

18. Without such modifications article 21 might open the way to arbitrary interference.

19. Mr. EDMONDS suggested that Mr. Zourek's suggestion was already covered by article 7, which had been provisionally accepted.

20. Mr. SCELLE said that to him, though perhaps not to some of the members of the Commission, it was the value of an opinion that was important, not the number of its exponents. In consulting treatises on international law, it was essential to bear in mind the context and the circumstances in which the views had been put forward. He attached, perhaps, less importance to the opinion of lawyers than to the Commission's duty of ensuring the progressive development of international law and, consequently, the integration of the international community. The theory of state sovereignty had had its day, and even though it still retained some utility, it would eventually have to give way to an international society which was inconceivable without a *res communis* and hence an international police.

21. Any thorough examination of the textbooks would reveal that so far as the high seas were concerned a clear distinction was drawn between general and special police measures. He must again warn the Commission

⁵ *Op. cit.*, p. 419.

⁶ *Yearbook of the International Law Commission, 1951*, vol. II, p. 82.