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**Summary record of the 341st meeting**

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

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## 341st MEETING

Monday, 7 May 1956, at 3 p.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

## Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-5) (continued)

1. Before inviting the Commission to continue its consideration of item 1 of the agenda—Regime of the high seas—the CHAIRMAN welcomed Mr. Georges Scelle, saying that he was sure that he would be expressing the feelings of the whole Commission in congratulating Mr. Scelle on the speedy recovery he had made from his recent illness.

2. Mr. SCELLE thanked the Chairman for his kind words.

Article 3: Right of navigation

3. Mr. FRANÇOIS, Special Rapporteur, referring to the addendum to his report (A/CN.4/97/Add.1), said that the United Kingdom amendment to article 3 was one of drafting only, and could be supported. The Yugoslav proposal, however, was not acceptable, for an "equal" right would not exclude limitations applying to all nations.

4. Mr. ZOUREK failed to understand the Special Rapporteur's objection to the Yugoslav proposal, which seemed to have some merit.

5. Mr. SPIROPOULOS pointed out that equality of right applied to all the draft provisions; the principle was self-evident.

6. Sir Gerald FITZMAURICE agreed and said that, except where the contrary was stated, all rights were equal rights. There were no historical grounds for suggesting that some nations would have a greater right than others, and the introduction of the idea of equality in that single article would simply lead to confusion.

7. Mr. SANDSTRÖM, Mr. SCELLE and Mr. AMADO concurred.

8. Mr. ZOUREK withdrew his support of the Yugoslav proposal.

Article 3 was adopted subject to the drafting change in the English text proposed by the United Kingdom Government.

Article 4: Status of ships

Article 5: Right to a flag

9. Mr. FRANÇOIS, Special Rapporteur, referring to article 4, said that, whereas at its seventh session the Commission had been of the opinion that the question of the right of international organizations to sail vessels exclusively under their own flags called for further study, which would be undertaken in due course,<sup>1</sup> certain governments, in particular those of Israel and Yugoslavia, had since called for immediate consideration of the matter. In view of the fact that the question deserved a more thorough study than could be given to it at the present session, the Commission should re-state that same opinion.

10. The United Kingdom amendment in paragraph 32 (A/CN.4/97/Add.1) was acceptable. It was, however, linked with the same government's amendment to article 5.

11. He failed to see the force of the Yugoslav proposal in paragraph 34. For instance, it seemed entirely to ignore treaties concluded prior to the setting up of the United Nations. The proposal should not be accepted.

12. Mr. EDMONDS pointed out that in the second paragraph of the comment on article 4 (A/2934), it was stated that the term "jurisdiction" was used in the same sense as in article 2. The substitution of "sovereignty" for "jurisdiction" in article 2, however, would require either a similar amendment to article 4 or the deletion of the second paragraph of the comment thereto.

13. Mr. LIANG, Secretary to the Commission, said that the Secretariat had compiled a volume<sup>2</sup> dealing with the various national laws concerning the nationality of ships, copies of which had already been distributed to members of the Commission.

14. On the question of the right of international organizations to sail vessels under their own flags, the Secretariat had prepared a paper for the assistance of the Special Rapporteur. If the Commission decided to reopen the question, it should do so during the present session.

15. With regard to the point raised by Mr. Edmonds, in that context, "jurisdiction" was the only suitable word.

16. Mr. SANDSTRÖM agreed with the Secretary's last point. What was meant was obviously legislative and judicial jurisdiction.

17. It would be advisable to take articles 4 and 5 together. If the question of international organizations were discussed, the comment by the Government of Israel should be carefully considered. In that connexion,

<sup>1</sup> A/2934, p. 4, comment on article 4.

<sup>2</sup> United Nations *Legislative Series*, ST/LEG/SER.B/5.

the protection aspect would be of major importance, and he recalled that, during the Second World War, the International Committee of the Red Cross had chartered ships to carry medical supplies for prisoners of war which, while sailing under the flag of the State that owned the ship, also prominently displayed the sign of the Red Cross. That was the right method to follow.

18. Mr. ZOUREK said that the question should certainly be dealt with at the present session; an unfortunate impression would be created if draft articles covering the whole of the regime of the sea did not suggest any solution for a problem which the Commission had held over from its last session for further study.

19. The CHAIRMAN said that further discussion of the question could await the submission of a text by the Special Rapporteur.

20. The Yugoslav proposal in paragraph 34 obviously commanded no support, but the Commission would have to take a decision on the United Kingdom draft text proposed in paragraph 32. It was clear that articles 4 and 5 could most conveniently be taken together.

21. Mr. FRANÇOIS, Special Rapporteur, suggested that, in view of the large number of amendments submitted by governments to article 5, it might be convenient to dispose first of the Belgian proposal in paragraph 38, which he would support.

22. Mr. KRYLOV said that there were so many amendments that it would be advisable to take first those dealing with questions of principle, submitted by the Netherlands and United Kingdom Governments and reproduced in paragraphs 50 and 54 respectively. A decision on those might well lead to the elimination of several of the other proposals. His own view was that the article had been well drafted, although perhaps with an excessive concern for detail. He found the Netherlands proposals decidedly attractive.

23. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Krylov's proposal. If, for instance, the Netherlands amendment were accepted, the other proposals dealing with points of detail would be automatically eliminated. He had proposed taking the Belgian amendment in paragraph 38 first, because a decision on it would not necessarily affect any other part of the article. He was perfectly willing, however, to examine the question of principle first, and in that connexion he recalled the difficulties the Commission had encountered in formulating the conditions for recognition of the national character of a ship by other States. The Commission had not been entirely satisfied with the text drafted, which had been based on the rules of the Institute of International Law adopted over fifty years previously. It would be convenient, without going into specific details, to examine the connexion between the State and the ship as put forward in the Netherlands proposal.

24. Mr. SANDSTRÖM said that the Special Rapporteur's recollection of the Commission's lack of enthusiasm for the draft of article 5 was correct; the article amounted to little more than a stop-gap. The United Kingdom proposals showed that both articles had the defect of being too narrowly conceived and at

the same time too vaguely expressed. He would support the United Kingdom amendment to article 4; as to article 5, both the United Kingdom and Netherlands proposals had much to commend them.

25. Mr. SALAMANCA said that the Commission would be wise to confine itself to consideration of the general principle that should apply. Behind the stress on the necessity for "genuine connexion between the State and the ship" was probably the fear of competition from States with very liberal registration laws. Introduction of detailed conditions might have some effect on the freedom of the high seas. Such details should therefore be avoided.

26. Mr. SCELLE said that, at its seventh session, the Commission had been far too ambitious in attempting to draft a text embracing the commercial legislation of all States. Although he had not yet had an opportunity to study the documents, his first impression of the United Kingdom and Netherlands proposals was favourable. For the moment the Commission should confine itself to an attempt at a simplification of the text, based on either the United Kingdom or the Netherlands amendments.

27. Mr. SPIROPOULOS said that the issues raised by the article were highly complex and defied codification. The Commission would be wise to confine itself to the formulation of general principles as set forth in the United Kingdom and Netherlands proposals, either of which or a combination of both could be selected.

28. Mr. ZOUREK, endorsing Mr. Spiropoulos' view, recalled his criticisms of the draft text at the seventh session,<sup>3</sup> in particular with regard to legal entities other than States. The existing text settled nothing and whereas in 1955 the Commission might have claimed that it had insufficient materials from which to draft a satisfactory formulation, the replies received from governments in 1956 had entirely changed the situation. The very wide divergencies in national practice and the variety of criteria for the registration of ships provided a powerful argument for substituting general principles for detailed provisions.

29. Article 4 had the great merit of stating categorically the principle that the nationality of a ship was determined by its port of registry. That was an important principle which should be retained.

30. On the whole, he preferred the Netherlands proposal for article 5 to the United Kingdom proposal, which was based on quite a different concept.

31. Sir Gerald FITZMAURICE said that the Commission should decide whether it wanted a detailed text or a general formula. If the latter, he would propose that the question be referred to a small sub-committee, which, on the basis of the United Kingdom and the Netherlands or any other proposals, could prepare a text for subsequent consideration by the Commission.

32. While there was nothing in the Netherlands proposal to provoke positive disagreement, it suffered, perhaps, from a tendency to the extreme of generality. The

<sup>3</sup> A/CN.4/SR.294, paras. 3 and 23.

United Kingdom proposal was an attempt, while eliminating controversial detail, to give some content to the idea of a substantial connexion between the State and the ship flying its flag.

33. In 1955, he would have accepted Mr. Zourek's point. After mature reflection however, he doubted whether the principle of registration by States was correct. Some ships—the outstanding example being warships—were not registered at all, and in many countries fishing craft and vessels below a certain tonnage were also exempt. The principle, therefore, was not of general application. There was considerable variation, also, in the conditions themselves; a ship might, for instance, be registered in more than one country although, of course, it would not have the right to fly more than one flag.

34. Mr. SALAMANCA said that article 5 had both a general and a specific aspect. If the Commission were to confine itself to general principles it could not at the same time, except superficially and in an unsatisfactory manner, make concrete and detailed provisions. The document prepared by the Secretariat had made it clear that the Commission could not undertake codification of such matters; moreover its report must be an integrated whole.

35. He would support the proposal to set up a sub-committee.

36. The CHAIRMAN, referring to article 5, said that the Commission should first decide whether it wished to formulate a general principle or detailed provisions.

37. Mr. AMADO said that the problem was complicated by its various aspects: that of registration, which was the Netherlands approach; that of the flag, which the United Kingdom preferred; and that of the general principle of the connexion between the State and the ship, which was stressed in the Netherlands proposal and clarified by the second sentence of the United Kingdom proposal. Those aspects should be considered in that order. The choice between what he would call the flag and the registration aspects was admittedly a complicated and difficult matter.

38. Mr. SPIROPOULOS suggested that a decision on the points raised by Mr. Amado should be deferred, and that a small sub-committee should be set up which, in the light of the discussion, could draft a suitable text for submission to the Commission.

39. Mr. AMADO concurred.

40. Mr. SCELLE supported Sir Gerald Fitzmaurice's proposal that the Commission should first decide on the method it was to follow. He himself preferred the formulation of a general principle to the enumeration of detailed provisions.

41. Faris Bey el-KHOURI said that any attempt to re-draft article 5 following the approach adopted at the previous session could lead only to confusion.

*It was unanimously decided that article 5 should be re-drafted on the basis of formulation of a general principle.*

*It was further decided to set up a sub-committee consisting of Mr. François, Special Rapporteur, Sir Gerald*

Fitzmaurice, Mr. Krylov, Mr. Salamanca, Mr. Scelle and Mr. Zourek, to prepare a text of article 5 in accordance with the foregoing decision, and to review the text of article 4.

*Article 6: Ships sailing under two flags*

42. Mr. FRANÇOIS, Special Rapporteur, said that both the Israeli and Yugoslav Governments considered that the question of change of flag should be dealt with, but although, at the previous session, there had been general agreement on the importance of the question, the Commission had decided not to deal with it, because of the many difficulties involved. He recommended that that decision be adhered to, particularly as the Commission would be hard pressed to conclude discussion of all the existing articles by the end of the session.

43. He found the two drafting amendments, proposed by the Netherlands and United Kingdom Governments respectively, acceptable.

44. The Yugoslav Government had proposed the addition of a new paragraph reading, "Ships sailing without a flag or under a false flag may also be assimilated by other States to ships without a nationality".

45. Mr. ZOUREK wondered whether the draft would not be incomplete without a provision concerning change of flag, since it was generally felt that dual nationality was most undesirable. Perhaps, as time was short, a general statement of principle might suffice.

46. Mr. KRYLOV considered that the wording of article 6 was not particularly felicitous and should be revised; it should refer to registration and not to the flying of flags.

47. Sir Gerald FITZMAURICE said that the Special Rapporteur was wise in suggesting that the Commission should not go back on its previous decision to leave aside the question of change of flag, which had been debated at considerable length at the previous session.<sup>4</sup> The Commission had concluded that, owing to the differences in national legislation and the time-limits laid down for registration to take effect, it would be impossible to ensure that loss of nationality coincided exactly with the moment at which the new nationality was acquired. That difficulty could not be overcome unless all States were prepared to adopt uniform and rigid legislation on the subject.

48. The Yugoslav Government, concerned at the policy followed by certain countries which were loth to release ships from registration, had proposed an elaborate system whereby a State would be given three months to remove from its register a ship whose owner wished to change its nationality and if that were not done the ship would then be deemed to be free to acquire a new nationality. Again, such a system would only be operable with the consent of all concerned.

49. He personally believed that the Commission could not go farther than to provide, as was done in article 6, that a ship was entitled to fly one flag only.

<sup>4</sup> A/CN.4/SR.293, paras. 71-103; A/CN.4/SR.294, paras. 52-77.

50. Mr. PAL pointed out that it would appear from the last sentence of the United Kingdom Government proposal for article 5 that a ship could fly two flags. He wondered how that position could be reconciled with article 6.

51. Sir Gerald FITZMAURICE explained that that was not the intention of the United Kingdom Government's proposal, the purpose of which was to cover cases where it was not unlawful for nationals of one country owning a vessel to fly the flag of another. However, once they had elected to do so, they were no longer entitled to fly the flag of their own country on that vessel.

52. Mr. ZOUREK said that he had learned that it was the practice of some States to allow ships to fly two flags by way of exception, when chartered by a foreign company; perhaps that contingency should be covered in article 6.

53. Mr. SPIROPOULOS wondered whether article 6 was strictly necessary, particularly as the proposed penalty was inadequate.

54. Mr. FRANÇOIS, Special Rapporteur, believed that as there was a close connexion between articles 6 and 5, the former might also be referred to the Sub-Committee once the Commission had decided the point of principle whether or not a provision on change of flag should be inserted.

55. He saw no reason for deleting article 6, and indeed no government had questioned its utility.

56. Mr. SANDSTRÖM agreed with the Special Rapporteur that it would be undesirable to omit article 6; some statement of principle on the subject of ships sailing under two flags was necessary.

57. He had some sympathy for the addition proposed by the Yugoslav Government, but would like to hear the opinion of the Special Rapporteur.

58. Mr. SPIROPOULOS said he would not oppose the retention of article 6, which should be referred to the Sub-Committee.

59. Mr. PAL also considered that the article should be referred to the Sub-Committee so that its wording might be brought into line with article 5.

60. Mr. FRANÇOIS, Special Rapporteur, in answer to Mr. Sandström, said that the Yugoslav proposal for the addition of a new paragraph raised a number of difficulties, for example, the question of how other States were to determine whether a flag was false. However, perhaps the problem was one of drafting rather than substance and could be referred to the Sub-Committee.

61. Mr. SANDSTRÖM considered that it was even more necessary to apply the severe penalty imposed in article 6 to ships flying false flags than to ships sailing under two flags.

62. Mr. SPIROPOULOS had no objection to the additional text proposed by the Yugoslav Government being referred to the Sub-Committee.

63. Sir Gerald FITZMAURICE said that although he was prepared to agree to the Yugoslav proposal

being examined by the Sub-Committee, he must point out that the question of a ship flying a false flag was already implicitly covered in article 6.

*It was agreed not to include a provision concerning change of flag, but to refer article 6 to the Sub-Committee for re-drafting, together with the Yugoslav proposal for the addition of a new paragraph.*

#### *Article 7: Immunity of warships*

64. Mr. FRANÇOIS, Special Rapporteur, reminded members that at its previous session the Commission had based its definition of warships on articles 3 and 4 of the Hague Convention of 1907 concerning the Conversion of Merchant Ships into Warships. The Netherlands and Yugoslav Governments had pointed out that the definition was not quite complete and the former had proposed a text for paragraph 2 which would bring it more closely into line with the Convention. That wording, which he found acceptable, would probably also satisfy the Yugoslav Government.

65. Mr. SPIROPOULOS, while understanding the reasons for attempting to provide a definition, was not altogether happy about the text adopted at the previous session. For example, it was not clear whether, if one of the conditions were not fulfilled, the vessel would not be regarded as a warship. He doubted whether an enumeration of the characteristics of a warship, which were now commonly known, was really essential.

66. Mr. FRANÇOIS, Special Rapporteur, considered that those objections were less applicable to the proposed new text of paragraph 2 which now referred to "the external marks distinguishing warships".

67. Mr. LIANG, Secretary to the Commission, pointing out that the purpose of the Hague Convention was to prevent warships from masquerading as merchantmen in order to evade capture, questioned whether the definition it contained was appropriate to a draft essentially concerned with peace-time conditions.

68. Sir Gerald FITZMAURICE said that the Secretary had made a useful distinction between the purpose of the two texts. The definition in the Hague Convention, while satisfactory in its own context, was defective for the general purposes of a draft dealing with the regime of the high seas in times of peace. For instance, the passage reading: "The term 'warship' means a vessel under the direct authority, immediate control and responsibility of the Power the flag of which it flies" failed to differentiate between warships and other publicly owned government vessels. Perhaps the best and simplest definition was that proposed by the Commission in the first phrase of paragraph 2 of the article, reading: "The term 'warship' means a vessel belonging to the naval forces of a State."

69. In reply to Mr. SANDSTRÖM, Mr. FRANÇOIS, Special Rapporteur, explained that the external marks distinguishing warships were a flag or action pennant.

70. Mr. AMADO considered that the definition given in paragraph 2 and in the Netherlands amendment was not scientific and could not be regarded as a state-

ment of existing law. He believed the first phrase of the Netherlands text, up to the words "it flies", would suffice.

71. Mr. FRANÇOIS, Special Rapporteur, said that he could support that amendment to the Netherlands proposal.

72. Mr. SALAMANCA, after expressing agreement with Mr. Amado, said that the article should lay stress on the functions rather than the characteristics of warships.

73. Mr. SPIROPOULOS said that he was still uncertain whether ships not possessing some of the features enumerated in the definition would be thereby excluded from the official list of warships of the country concerned. Perhaps the Sub-Committee might be requested to draft a definition in the light of the present discussion.

74. Sir Gerald FITZMAURICE said that some degree of precision was essential; otherwise there was danger of the kind of abuse which the authors of the Hague Convention had sought to prevent.

75. Mr. AMADO agreed.

76. Mr. PADILLA-NERVO considered that paragraph 2, as adopted at the previous session, already contained the necessary elements, and that perhaps the only addition required was a reference to the external marks distinguishing warships.

77. Mr. SPIROPOULOS said that if the enumeration in paragraph 2 was to be retained, Mr. Padilla-Nervo's suggestion should be followed, so as to make the definition complete.

78. The CHAIRMAN, observing that there seemed to be general support for paragraph 1, proposed that the decision on paragraph 2 be deferred until the next meeting.

*It was so agreed.*

*The meeting rose at 6.10 p.m.*

## 342nd MEETING

*Tuesday, 8 May 1956, at 10 a.m.*

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*Chairman:* Mr. F. V. GARCÍA-AMADOR.

*Rapporteur:* Mr. J. P. A. FRANÇOIS.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-

KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

*Secretariat:* Mr. LIANG, Secretary to the Commission.

**Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6)**  
(continued)

*Article 7: Immunity of warships (concluded)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 7, paragraph 2 (A/2934).

2. Mr. FRANÇOIS, Special Rapporteur, said that in the light of the discussion at the previous meeting he would suggest that the words "which is under the command . . . under regular naval discipline" be replaced by the words "and bearing the external marks distinguishing warships of its nationality". He believed that that suggestion, which was according to what had been proposed by Mr. Amado at the previous meeting, would satisfy the Netherlands and Yugoslav Governments.

3. Mr. SPIROPOULOS asked in what relation that definition would stand to the definition in the Hague Convention concerning the Conversion of Merchant Ships into Warships. Perhaps it should be made clear that the Commission's definition was for times of peace.

4. Mr. ZOUREK believed it might be desirable to retain the latter part of paragraph 2 as adopted at the previous session, because it contained at least some precise criteria.

5. Mr. SANDSTRÖM said it was bad policy to alter a definition already established after exhaustive discussion, and to do so would only give rise to misunderstanding and criticism. He saw no reason why the Commission should not retain the substance of the definition in the Hague Convention by inserting in the text adopted at the previous session a reference to the external marks distinguishing warships.

6. Mr. AMADO said that he would not press his proposal.

7. Mr. PADILLA-NERVO believed that the wording suggested by the Special Rapporteur would suffice, and would be acceptable to the Netherlands and Yugoslav Governments. There was no need for the Commission to discuss the consequences of adopting such a definition, because all the aspects of the problem had been thoroughly studied at the previous session.

8. The CHAIRMAN suggested that Mr. Spiropoulos' point could be met by prefacing paragraph 2 with the words "For the purposes of this article".

9. Mr. LIANG, Secretary to the Commission, pointed out that the definition in the Hague Convention had been drafted in such a way as to facilitate visit and search in order to ascertain whether a merchantman had been genuinely converted into a warship, and the wording, at least to some extent, reflected the legal usage of that time.