United Nations Conference on the Law of the Sea

Geneva, Switzerland
24 February to 27 April 1958

Document:
A/CONF.13/C.2/SR.11-15

Summary Records of the 11th to 15th Meetings of the Second Committee

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

38. His delegation accepted the principle enunciated in article 32.

39. He was opposed to the provision in article 33 that ships owned or operated by a state and used for commercial purposes should enjoy privileges and immunity not enjoyed by other merchant vessels. The criterion for assimilating ships owned or operated by a state to the category of warship should be use or service, rather than government ownership.

40. In conclusion, he would urge that the Conference should accept freedom as the guiding principle of its deliberations — the freedom of the high seas.

The meeting rose at 5 p.m.

ELEVENTH MEETING

Monday, 17 March 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 (articles 26 to 48 and 61 to 65) (A/3159) *(continued)*

General debate (continued)

STATEMENTS BY MR. SHAHA (NEPAL), MR. MATINE-DAFTARY (IRAN), MR. ZOUREK (CZECHOSLOVAKIA), MR. LIU (CHINA) AND MR. HAMEED (PAKISTAN)

1. Mr. SHAHA (Nepal) thought that, unless there were compelling and clear reasons for alternative or new proposals, it would be advisable to accept the clauses in the valuable text which the International Law Commission had drafted with great care. He would support any amendments which would, in his opinion, promote the development of international law, since that was the purpose of the Conference.

2. It had been made clear at the United Nations General Assembly that his government was most anxious for the immediate discontinuance of nuclear tests which resulted in the pollution of the high seas and the air space above them. The International Law Commission was not to blame for not inserting in its draft a clause prohibiting such tests, since it could only include in the draft recognized rules that were susceptible of codification. In its commentary on the draft, it had urged states to come to an agreement on such tests; it could not have done more.

3. The statement in article 27 that the high seas were open to all nations, and that the freedom of the high seas included, *inter alia,* freedom of navigation, was borne out by *jus gentium* and by various treaties as well as by actual state practice. But it would have no practical effect for land-locked states unless they had free access to the high seas. His government was particularly anxious that the draft should include a rule to that effect. It could be argued that, having made arrangements for the question of free access to the sea of land-locked countries to be considered at the Conference, the General Assembly was in favour of that rule. He was grateful to the United States delegation for its recognition of that right, and to the representative of Canada in the First Committee (17th meeting) for his assurance that the Canadian Government would co-operate in efforts to ensure that land-locked countries would enjoy it and be able to trade with all nations. He greatly regretted the view expressed by some representatives in the Fifth Committee that the question was one of trade and communication, and therefore not really an issue for the Conference. True, the question was connected with the general aspect of transit, but then the question of freedom of navigation on the high seas was also connected with it in the same way. The right of access to the high seas of land-locked countries derived from the freedom of the high seas. No set of rules relating to the high seas would be complete if it did not include a clause confirming the possession by land-locked countries of that right.

4. Mr. MATINE-DAFTARY (Iran) said his delegation viewed with favour the principles which the International Law Commission had taken as a basis for drafting the articles referred to the Committee.

5. The general debate had brought out the cleavage existing between east and west, maritime and non-maritime states, large and small states, and old and new states. He deplored the bitter discussions that had occurred on purely political topics not covered by the Conference's terms of reference; they had polluted, not the sea, but the atmosphere in which the Conference was being held. He was convinced that the Conference could succeed if those attending it kept within the limits set by General Assembly resolution 1105 (XI).

6. In defining the freedom of the seas, the representatives of the maritime countries had drawn certain exaggerated conclusions — for example, the notion that the breadth of the territorial sea should never exceed three miles. It was almost true to say that in practice it was those states alone which benefited from the freedom of the high seas; in fact, they were laying claim to hegemony of the high seas. The non-maritime states, which were anxious to protect their territorial integrity and in many cases to ensure supplies of fish and other sea products for their peoples, feared that the adoption as a universal rule of the three-mile concept, which had in the past corresponded to the range of cannon now replaced by much more formidable weapons, might transform the principle of *mare liberum* into one of *mare nostrum.* It was not the fault of the non-maritime states that they did not have large fleets; the reason was that they were under-developed in every way as a result of the policy of colonialism followed by the states which benefited from the freedom of the seas. But a new era had begun; colonialism had been condemned. The under-developed states of Asia and Africa, including all those which had recently become independent, were ready to co-operate in all honesty and without bitterness with the great maritime states if they showed understanding.

7. That was why it had been laid down in Article 13 of the Charter of the United Nations that the General Assembly should encourage the progressive development of international law and its codification. That was why the Conference had been convened — to examine the law of the sea in its technical, biological, economic and political aspects as well as from the legal standpoint. To argue that a number of obsolete customs and

practices, enshrined in conventions to which most of the states of Asia and Africa were not parties, should be continued was tantamount to arguing that there should be no progressive development of international law, and that the non-maritime states should be condemned to continue to suffer from the unfair situation that had existed in the past. It would be equivalent to gainsaying the purpose for which the Conference had been convened. He appealed to all present to discard extremist and over-dogmatic opinions and to try to reach a compromise in a spirit of progressive realism.

8. Mr. ZOUREK (Czechoslovakia) said that all states possessed an equal right to enjoy the advantages of the freedom of the high seas. Consequently, the establishment of international rules for the high seas was in the interest of all. The principle of the freedom of the high seas, coupled with that of the sovereign equality of states, formed the legal basis for the right of free access to the sea of land-locked states.

9. The International Law Commission's draft articles on the régime of the high seas constituted a firm foundation on which to reach general agreement and settle controversial questions.

10. After a brief survey of the claims of a few states in previous centuries to the dominion of the seas, he pointed out that since the industrial revolution at the beginning of the nineteenth century the principle of the freedom of the seas had become and still was one of the fundamental principles of international law recognized by all states. But the existence of that principle did not mean that States could use the high seas in any way they wished. The freedom of every state in that respect was limited by the freedom of other members of the international community. Any state which used the freedom of the high seas in such a way as to exclude other states or their nationals from using the high seas would be violating that freedom, and would in consequence incur international responsibility.

11. The greatest threat to the freedom of the high seas at the present time was the testing of atomic bombs and long-range weapons. Such tests had closed large areas of the high seas to international shipping, made fishing there impossible, destroyed part of the living resources of the sea and created extensive danger of exposure to atomic radiation. In its commentary on article 27, the International Law Commission had found a solution for that problem. It pointed out that states were bound to refrain from any acts which might adversely affect the use of the high seas by national of other states. That ruling applied to nuclear weapon tests on the high seas and should accordingly be expressed in appropriate language in the actual instrument which was to deal with the régime of the high seas. To avoid misunderstanding, he should explain that there was no intention of dealing with the general question of nuclear tests, but simply of stating that nuclear weapon tests on the high seas were a violation of the principle of the freedom of the high seas. His delegation believed that the question of nuclear tests on the high seas fell within the Conference's purview, and that failure to confirm the existing law on that point would cause very grave disappointment among the peoples threatened by such tests and, indeed, sound the death-knell of the freedom of the seas.

12. Turning to the question of the flag flown by ships and their nationality, he remarked that on the high seas ships were subject only to the jurisdiction of the state whose flag they flew. In the interests of good international relations, rules should be formulated which would suppress all doubts and prevent abuses likely to cause international friction. He agreed with the statement in article 29 that there must exist a genuine link between the state and the ship; that statement should be retained and, if possible, developed. In view, however, of the wide divergencies in the laws of states, it would be difficult to agree on any exact criteria on the subject. One criterion, in his opinion, was the operation of a ship by the state or its nationals. There should be added to article 29 a provision regarding the nationality of small vessels belonging to countries with laws that denied them the right to fly a flag.

13. The rule laid down in the Barcelona Declaration of 1921 that the ships of a land-locked state must be registered in one fixed place in the territory of that state had proved in practice to be entirely satisfactory to all land-locked states, and was generally recognized in international law. It should accordingly be codified as one of the rights deriving from the fundamental right of land-locked states to free access to the sea.

14. The flag flown by a ship linked that ship to the legal system of a particular state. Hence, the right to a flag was vested in states, and only in states. There could be no question of according it to international organizations. That, however, need not prevent ships chartered for such an organization from flying its flag alongside the state flag should that be considered necessary for the performance of the duties assigned to them by the chartering organization. When they did so, the purpose of the two flags would, of course, be entirely different.

15. His delegation was in agreement with the provisions of article 33, and wished to refute some of the criticisms levelled against it. The immunity of a state and its property was a direct consequence of sovereignty. Every sovereign state must respect the sovereignty of other states, and could not arrogate to itself the right to subject to its jurisdiction foreign states and their property, with the exception of immovable property situated in its territory, if not used for the purposes of a diplomatic mission. *A fortiori,* no such claim could be entertained with regard to a ship on the high seas which was not subject to the jurisdiction of any state. That rule was confirmed by Article 2 (1) of the United Nations Charter. Every sovereign state determined for itself what its government functions should be, and of what they consisted. If a state considered that shipping came within the category of state functions, that was its own affair, and other states were obliged to respect the immunity of its ships. The critics of article 33 had failed to explain on what rule of international law they based their claim to exercise jurisdiction over a foreign state's shipping on the high seas in exceptional cases where the exercise of certain powers in respect of privately owned shipping was admitted by international law. The argument that government ships should be refused immunity because privately owned ships did not enjoy it was groundless. It would be erroneous to appraise the actions and institutions of states with a different eco-

nomic and social structure in the light of those of one's own state, or to treat the principles underlying the legislation of a particular state or group of states as a yardstick by which to judge the legal institutions of another state. Such an attitude conflicted with the duty to respect the sovereign acts of foreign states, and was a source of friction in international relations.

16. Although the experience of recent years had shown that piracy was by no means a thing of the past, the Czechoslovak delegation considered that the provisions concerning piracy in the draft articles occupied a disproportionate amount of space. Moreover, the definition of piracy in article 39 did not seem to be quite in harmony with the development of international law. For example, the omission of acts of violence and depradation committed on the high seas for other than private ends meant that acts covered by the definition and committed at the order or the initiative of a state organ, if they could not be described as acts of aggression, could not be regarded as piracy. That would be tantamount to admitting the order of a superior officer as an excuse for the commission of a crime and so would be a flagrant contradiction of the principles which had been recognized in the Charter and judgement of the Nürnberg Tribunal, and which, having been unanimously approved by General Assembly resolution 95 (I), had become an integral part of international law. Furthermore, the definition did not cover acts of piracy committed on the high seas by one aircraft against another. The definition of piracy therefore required further consideration.

17. In conclusion, taken as a whole, the articles allocated to the Second Committee raised no question for the solution of which international law did not provide the necessary grounds. There was therefore reason to hope that the International Law Commission's draft could be accepted by a large majority and could form the basis for a satisfactory international agreement.

18. Mr. LIU (China) said his delegation generally approved of the International Law Commission's draft articles, which were of great interest and concern, not only to the maritime Powers, but to all peoples whose lives were affected by the use of the sea and its resources. Moreover, the orderly use of the sea was a vital factor of the peace and welfare of all mankind. Since the broad principles underlying the articles allocated to the Second Committee were indisputable, it was to be hoped that the Conference could adopt them without much difficulty.

19. His delegation subscribed to the four freedoms set forth in article 27, but considered that the fundamental principle of the high seas, being open to all nations, should be formally declared in a separate sentence. However, article 26, paragraph 2, seemed to relate to the delimitation of the territorial sea, rather than to a definition of the high seas, and might therefore be transposed to article 4.

20. The articles relating to safety of navigation, jurisdiction in collisions and duty to render assistance were so crucially important that they should be incorporated in a general convention. He could not agree with the suggestion that those matters could best be dealt with in multilateral conventions. The fact that some of the rights and duties involved were already embodied in various instruments should facilitate, rather than hinder, their acceptance in a comprehensive convention which could, moreover, help to secure uniformity of standards by eliminating discrepancies.

21. Article 35 seemed inadequate to cover responsibility for collision on the high seas. It was an established principle that a criminal offence was deemed to have been committed within the territory of a state if the overt act constituting the offence was committed within the territory of that state or if the offence produced its effects in that territory. In a collision case which involved criminal responsibility and where the harmful act produced its effect upon a vessel of a different nationality, the offence was of the same nature as a crime producing its effect on the territory of another state. That principle was expressed in Chinese criminal and maritime law and was supported by the judgement handed down by the Permanent Court of International Justice in the *Lotus* case.[1] While it might be argued that that judgement had been carried only by the casting vote of the president of the Court, it should be borne in mind that the 1952 Brussels Convention embodying the principle adopted in article 35 had been acceded to only by a small number of states. Accordingly, article 35 should be based on the principle underlying the judgement in the *Lotus* case.

22. The Chinese delegation was in full agreement with article 36, since Chinese maritime law contained similar provisions and further rendered liable to imprisonment the master of a ship failing to render assistance in case of distress or collision.

23. Although, owing to divergent national practices, a clear definition of the " genuine link " between a state and the ship flying its flag raised difficult problems, the principle was essential in order to enable the flag state to exercise effective control over the ship and to discharge its responsibility with regard to safety and other regulations. Chinese law contained detailed provisions on the subject. It provided that no ships except those of Chinese nationality should be permitted to fly the Chinese flag. Ships of Chinese nationality were those belonging to the Chinese Government, to Chinese nationals and to companies established under Chinese law and having their head offices in China. That was a practical means of ensuring the existence of a genuine link. It was to be hoped that the Committee would formulate a more precise draft. Article 30 was closely connected to the principle of the "genuine link"; the Chinese delegation specially endorsed the statement in the commentary that in adopting the second sentence of the article the Commission intended to condemn any change of flag that could not be regarded as a *bona fide* transaction.

24. The Chinese delegation agreed with paragraph 1 (vi) of the commentary on article 39, but thought that if the acts so committed involved navigating or taking command of the ship they should be regarded as acts of piracy. A new sub-paragraph to that effect might be added to article 39, paragraph 1.

25. Article 40 related only to mutiny by the crew on

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

a government ship or aircraft. It was equally possible, however, that the passengers of such a ship or aircraft might commit acts of a piratical nature which should be assimilated to those committed by passengers on a private ship or aircraft. The text might be amended to take that possibility into account.

26. His delegation found article 48 on the pollution of the high seas acceptable in its existing form. He did not, however, regard the prohibition of nuclear tests as falling within the competence of the Conference, since pollution was only one aspect of the general problem which was a matter for political decisions in other United Nations organs. The main objective of suspending nuclear tests should be the preservation of civilization and the human race rather than merely the freedom of the high seas. The Conference should not be deflected from its main purpose, which was to draft an international instrument giving effect to laws and customs reaffirmed by centuries of experience.

27. Mr. HAMEED (Pakistan) said that his country was particularly concerned with the principle of the freedom of the high seas, because it was geographically split into two halves and the high seas alone provided the main means of communication between its eastern and western parts. His country had high aspirations for its small but growing merchant fleet and the trade that was so vital for its economic development.

28. His delegation agreed with the definition of the high seas set forth in paragraph 1 of article 26, but considered that paragraph 2 should be dealt with by the First Committee, since it related to internal waters.

29. Article 27 could usefully be supplemented by a reference to the freedom of scientific research. In that connexion, he considered that the question of nuclear tests should be settled by the United Nations organs specifically created to deal with the problem of disarmament.

30. While his delegation welcomed the reference in article 29 to the "genuine link" between the state and ships flying its flag, it considered the wording of the article too vague and could accept it as a statement of principle only.

31. Article 39, paragraph 1, should be completed by the inclusion of a stipulation that the acts in question directed against an aircraft by a privately owned ship also constituted piracy.

32. The rule in article 47, paragraph 2, whereby the right of hot pursuit ceased as soon as the ship entered the territorial sea of its own country or of a third state would enable a foreign ship violating the laws of a coastal state to evade pursuit by slipping into the territorial sea of a neighbouring coastal state. The article should contain a reference to the appropriate remedy in such cases, which would be to secure the extradition of the offender by bilateral agreement.

33. In conclusion, he would be glad to hear the views of other delegations on articles which were already the subject of international agreements — for example, articles 34, 35, 36 and 48. There was some doubt of the desirability of drawing up a new international convention on the matters dealt with in those articles.

The meeting rose at 4.45 p.m.

TWELFTH MEETING

Tuesday, 18 March 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 (articles 26 to 48 and 61 to 65) (A/3159) *(continued)*

General debate (continued)

STATEMENTS BY MR. JENKS (INTERNATIONAL LABOUR ORGANISATION), MR. MINTZ (ISRAEL), MR. CAMPOS ORTIZ (MEXICO) AND MR. OZORES (PANAMA)

1. Mr. JENKS (International Labour Organisation), speaking at the invitation of the CHAIRMAN, asked permission to refer to articles 29, 34 and 35 of the International Law Commission's draft, which bore on matters that closely concerned his organization, the ILO.

2. With regard to the reference in article 29 to a "genuine link" between the flag state and the ship, the Commission had drawn special attention to the obligation of the flag state to exercise control over such matters as safety regulations and labour conditions. The ILO had devoted considerable attention to the problem, and the Preparatory Technical Maritime Conference it had held in 1956, at which twenty-one states had been represented — mainly by government, shipowners' and seafarers' delegates — had adopted a resolution urging that the country of registration should accept the full obligations implied by registration, and should exercise effective control. Among those obligations were securing the observance of internationally accepted safety standards, establishing government-controlled agencies to supervise the signing on and signing off of seafarers, ensuring that the service conditions of crews conformed with generally accepted standards, freedom of association for seafarers, proper repatriation arrangements and satisfactory arrangements for the examination of candidates for certificates of competency and for the issue of such certificates. In brief, the resolution stipulated as a minimum consequence of the registration of vessels that the country concerned should assume direct responsibility for ensuring that each vessel registered complied with safety standards, was properly manned and was navigated by competent persons. The provisions would be further considered at the forty-first session (maritime) of the International Labour Conference, to be held at the end of April 1958. While the International Law Commission's difficulties in finding a precise definition of the "genuine link" were understandable, the ILO had been trying to define, in matters falling within its competence, the responsibilities of states in relation to vessels flying their flags, with a view to ensuring safety on the high seas and the welfare of crews, irrespective of changes in world distribution of shipping arising from various factors. It was to be hoped that if the Conference on the Law of the Sea attempted to define the genuine link more precisely those factors would be taken into account.

3. In the commentary on article 34, concerning safety at sea, the Commission referred to conventions prepared under the auspices of the ILO. His organization, while appreciating the recognition of the importance of

its work, considered the wording of the article so general that it might give rise to considerable problems. Shipowners' and seafarers' representatives in the ILO had stressed the importance of joint negotiations and recent ILO conventions specifically provided that effect might be given to their provisions by collective agreement between shipowners and seafarers. Although government regulation was desirable in many matters, the instruments concerned by no means covered the whole field of reasonable labour conditions. Moreover, the internationally accepted standards for labour conditions at sea were laid down in conventions and recommendations adopted by the International Labour Conference, which were not binding upon members of the Organisation by virtue of such adoption. Members were obliged to apply such instruments only if they had accepted them by ratification. Although they were obliged to ratify them on obtaining the consent of the competent national authority, that consent was entirely at the discretion of the said authority. Furthermore, ILO conventions did not enter into force for ratifying members until certain conditions were fulfilled, such as ratification by a certain number of countries, including members having a prescribed minimum tonnage. The International Law Commission's text might therefore be open to objection. However, attention had been drawn to as essential factor of the safety of navigation, and the Conference might place on record its appreciation of the extent to which the work of the ILO was complementary to its own, since further progress in the adoption of maritime conventions was both possible and desirable.

4. The question of jurisdiction in the event of collision, dealt with in article 35, had also been considered at the 1956 Preparatory Technical Maritime Conference. The ILO's Officers' Competency Certificates Convention, 1936, provided that the duties of master or skipper, navigating officer in charge of a watch, chief engineer or engineer officer in charge of a watch, should be exercised only by persons holding a certificate of competency to perform such duties. The resolution on the subject adopted by the Preparatory Conference confirmed the principle that the authorities of the state issuing such a certificate were alone competent to suspend or cancel it, and that a state should not exercise the right to interfere with or suspend the validity of a foreign certificate within its own jurisdiction, unless the issuing state or other states entitled to suspend or cancel under reciprocal arrangements with that state had failed to inquire into the necessity of taking action in that regard. The resolution also expressed the wish that a state having jurisdiction over an incident of navigation which considered that action should be taken with regard to the use of a certificate issued by another state should notify the issuing state, so as to enable it to take any necessary steps. Those principles might be derogated from by special reciprocal arrangements for acceptance of certificates between states or groups of states. The present wording of article 35 seemed to be more appropriate to penal than to disciplinary proceedings, and the principle in the commentary that power to withdraw or suspend certificates rested with the issuing state might be more fully reflected in the article itself. The Conference might also take formal note of the action which the ILO was taking in the matter.

5. Mr. MINTZ (Israel) observed that the principle of the freedom of the high seas was the fundamental tenet of the law of the sea as a whole. The Committee must therefore consider carefully whether article 27 adequately reflected that fact. His delegation considered that the concept was unduly restricted by being confined to the régime of the high seas. The effect of article 27, paragraph 1, if read together with articles 1 and 26, was unrealistic, since it was assumed that when a ship sailed from one port to another it crossed an invisible frontier, some miles from the shore, beyond which freedom of navigation existed. In actual fact, however, a ship passing through the territorial sea enjoyed the right of innocent passage, which was independent of the sovereignty of the coastal state and which formed an integral part of freedom of navigation. The fact that passage through the territorial sea might be subject to qualifications did not alter the basic fact that innocent passage was exercised as a right, and not on sufferance; suspension of such passage within the territorial sea could not be arbitrary, even as a state could not arbitrarily interfere with freedom of navigation on the high seas. Moreover, qualifications of the right of innocent passage did not always exist, as in the case of international straits and bays and free access to ports. In that connexion, the Netherlands delegation had rightly recalled at the 4th meeting that navigation had little meaning unless it served the needs of world trade, and extended from port to port.

6. Where navigation was concerned, the territorial sea could be regarded as a kind of buffer zone, in which the concept of territorial sovereignty and that of the freedom of the seas overlapped. Innocent passage in the territorial sea should properly be placed in that context. The problems of land-locked countries provided a further argument against confining the concept of the freedom of the seas to the régime of the high seas. It was suggested in the memorandum concerning the free access to the sea of land-locked countries (A/CONF.13/29) that the doctrine of the freedom of the seas might extend its influence into the interior of continental land masses, and particularly inland along navigable rivers. The Israel delegation conceded in principle the validity of that doctrine.

7. All those aspects of the freedom of the seas were really facets of the concept of the essential unity of a maritime voyage. Accordingly, the distinction between the régime of the territorial sea and that of the high seas seemed unduly rigid. The articles should be redrafted or regrouped so as to include both innocent passage and passage on the high seas within the framework of freedom of navigation. His delegation suggested that basic concepts and definitions might be listed as the initial articles, before they were split up into their various component parts.

8. The concept of the unity of a voyage was also important in connexion with interference by one state with the shipping of another. With reference to the commentary on article 27, he pointed out that acts adversely affecting the use of the high seas might not themselves occur on those seas. For example, if a coastal state hampered innocent passage, the right of navigation of the injured party might be prejudiced by the need to divert or cancel sailings. Again, a state which was in-

volved in a political conflict with another and imposed penal sanctions was likely also to affect adversely the use of the sea by states legitimately trading with the other state. Other articles relating to freedom of navigation and fishing should also be carefully studied to guard against encroachments of that general principle. With regard to the articles on piracy, unlawful seizure and detention of vessels fishing outside territorial waters and their prompt release should be taken into account, and the possibility for the speedy settlement of such disputes should be kept in mind. Finally, the right of hot pursuit should be confined to cases where the local laws alleged to have been infringed were in conformity with international law; otherwise, a state of anarchy would prevail in which every state would enforce its own standards.

9. The basic concept of the freedom of the seas must be completed by an international system whereby states would assume responsibility for ships under their jurisdiction. Israel was a party to the International Load Line Convention of 1930, the International Convention for the Safety of Life at Sea of 1948 and the International Regulations for Preventing Collisions at Sea of 1948, and could therefore accept article 34 in principle, although it considered that that text should be redrafted to take existing treaty provisions into account. The Secretariat's note listing existing maritime instruments (A/CONF.13/C.2/L.8) was incomplete, since it gave no information on the status of ratification of those instruments and no particulars on the method of accession to them. Moreover, a number of important instruments among the eleven Brussels conventions, such as the 1926 convention on mortgages and liens and the 1957 conventions on limitation of shipowners' liability and on the treatment of stowaways, had not been included in the note because they did not relate to the draft articles. It would be advisable for the Committee to peruse those conventions and to decide whether any of them should be referred to by the Conference. It would be inappropriate for a Conference concerned with the codification of maritime law to omit consideration of such important international instruments relating to shipping.

10. With regard to the manner in which the provisions of the various conventions should be dealt with by the Conference, it had been suggested that if the results of the Conference were to be embodied in a resolution, it might be possible to include in it provisions parallel to those of existing conventions, that reference should be made to those instruments if the Conference produced a code or separable codes, or that it should recommend states not yet parties to the conventions to accede to them. In view of the great variety and complexity of the instruments concerned, a general approach to the question seemed unwise. It might be better to examine each convention individually and then to decide on the method of work. The Committee might decide to appoint a working group to consider the scope of those instruments and their relationship to the International Law Commission's draft.

11. With regard to the question of the nationality of ships and of the "genuine link" between the ship and its country of registration, he observed that the concept of nationality as applied to a ship was a convenient simile and that under many legal systems proceedings could be brought against ships as if they were juridical personalities. In connexion with article 29, however, the Committee should consider whether national laws made the ship's nationality dependent upon the right to fly a flag or upon its registration with a state. The articles under which a ship might be regarded as stateless were contrary to the basic concept that every state had exclusive jurisdiction over ships flying its flag, and was correspondingly responsible for them and for the maintenance by them of internationally recognized standards. In that respect, the Commission's draft might be reconsidered, possibly on the basis of the German representative's suggestions at the Committee's 8th meeting.

12. It would be difficult and hazardous for the Conference to reach a practical solution of the problem raised by the concept of the "genuine link" without studying the economic and social factors involved, which were not sufficiently documented. Maritime states that subjected their merchant marines to normal taxes and obligations and to strict shipping laws would no doubt be interested in the universal application of such a regulation. But it was not enough merely to enunciate the principle and to leave each state to decide what constituted a genuine link. The social factors had been studied at the ILO Preparatory Technical Maritime Conference, and would be considered further at the forty-first session (maritime) of the International Labour Conference in April 1958. Israel, which provided its seamen with the necessary social protection, was prepared to help to maintain adequate social standards for seafarers. However, the whole problem required further co-ordination and clarification and might therefore be better dealt with by a specialized agency, perhaps by the Inter-Governmental Maritime Consultative Organization, when finally established.

13. In conclusion, he considered that the arrangement with regard to special United Nations registration, dealt with in paragraph 5 of the commentary on article 29, complied with the rules governing the Organization's other activities, privileges and immunities. If the Conference recommended the principle, the details might be worked out by the General Assembly in pursuance of the competence conferred on it in article 105 (3) of the Charter.

14. Mr. CAMPOS ORTIZ (Mexico) said that the draft submitted by the International Law Commission was a useful basis for drawing up a practically complete code of the sea.

15. He agreed that the definition of "internal waters" in article 26 should not appear in the part relating to the régime of the high seas, but in that concerned with the territorial sea.

16. His delegation had submitted an amendment to article 27 (A/CONF.13/C.2/L.3), proposing an addition to the effect that the exercise of the freedom of the high seas was subject to "the conditions laid down by these articles and by the other rules of international law". Those words had been taken from article 1. He had been glad to note that the representative of Ceylon (9th meeting) had expressed agreement with that amendment and that the delegations of France and

Portugal had submitted amendments to the same effect (A/CONF.13/C.2/L.6 and A/CONF.13/C.2/L.7).

17. The second sentence in article 29 should, he thought, be revised, since in fact ships flew the flag of the country of their nationality. The flag was merely an external sign; it did not in itself confer nationality on a ship. It appeared that the Commission had recognized that to some extent in laying down the rule that there must be "a genuine link between the state and the ship". But that provision gave rise to the same problem, inasmuch as the genuine link was the ship's nationality. It should, he believed, be left to the discretion of each state to fix the conditions for granting its nationality to ships, and the right so enjoyed by each state and the conditions fixed by it accordingly should be respected by all other states. The only alternative would be to specify the conditions in an international instrument, but that would, he feared, give rise to a number of difficult problems. In article 29, the Commission had recommended the first of those alternatives, but by conceding to other states the right to decide for themselves whether there was a genuine link between the ship and the flag state, the Commission had opened the door to the creation of insoluble problems; he could imagine no situation more likely to engender disputes. His delegation was therefore opposed to the proposal that the Conference should adopt the genuine link principle and refer the problem to other bodies for detailed examination. An effort should be made to find a satisfactory solution at the Conference itself.

18. He agreed with the provision in article 33 that ships (other than warships) on the high seas owned or operated by a state and used only on government service, whether commercial or non-commercial, should be assimilated to and should have the same immunity as warships. Such ships should not, however, have policing rights.

19. Article 39 made "private ends" the essential factor in the commission of acts of piracy. But neither that article nor article 40 or 41 contained the stipulation included in paragraph 2 of the commentary on article 39 that acts of violation or depredation committed by warships during a civil war were not acts of piracy. Having regard to the statement in the last sentence of that paragraph, he would recommend that it should be stated in that article — and also in articles 40 and 41, which, unlike article 39, contained no mention of the qualification as to "private ends" — that acts committed for purely political ends would not be regarded as acts of piracy. That ruling had appeared in the draft provisions for the suppression of piracy of the League of Nations Committee of Experts for the Progressive Codification of International Law.[1]

20. The Mexican delegation had submitted an amendment to article 47 (A/CONF.13/C.2/L.4) which had a dual purpose: firstly, to give a state the right of hot pursuit within a conservation zone established unilaterally by it in accordance with article 55 as well as in its territorial sea or the contiguous zone to which article 66 related; and secondly, to confer on the coastal State the right of hot pursuit of ships which, though neither they themselves nor any of their own boats were actually within the state's territorial sea or the contiguous zone, were taking part in illicit acts for which boats other than their own were being used in the territorial sea or the contiguous zone. There had in practice been several cases of that kind. Though the Commission had decided at its third session (A/CN.4/SR.125, paras. 37 to 76) against including a clause on those lines in its draft, that did not prevent the Conference from doing so.

21. A clause should be added to paragraph 1 of article 48 to prevent the pollution of the sea with hydrocarbon. Paragraph 2 of the same article should be expanded so as to constitute a set of standardized international rules and measures regarding the disposal of radio-active waste in the sea. The regulation of that subject should not be left to the discretion of individual states. In framing any such international rules, however, account should be taken of the Statute of the International Atomic Energy Agency and the recommendations of that and other international organizations.

22. Mr. OZORES (Panama) thought that it might be advisable to amend article 26 of the International Law Commission's draft by adding a clause to the effect that the contiguous zones to which article 66 related were not part of the high seas.

23. It should either be laid down in article 29 that the "genuine link" between ships and the state in which they were registered should be determined by the domestic laws of the state of registration, or, preferably, all reference to the relationship between ships and the state in which they were registered should be deleted, since that relationship was not a concept of international law. For a long time certain maritime states, but by no means all of them, had been much concerned at the fact that for reasons of economy, and to some extent of security too, several shipping companies preferred their vessels to be registered in countries like Panama. That preference was due to the fact that the government taxes imposed by Panama on ships registered in that country were much lower than the corresponding taxes in other countries, and that Panama, being an under-developed country which needed to attract foreign capital and benefit from foreign technical experience, followed an open-door policy in regard to foreign capital and had refrained from setting up a complicated system of currency control. Moreover, at the entrance to the Panama Canal there was a large free zone where no taxes were imposed on industry or trade. It was surprising that maritime Powers which declared themselves in favour of the freedom of the high seas wanted that freedom to be limited by making it impossible for shipping companies to register their ships where they wished. The maritime Powers advocating that limitation had in fact benefited from the low rate of taxation on ships registered in Panama, because that had resulted in lower freight rates for the carriage of goods to those countries, including, for example, goods they had received under the Marshall Plan.

24. Panama supported article 34. Ships registered in Panama were required to carry safety certificates issued by one of the three companies which led the world in that connexion. It was true that there was a large number of old ships among the vessels registered in Panama,

[1] Ser. L.o.N.P., 1926.V.5.

but it was also true that there were a large number of old ships among vessels registered in countries opposed to the registration in Panama of ships owned by companies with their headquarters in other countries.

25. Panama, like Liberia, had ratified the International Convention for the Safety of Life at Sea.

26. Article 45 should be amended to make it possible for any vessel on state service, either permanently or temporarily, to make seizures on account of piracy, since some states, either because of shortage of funds or as a consequence of their peaceful attitude, possessed no warships or militairy aircraft. Article 47 also should be amended so as to make it possible for vessels in the same category to engage in hot pursuit in the circumstances mentioned in that article.

27. With reference to article 33, it should be observed that owing to the shortage of private capital for the flotation of shipping companies some countries which were not under a socialist régime had state-owned or partly state-owned merchant fleets. Those countries should not be deprived of their right to have such fleets, which were at least as useful as were fleets of warships to the human community taken as a whole.

The meeting rose at 4.45 p.m.

THIRTEENTH MEETING

Wednesday, 19 March 1958, at 10.45 a.m.

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

Consideration of the draft articles adopted by the International Law Commission at its eighth session (articles 26 to 48 and 61 to 65) (A/3159) *(continued)*

General debate (concluded)

STATEMENTS BY MR. POMÉS (URUGUAY), MR. GUARELLO (CHILE), MR. EL ERIAN (UNITED ARAB REPUBLIC) AND MR. KORETSKY (UKRAINIAN SOVIET SOCIALIST REPUBLIC)

1. Mr. POMES (Uruguay) said his delegation would co-operate constructively in the preparation of provisions concerning the law of the sea which took into account geographical and economic conditions, history and scientific advances.

2. As was only to be expected, some parts of the International Law Commission's draft conflicted with existing international conventions, others constituted repetitions of clauses in such conventions, and yet others dealt with matters which were the specific concern of specialized agencies. Nevertheless, subject to these and certain other qualifications, the draft was the most comprehensive codification ever attempted of the law of the sea.

3. Referring to particular articles, he said that some (for example, articles 26 and 47) could not be dealt with independently; decisions regarding them would have to await the outcome of the proceedings in other committees.

4. In his delegation's opinion the drafting of article 29 (Nationality of ships) left something to be desired. The bare expression " genuine link " without amplification was too vague. The article was of some importance inasmuch as its provisions had a bearing on article 34, which stipulated that the crews of ships should enjoy reasonable labour conditions. If article 29 was loosely drafted, the conditions of employment of seafarers might possibly not be adequately safeguarded. His delegation was keenly interested in the question of working conditions on board ships; Uruguay had ratified a number of international labour conventions relating to the subject and its domestic labour legislation followed an enlightened policy. So far as the nationality of ships was concerned, his government had long held the view that the test of the " genuine link " was whether the state exercised effective control over the ship flying its flag. In that connexion, he hoped that the conference would succeed in removing all doubt concerning the status of " stateless " ships to which reference was made in the commentary on article 31.

5. He considered that the provisions dealing with the pollution of the sea by oil (article 48) should be strengthened, in the sense that a clause should be added concerning the harmful effects which might ensue from exploration work.

6. Lastly, he thought that some of the definitions and passages contained in the commentaries should be embodied in the articles themselves.

7. Mr. GUARELLO (Chile) said his country had been the first to proclaim, on 23 June 1947, that its sovereignty extended over the sea to a distance of 200 miles from the coast. That action had been the subject of much comment, a great deal of it unfair. The people who made such comments were doubtless ignorant of the truth of the matter. The fact that the General Assembly of the United Nations had decided to convene the present conference was proof that not all the rules relating to the sea were universal rules recognized by all states.

8. His delegation's objections to the International Law Commission's text concerned only the parts relating to fisheries.

9. Freedom which was not exercisable equally by all states was not really freedom. Provisions from which only states with large economic resources could benefit established not freedom but a privilege to be enjoyed by powerful states alone. Chile was one of the countries which lacked the means necessary for building up a fleet able to fish in any part of the world. His government was not requesting assistance to build up such a fleet; it was only demanding that ships should not come from far off to destroy the resources of the sea off its coast. His country had the means to conserve those resources and to use them in a rational manner.

10. Referring to paragraph 3 of the commentary on article 49, he said that it was by reason of the reckless destruction of the resources of the sea off the coast of Chile that his government had taken the action he had mentioned at the beginning of his statement. That action had not affected the freedom of navigation in the area concerned, nor had it made it quite impossible for nationals of other states to fish there. In taking that action it had followed the example set by President Truman's proclamation of 1945. Recent technical develop-

ments had made it necessary for all coastal states to adopt similar conservation measures.

11. Freedom to fish anywhere on the high seas was not a tradition as was the freedom of navigation on the high seas. To prevent abuses, it had become necessary to lay down international regulations regarding the freedom of navigation on the high seas ; it was even more necessary to lay down new international regulations, suited to the times, regarding fishing. The obsolete idea of limiting the breadth of the territorial sea to three miles had produced the result that practically the entire expanse of sea was treated as high seas and that a few concerns, fishing anywhere they pleased on the high seas, had by irresponsible and irrational methods of exploitation virtually exterminated certain species. In self-protection, therefore, Chile had, in concert with Peru and Ecuador, laid down regulations governing fishing and whaling in the areas of the Pacific off their coasts.

12. So long as the problem of the breadth of the territorial sea had not been settled satisfactorily, no progress could be made in the drafting of provisions concerning rights and obligations in and on the high seas. There appeared, however, to be general agreement that : (*a*) it was necessary to conserve in all parts of the sea the natural resources of the sea, which included not only the living resources of the sea but also the resources which were necessary for the existence of the living resources ; (*b*) the coastal state had a greater interest than any other state in the conservation of the resources of the sea off its coast ; (*c*) the coastal state should lay down adequate rules for the conservation of those resources and ensure that such rules were observed ; (*d*) the coastal state should have the right to benefit from those resources and to delegate that right to other states if it so wished ; (*e*) there should be adequate scientific and technical justification for all measures to conserve those resources ; and (*f*) states other than the coastal state should have the right to exploit those resources provided that they observed the conservation rules laid down by the coastal state.

13. The fact that there had been a delay in drawing up suitable international regulations regarding the conservation of the resources of the sea did not in any way affect the right of the coastal state to conserve the resources in the sea off its coast. Chile intended to exercise that right, on the basis of scientific and technical data, and in enforcing its regulations would not discriminate as between Chilean nationals and aliens.

14. Mr. EL ERIAN (United Arab Republic) said that the recognition of the principle of the freedom of the high seas was one of the most important landmarks in the history of international law. Its importance had increased with the development of shipping and the increase in the number of independent states.

15. In his opinion the question of the relationship between the rules to be prepared by the conference and existing international conventions could not be settled until it had been decided whether those rules should be laid down in one or more instruments. The question should be given very careful consideration later.

16. Referring to the question discussed in paragraph 5 of the commentary on article 29, he said that his delegation, bearing in mind the advisory opinion of the International Court of Justice of 11 April 1949,[1] supported in principle any move tending to confirm the " legal personality " of international organizations. He referred to the very sensible suggestions made by Mr. François in his supplementary report on the subject.[2] The question of criminal and civil jurisdiction over vessels flying the flag of an international organization but not the flag of any state should receive very careful consideration.

17. He did not agree with the opinion expressed by several representatives that the conference was not competent to discuss the question of nuclear tests on the high seas. The carrying out of such tests infringed the principle of the freedom of the high seas.

18. Sub-paragraph 1 (*b*) of article 46 should be deleted, for there was no justification for that clause, which would have the effect of making it permissible for warships to board ships suspected of engaging in the slave trade in the maritime zones treated as suspect in the international conventions for the abolition of that trade. There was in the General Act of Brussels of 1890 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 provision had perhaps been justified in the nineteenth century, but conditions had changed since then. There was no such provision in the Convention of Saint-Germain-en-Laye of 1919, the Slavery Convention of 1926, or the Supplementary Convention on the Abolition of Slavery of 1956. The clause in question was objectionable and a potential source of international disputes.

19. Mr. KORETSKY (Ukrainian Soviet Socialist Republic) observed that the general debate had clarified the positions held by various countries and had shown that comparatively few of the articles allocated to the Second Committee were controversial. There was therefore reason to hope that agreement could be reached, particularly if the Committee based its further deliberations on the principle of the peaceful co-existence and co-operation of sovereign states.

20. In that connexion, he said that nuclear tests on the high seas were a violation of the principle of the freedom of the high seas. It was well known that the Union of Soviet Socialist Republics yielded to no other state in its insistence on the prohibition of such tests and had made practical proposals for the reduction of armaments and prohibition of nuclear weapons. The Soviet Union could not be blamed for the failure to settle the problem of disarmament. The Committee was, however, concerned not with disarmament but with the prohibition of nuclear tests on the high seas. It was the right and duty of the conference to consider such prohibition, for nuclear tests certainly violated all the four freedoms set forth in article 27. The legality of nuclear tests on the high seas had been challenged by learned jurists in the United States of America, the United Kingdom and France.

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[1] *I.C.J. Reports, 1949*, p. 179.

[2] *Yearbook of the International Law Commission, 1956, Vol. II* (A/CN.4/SER.A/1956/Add.1), document A/CN.4/103.

21. The principle of the freedom of the high seas was also violated by military exercises conducted in the vicinity of the coasts of countries other than those carrying out the exercises.

22. With regard to the definition of the freedom of the high seas in article 27, he said that special regulations governing navigation could be established in respect of some seas and straits under generally accepted international law and multilateral agreements. If a small number of states had jurisdiction over certain seas and areas of sea leading only to the coastal waters of those states, special regulations might be necessary to maintain the security of those states. Accordingly, some reference to such special provisions should be inserted in the articles.

23. His delegation considered that some of the provisions of the International Law Commission's draft articles were anachronistic. As the representative of the United Arab Republic had stated, the provision in article 46 concerning the search of ships suspected of engaging in the slave trade in " suspect " zones was unjustified. In the past, that right of search had given certain maritime states an opportunity of controlling shipping in its own interests, but even at that time the right to search commercial ships had been regarded as an exception to the principle of international law that the right could not be exercised except by warships of the state of nationality of the suspected ship.

24. The International Law Commission's draft provisions on piracy were equally anachronistic. Piracy in the strict sense of the word was hardly known in modern times ; but it had now taken the form of aggressive acts perpetrated or engineered by various states. For example, such acts had been committed in the Mediterranean against ships of the Spanish Republican Government in 1936 and 1937 ; and more recently the Chiang Kai-Shek régime had committed such acts in the Pacific. Such open acts of aggression, however, fell within the competence of the Security Council and should not be dealt with in detail in the articles before the conference. The whole matter could be dealt with adequately in a single article.

STATEMENT BY MR. FRANÇOIS
(EXPERT TO THE SECRETARIAT OF THE CONFERENCE)

25. Mr. FRANÇOIS (Expert to the secretariat of the Conference) made a statement.[1]

26. Mr. MINTZ (Israel) wished to make it clear that he had asked for a list of the Brussels conventions only, and did not suggest the perusal of the numerous other conventions mentioned by Professor François.

27. Mr. CHAO (China), speaking on a point of order, reserved his right to reply to the Ukrainian representative's reference to action which the Chinese Government had taken in self-defence.

The meeting rose at 12.55 p.m.

[1] The full text of the statement is annexed hereto.

Annex

STATEMENT BY MR. FRANÇOIS
(EXPERT TO THE SECRETARIAT OF THE CONFERENCE) [2]

1. I know that I shall be speaking for all my colleagues on the International Law Commission in expressing our profound gratitude for the praise which several speakers have been good enough to accord to the Commission's work. I was personally most touched by the kind remarks addressed to the Special Rapporteur of the Commission.

2. I have asked for the floor now that the general discussion of the articles referred to this committee for examination is completed in order to make a few remarks which may perhaps shed light on the Commission's intentions on certain points or dispel any misunderstanding that might exist as to the interpretation of certain articles of the draft.

3. In the first place, I should like to speak of the Law Commission's attitude towards existing multilateral conventions regulating certain matters relevant to the law of the sea. This point has been raised by several delegations both in the Second and in the First Committee. From the outset, the Commission had to make up its mind on the attitude it should take towards the conventions in question, which are those listed in a note issued by the secretariat (A/CONF.13/C.2/L.8). Three courses were open to the Commission : It could study afresh the matters regulated by the conventions and include the results of its study in its draft ; it could confine itself to a reference to the conventions coupled with a recommendation that states accede to them ; or it could include in its regulation the principles underlying the conventions in question without elaborating them.

4. The first course — detailed regulation of the matters in the draft — was rejected from the outset. Neither the Commission itself nor this conference could be regarded as competent to revise the results of the special conferences which produced the conventions in question.

5. The second alternative, to recommend that states accede to the existing treaties, a course since advocated by certain delegations in this committee, was, in the Commission's view, no more satisfactory than the first. It is unlikely that a recommendation of this kind could win general acceptance from the states participating in this conference, including those states which have not hitherto been prepared to accede to the conventions in point. Should this be so, it would mean that a conference for the codification of the law of the sea would leave open a whole series of questions of the utmost importance for maritime navigation and that a number of states would incur no obligations in the matter.

6. The Commission accordingly followed the third course with respect to several of the conventions under consideration — namely, that of including in its draft articles the principles underlying those conventions, leaving states the option of discharging the obligations they had assumed either by ratifying the conventions or by ensuring application of the principles in some other way, for example, by inserting detailed regulations on the subjects in their national law.

7. This course was followed for articles 22 (Government ships operated for commercial purposes), 34 (Safety of navigation), 36 (Duty to render assistance), 37 (Slave trade) and 48, paragraph 1 (Pollution of the high seas).

8. Since the articles refer solely to the principles of the relevant conventions, there is no danger of incompatibility between them and the conventions. The Commission

[2] Circulated to members of the Committee as document A/CONF.13/C.2/L.14.

therefore regards this procedure as open to no pertinent objection.

9. In the case of article 35 (Penal jurisdiction in matters of collision) the Commission followed the same course, taking as its guide the Brussels Convention of 1952. This convention applies to collisions on the high seas and, also, in the territorial sea ; the contracting parties may, however, reserve to themselves the right to take proceedings in respect of collisions occurring in their own territorial waters — i.e., the right to exclude collisions in the territorial sea from the scope of their undertaking. The Commission's draft, on the other hand, deals solely with collisions on the high seas. Hence states which accept article 35 will be in the same position as states that have made the reservation provided for in the Brussels Convention with respect to the territorial sea. There is thus no incompatibility between the articles and the Convention.

10. The only cases which might inspire some doubts are those of article 21 (Arrest of ships for the purpose of exercising civil jurisdiction) and article 46 on the right of visit in the case of vessels suspected of engaging in the slave trade. I should like to make a few remarks on the first case.

11. At its seventh session, the International Law Commission decided to base these articles on the rules adopted in the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Seagoing Ships. When governments were consulted, however, some of them opposed this proposal, taking the view that the Brussels Conference had been mainly concerned with arrest in *ports* and *internal waters* and had brought ships passing through the territorial sea within the scope of the article merely by using the phrase " in jurisdiction of any of the contracting states " without properly realizing the prejudice which, by favouring private creditors, it thereby caused to maritime shipping merely passing through the territorial sea without entering a port. Such obstacles would be aggravated were the breadth of the territorial sea to be extended.

12. The Commission, coming round to this point of view, replaced the text by that which had been proposed by The Hague Conference of 1930 for the Codification of International Law, and which the Commission had preferred in the beginning because it showed greater consideration for the interests of shipping.

13. The conference will therefore need to decide first on the substance of the question — i.e., whether it prefers the 1930 text or that of 1952. If it prefers the 1952 text, the article will naturally have to be changed.

14. Should it prefer the 1930 text, now proposed by the Commission, the question will then arise of the position of states which have already ratified the 1952 Convention. The Commission sees no great difficulty in this respect, and in paragraph 4 of the commentary on article 21 expresses the following view : " The existence of different rules on this point could hardly be regarded as a bar to the adoption of the above-mentioned provision, since the Brussels Convention would bind only the contracting parties in their mutual relations." The United Kingdom delegation, however, considers that its government could not accept two sets of international rules which in some respects impose different obligations. For this reason, the said delegation has suggested [4th meeting] that the conference confine itself to recommending accession to the Brussels Convention and, should the latter prove imperfect, that efforts be made to improve it under the procedure provided in the Convention itself. But I do not see how this procedure could be applied if in principle the conference pronounces itself in favour of the 1930 system. It would be impossible to invite a conference of over eighty states to accede to a convention which it is unable fully to accept and which has only been ratified by some ten states, in the hope that it will later prove possible to amend it. It would be better, in my opinion, to include a paragraph worded as follows : " States which are parties to the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Sea-going Ships may apply, in their mutual relations, the provisions of that convention where they differ from the rules in the preceding paragraph." If such a proviso still fails to give satisfaction, the conference could go further and word the paragraph as follows : " States which are parties to the Brussels Convention may enter a reservation to the effect that the previous paragraph shall not apply whenever its application would not be in conformity with the rules of the said convention."

15. It would be a good idea, as the Israeli delegation has proposed [12th meeting], to examine each convention separately and not to delete articles whose inclusion seems advisable.

16. It was not the intention of the Commission to interfere in any way with the special conventions already existing in maritime law as far as the mutual relations between the states parties to those conventions are concerned. Hence, the Convention regulating the régime of the Bosphorus and the Dardanelles, to which the Turkish delegation referred, is not affected by the rules of the draft. This, incidentally, has been pointed out in so many words in paragraph 5 of the commentary on article 24 : " The article does not affect the rights of states under a convention governing passage through the straits to which it refers." It might perhaps be advisable to include this general principle somewhere in the text of the articles.

17. Much the same reply may be given to a question raised by the Norwegian delegation — namely, whether states which had acceded to a convention establishing a system for the settlement of conservation problems would be denied the right to arbitration laid down in the draft. To this reply must be that, if a fishery convention between the parties prescribes a special manner of settling disputes, the dispute must be submitted to the body specified in the convention. If article 57 is not clear enough on that point, it would be wise to amend it so as to leave no shadow of doubt.

18. Some speakers, including the representative of Ireland [8th meeting], said that the meaning of the expression " merchant ships " used by the International Law Commission ought to be more precisely defined, particularly when used in the context relating to innocent passage through the territorial sea ; they are not sure whether the expression includes fishing vessels.

19. As can be seen from part I, section III of the draft articles, the International Law Commission divided ships into merchant ships, government ships other than warships, and warships. The category " merchant ships " comprises all private ships, including fishing boats. Hence, these boats likewise have the right of innocent passage provided for in article 15.

20. The Commission was criticized for not having drafted some of the articles as precisely as might be desired : such expressions as " where circumstances necessitate ", " to any appreciable extent ", " sufficiently closely linked ", " adequate grounds ", " reasonable measures ", " unjustifiable interference " and others are, it is said, out of place in a document of this kind. The Commission cannot regard these objections as fully justified. It is true that the articles ought to be drafted in the clearest possible language. Perhaps the Commission's texts, which were often drafted in haste, may still be improved in this respect. Yet, as the representative of India has pointed out, the expressions in question all occur in national legislation. In the opinion of the International Law Commission, a codification of international law can no more do without these expressions

than can national law. Any attempt to codify international law without using such expressions will prove vain. In contentious cases, the meaning will have to be decided by an impartial authority, to which disputes regarding the interpretation of these expressions in specific cases are to be submitted.

21. It is not always understood why the International Law Commission in some cases recommended the submission of disputes to the International Court of Justice or to an arbitral body, whereas in other cases it makes no recommendation at all. The Commission takes the view that, in general, it is desirable that all disputes which cannot be settled through the diplomatic channel should be submitted either to the jurisdiction of the Court or to arbitration. The Commission has, however, had to take into account the fact that the number of states prepared to accept the jurisdiction of the Court or compulsory arbitration is still small. If it had inserted in each of its proposals a compulsory jurisdiction or arbitration clause, the Commission would have rendered the proposals unacceptable to several states and would thus from the outset have jeopardized the success of its work. As a rule, therefore, the Commission has therefore inserted a clause of that kind only in cases where it is to be expected that the majority of states would not accept certain obligations (necessarily framed in vague terms) without the guarantee of compulsory jurisdiction or arbitration. The most striking example of this is the arbitration provided for in disputes concerning the protection of the resources of the sea. In other cases, the Commission had left this matter to be dealt with in accordance with the existing rules for the settlement of disputes, so as not to jeopardize the results of the work of codification. Only if the arbitration or jurisdictional clause is reserved for exceptional cases will there be any hope of overcoming the objections of states which refuse to accept such a clause as a general rule.

22. The Commission showed a preference for arbitration in cases where extremely technical matters are involved, such as the protection of the living resources of the sea. In other cases, it prefers the jurisdiction of the Court, while leaving the door open to arbitration if the parties prefer it.

23. The Chinese delegation is unable to support the idea of establishing two different systems for the two cases provided for in paragraphs 2 and 3 of article 57 on the settlement of disputes. In the opinion of that delegation, there is no logical justification for such a dual system ; every state or group of states concerned in the dispute should designate one or two members, and the composition of the arbitral commission should be enlarged.

24. I regret that I am unable to agree with the Chinese delegation, because I consider the system which it advocates unworkable. The system supported by the Chinese delegation would in no way guarantee the establishment of an impartial and objective arbitral body in cases where there are several parties to the dispute and where these parties are divided into more than two groups with divergent interests. Let us suppose there is a dispute between a coastal state and a plurality of states — say four or five — which fish in areas of the sea adjacent to the coastal state but nevertheless have divergent interests. Under the Chinese system, there would be an arbitral tribunal with, say, ten or twelve members, who would undoubtedly rule against the coastal state. In such cases, the only way — unless the parties wish to submit the dispute to the Court — is to have recourse to an impartial authority which will set up the tribunal.

25. Several speakers criticized article 33. This article, for purposes connected with the exercise of powers by other states, assimilates government ships on commercial service to warships. Some delegations may not have properly realized the implications of the article. Its only effect would be that government ships on commercial service will not be subjected on the high seas to the rights of visit and hot pursuit by ships under a foreign flag. Since the rights of visit and hot pursuit are in fact exercised against ships under a foreign flag in quite exceptional cases only, the practical importance of this article is certainly not great. The critics of the article nevertheless regard it as illogical. In their opinion, there is no valid reason for the distinction. In the opinion of the International Law Commission, there were sound reasons in favour of the article. A state exercises sovereignty in its own territory, in its ports and in its territorial waters ; and hence, under the Brussels Convention of 1926 relating to the Immunity of state-owned vessels, it is entitled to treat the ships of another state on commercial service as private ships. If the other state will not accept this point of view, it is free to keep its merchant ships away from the state in question. On the high seas, however, the situation is quite different. There, states exercise no sovereignty and if they wish to exercise on the high seas a right of visit or hot pursuit against government vessels under a foreign flag, they can be entitled to do so only by virtue of a rule of international law. The International Law Commission is not convinced that, apart from the Brussels Convention, such a general rule of international law authorizing the arrest on the high seas of state-owned vessels flying a foreign flag exists. The International Law Commission is not even sure whether, in this respect, the Brussels Convention could be regarded as repeating a rule of general or customary law. In any event, the Commission would regard such a rule as inappropriate : the right of all warships to arrest on the high seas government ships flying a foreign flag, where they are in commercial service, might be the source of international friction in no way offset by practical advantages. For these reasons, the International Law Commission did not wish to recognize such right of visit ; states which are parties to the Brussels Convention are free to apply the rule in their mutual relations, but the International Law Commission was not prepared to extend its application to all other states. In doubtful cases of this kind, the principle of the freedom of the seas must prevail.

26. Some delegations do not agree with article 29, which requires the existence of a genuine link between the ship and the state whose flag it flies. It had been urged that the freedom of the seas subsumes the sovereign rights of states to grant authority to fly their flag. The International Law Commission does not share that view. It admits that a system under which any state can grant its flag to all ships applying for it is in fact the acme of freedom. That conception of freedom is, however, incompatible with the interests of the international community. In the view of the International Law Commission — and this declaration has met with the approval of a number of delegations — every freedom must be regulated if it is desired that it be exercised in the interest of those entitled to benefit by it. The essential corollary to the freedom of the seas must be that states exercise the same jurisdiction over ships sailing the high seas under their flag as they exercise in their own territory. It is in this sense that ships are regarded as floating extensions of the flag state's territory. This régime is based on the notions that the ship must in the main belong to nationals of the flag state ; that the owners must be domiciled in that state ; that the officers and at least the major part of the crew must be nationals of that state ; that in foreign ports the consular officers of the flag state shall exercise the necessary control over such ships putting in at those ports and, where appropriate, grant them such protection as they may need ; and, finally, that the ships shall return to their home ports at regular intervals. That is what the International Law Commission understands by the link between the ship and the flag state. If that link no longer exists, the

entire system collapses, and a situation will arise on the high seas which some may regard as the ideal state of freedom, but which others — including the International Law Commission — regard as contrary to a sound conception of the freedom of the seas, and hence to the interests of the international community. The nature of this genuine link, and the consequences of its absence, will have to be specified ; and there is little likelihood that the present conference, which is already over-burdened, will be able to deal with the matter. It is important, however, that it should come out in favour of the principle, the details of which will be studied subsequently.

27. The representative of Israel [12th meeting] is not satisfied with the document in which the secretariat has set out the conventions relating to the articles being considered by the Second Committee [A/CONF.13/C.2/L.8]. He asserts that the list is incomplete because it contains no reference to conventions which, while not the subject of articles in the draft, nevertheless relate to the law of the sea. According to the representative of Israel, the inclusion of conventions of this kind would have enabled the conference to make sure that certain topics had not been overlooked. I wonder whether the representative of Israel realizes how long such a list would be. A similar list relating to fishing already exists ; it runs to forty-three pages [A/CONF.13/23]. I also wonder whether the representative of Israel is not over-estimating the usefulness of such a list. After the preparatory work by the International Law Commission, the consideration of the draft articles by Governments, and the close study given to them by representatives at the conference, to which the high level of the discussions bears witness, it does not seem very likely that a list of treaties would bring to light further important topics of which no one has, so far, thought. It would not be desirable to ask the secretariat to undertake further work that is not strictly necessary in addition to the onerous duties it is performing with such zeal and devotion.

28. It is not for me to defend the International Law Commission's draft against all the objections which have been raised during the general debate or against those which will yet be raised during the detailed discussion of the articles. However, should the Second Committee wish, during its discussions, to be informed about the International Law Commission's intentions on points which do not seem to be sufficiently clear, or about its intentions with regard to any specific point, I shall be pleased to provide all the information I have.

FOURTEENTH MEETING

Monday, 24 March 1958, at 3 p.m.

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

Organization of the work of the Committee (A/CONF.13/C.2/L.31) *(continued)* [1]

1. The CHAIRMAN said that the procedure outlined in his note (A/CONF.13/C.2/L.31) provided for discussion of the articles referred to the Committe in two stages. On first reading, provisional votes only would be taken, the final votes being left until the second reading.

2. Pressure of time had prompted certain delegations to suggest that the provisional voting be dispensed with ; that the Committee proceed forthwith to discuss the articles by groups, as sugggested in the first note by the Chairman (A/CONF.13/C.2/L.1), together with the relevant amendments ; and that so soon as the discussion on any group had been completed a final vote be taken on each article therein.

3. Sir Alec RANDALL (United Kingdom) agreed that the system proposed by the Chairman was ideal in theory ; but in view of the limited time available it would be better to dispense with the first, provisional, vote. He therefore proposed that the vote taken on each article be considered as final so far as the Committee was concerned ; once an article had been voted upon, it would go to the conference.

4. Mr. KEILIN (Union of Soviet Socialist Republics) said that, given the importance of the issues involved, the procedure proposed by the Chairman was preferable to that proposed by the United Kingdom representative. It was highly desirable that there should be a provisional vote on each article leaving delegations free to take their final stand at the second reading.

5. Mr. ZOUREK (Czechoslovakia) said that it would be advisable for practical reasons to adopt the procedure outlined in the Chairman's note ; the provisional vote on each article would provide a basis on which a working group could draft a revised text for the second reading and final vote.

6. Mr. COLCLOUGH (United States of America) supported the United Kingdom proposal. The Committee had had an exhaustive general debate on the articles referred to it, and could well dispense with a first reading in the interests of dispatch.

7. The CHAIRMAN put the United Kingdom proposal to the vote ; any votes cast against it would be tantamount to support for the procedure suggested in his note (A/CONF.13/C.2/L.31).

The United Kingdom proposal was adopted by 33 votes to 17.

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

PROPOSAL BY PERU TO POSTPONE DISCUSSION OF ARTICLES 26, 27 AND 47 (A/CONF.13/C.2/L.33)

8. The CHAIRMAN said that the Peruvian proposal that discussion of articles 26, 27 and 47 be deferred (A/CONF.13/C.2/L.33) would clearly have to be disposed of before the committee took up articles 26 and 27.

9. Mr. GARCIA-SAYAN (Peru), introducing his delegation's proposal, said that it was essential to defer consideration of the articles in question if the Committee was to do its work coherently. Article 26 defined the high seas by their relationship to the territorial sea and internal waters, the articles on which had been referred to the First Committee. Article 27 dealt, among other things, with the freedom of fishing, which must be construed in the light of the coastal state's rights and interests in the conservation of the living resources of the sea, specified in articles 54 and 55. Article 47, on the right of hot pursuit, was directly connected with the question of the extent of the terriorial sea, the con-

[1] Resumed from the third meeting.

tiguous zone and the conservation zone, implicitly recognized by the draft articles and clarified by the relevant proposals of Mexico (A/CONF.13/C.2/L.4) and Peru (A/CONF.13/C.2/L.35). Hence it would be desirable to await the decisions of the First and Third Committees on related matters, before embarking upon the discussion of those three articles.

10. He recalled that the First Committe, in adopting at its 23rd meeting a proposal that consideration of articles 1, 2, 3 and 66 be deferred, had limited the deferment to 31 March 1958. For his part, he would prefer not to specify a time-limit, but simply to propose that the committee take up articles 26, 27 and 47 only after it had disposed of all the other articles referred to it. By that time, the views of other committees on related issues would probably be known.

11. Mr. GIDEL (France) urged the Committee to consider the articles referred to it in the groups mentioned in the Chairman's note (A/CONF.13/C.2/L.1). It would then begin with articles 26 and 27, which formed group I. Those articles contained the fundamental provisions relating to the general régime of the high seas, and the Committee should deal with them before taking up the remaining articles referred to it.

12. Mr. LÜTEM (Turkey) said that various committees had already deferred consideration of far too many articles. He opposed the Peruvian proposal, which, if adopted, would unnecessarily complicate the Committee's discussions.

13. Mr. RADOUILSKY (Bulgaria) also opposed the Peruvian proposal. Articles 26 and 27 dealt with fundamental issues ; if the Committee put off considering them it would be difficult for it to deal with the other articles referred to it.

14. Mr. MUHTADI (Jordan) considered that the Committee should start on articles 26, 27 and 47 forthwith.

15. Mr. POMES (Uruguay), supporting the Peruvian proposal, pointed out that not all the amendments to articles 26, 27 and 47 had yet been circulated in French or Spanish.

16. Mr. CARDOSO (Portugal), associating himself with the statements of the representatives of Bulgaria, France and Turkey, said that it would be futile to defer consideration of articles 26, 27 and 47. The work of the First Committee would be facilitated if the Second Committee speedily agreed on a definition of the high seas.

17. Sir Claude COREA (Ceylon) said that, while he would like to support the Peruvian proposal, there seemed to be no reason why consideration of article 26 should be deferred, since the decisions of other committees on the articles referred to them did not depend on the definition of the high seas to be adopted by the Second Committee.

18. But he would suggest that before article 27 was put to the vote delegations should be allowed time to seek instructions from their governments on the various amendments submitted to it.

19. Mr. ZOUREK (Czechoslovakia) was unable to support the Peruvian proposal for three reasons : first, the work of the other committees did not depend on the Second Committee's decisions on the three articles concerned ; secondly, only a short time was available for discussion ; and lastly, if adopted, the proposal would hinder the work of the other committees.

20. The CHAIRMAN put the Peruvian proposal (A/CONF.13/C.2/L.33) to the vote.

The Peruvian proposal was rejected by 41 votes to 7, with 4 abstentions.

ARTICLES 26 (DEFINITION OF THE HIGH SEAS) AND 27 (FREEDOM OF THE HIGH SEAS) (A/CONF.13/C.2/L.3, L.6, L.7, L.15, L.21, L.26, L.29, L.30, L.32 to 34, L.45, L.47)

21. Mr. VRTACNIK (Yugoslavia) could support the amendments to article 26 submitted by the delegations of France (A/CONF.13/C.2/L.6) and the United Kingdom (A/CONF.13/C.2/L.47), provided paragraph 2 was reinstated in the rules as a separate article following article 5 (Straight baselines).

22. Dealing specifically with the United Kingdom amendment, he said that if the First Committee was not prepared to include a definition of internal waters in part I, section I, of the articles, the Yugoslav delegation would prefer article 26 to remain as drafted by the International Law Commission. He therefore suggested that discussion of the French and United Kingdom amendments be deferred until the First Committee had decided whether to include among the articles referred to it an article defining internal waters.

23. Mr. GIDEL (France) pointed out that the general debate had shown that many representatives felt that paragraph 2 of article 26 was misplaced ; although the French delegation had suggested that it be deleted, it would have no objection to its being placed in part I, section I, as proposed by the Yugoslav representative.

24. He had no objection in principle to the amendment submitted pointly by the Romanian and Ukrainian delegations (A/CONF.13/C.2/L.26).

25. Mr. HANIDIS (Greece) would not object to the deletion of paragraph 2 from article 26, but felt that the provision it contained should be referred to the First Committee.[1] As a number of representatives had urged, the definition of internal waters should be incorporated in part I, section I.

26. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that the joint amendment to article 26 (A/CONF.13/C.2/L.26) had been submitted in order to remedy a defect to which attention had been drawn in the general debate. He emphasized that for certain seas, such as, for instance, the Black Sea, and the waters surrounding archipelagoes, a special régime of navigation should be established for historical reasons or by virtue of international agreements. In support of the amendment, he quoted the last sentence of paragraph 2 of the International Law Commission's commentary on article 26.

The meeting rose at 4.40 p.m.

[1] Proposal subsequently issued as document A/CONF.13/C.2/L.54.

FIFTEENTH MEETING

Tuesday, 25 March, 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)*

ARTICLES 26 (DEFINITION OF THE HIGH SEAS) AND 27 (FREEDOM OF THE HIGH SEAS) (A/CONF.13/C.2/L.3, L.6, L.7, L.15, L.21, L.26, L.29, L.30, L.32, L.34, L.45, L.47, L.54) (continued)

1. Mr. HSUEH (China) withdrew his delegation's amendment to article 26 (A/CONF.13/C.2/L.45) in favour of the Greek proposal (A/CONF.13/C.2/L.54) that paragraph 2 of article 26 should be removed from that article and referred to the First Committee.

2. Introducing the Chinese amendment to article 27 (A/CONF.13/C.2/L.45), he recalled the statement made in the general debate by the leader of his delegation at the 11th meeting, and suggested that the precise wording should be left to a drafting committee.

3. Mr. COLGLOUGH (United States of America) said that his delegation opposed the amendment submitted by the delegations of Romania and the Ukrainian Soviet Socialist Republic (A/CONF.13/C.2/L.26) and urged other delegations to do likewise.

4. Emphasizing that the whole theory of the International Law Commission's draft on the general régime of the high seas rested on one essential principle — namely, that the high seas were the property not of one nation, or of a few nations, but of the community of nations — he said that the high seas were not open to regulation or appropriation by any one nation or group of nations. The joint proposal would allow of encroachments upon the freedom of the high seas in violation of that fundamental principle.

5. International law did not recognize the idea of " closed seas ". The Soviet Union had, however, unilaterally developed such a concept and classified the following as " closed seas " : first, seas communicating with other seas through one or several narrow straits and surrounded by the territory of a limited number of States, the régime of the straits being regulated by international agreement. (In 1956, the Soviet Handbook of International Maritime Law had cited the Black Sea and even the Baltic as " closed seas " in that category.) Secondly, seas surrounded by the territory of a " limited number of States " where the straits were not regulated by international agreement ; Soviet sources cited the Sea of Japan and the Sea of Okhotsk as examples. The second category was extremely broad, and could be made to subsume a number of seas in different parts of the world.

6. The Soviet Union had taken unilateral action in the case of the Sea of Okhotsk, having informed the Government of Japan of its intention to exclude all foreign fishermen therefrom by 1959. The next step might well be a special régime making that sea an " internal sea ".

7. Although in practice the Soviet Union had found it necessary to treat the Baltic as an open sea, a Soviet publication had in 1956 cited various ancient treaties with Sweden and Denmark in which those countries, but not the other Baltic coastal states, had agreed with Russia to exclude foreign warships from the Baltic. That source, and other Soviet sources, including the authoritative Soviet State and Law (June 1950), considered the treaties in question as valid and not superseded by the Treaty of Copenhagen of 1857, by which the régime of the Baltic had since been governed and which was interpreted by other Powers as leaving the Baltic open to all foreign ships.

8. In view of the similarity between the past practices of the Soviet Union and the statement of the Ukrainian SSR representative at the previous meeting, the United States Government viewed the two-power proposal as an attempt to win recognition in international law for the doctrine of the " closed sea " — a doctrine which gravely menaced the freedom of the high seas.

9. Mr. CAMPOS ORTIZ (Mexico), introducing his delegation's amendment to article 27 (A/CONF.13/C.2/L.3), said that he had based the wording on that of paragraph 5 of the International Law Commission's commentary on the article, which was similar to that used in article 1 and various other articles of the Commission's draft.

10. With reference to the French proposal (A/CONF.13/C.2/L.6), which entailed the deletion of the four freedoms specified in article 27, he said that it would be advisable to retain the International Law Commission's enumeration, as all four were recognized by the community of nations.

11. Referring to the Yugoslav amendment (A/CONF.13/C.2/L.15) and that of the Netherlands (A/CONF.12/C.2/L.21) to article 27, he suggested that the ideas they embodied be included in article 30 (Status of ships).

12. Lastly, he proposed that a working party be set up to consider the various amendments and to draft a text for discussion before articles 26 and 27 were put to the vote, or, alternatively, that the Committee should follow the example of the Third Committee and authorize the sponsors of amendments to prepare a consolidated text in consultation with the officers of the Committee.

13. Mr. CARDOSO (Portugal), introducing his delegation's amendment to article 27 (A/CONF.13/C.3/L.7), said that, even though a coastal state might have a special interest in the waters adjacent to its coast, the right of access to the high seas was so essential that no state should have the right to exercise jurisdiction on any kind over waters which gave any other coastal state access to the high seas. In support of the amendment he pointed out that, in paragraph 7 of its commentary on article 3, the International Law Commission had noted that the right to fix the limit of the territorial sea at three miles was not disputed, but that, as regards the right to fix the limit at between three and twelve miles, international practice was far from uniform. Consequently that right, in his opinion, did not exist in international law.

14. The Commission had agreed that the contiguous zone might not extend beyond twelve miles, and in its commentary on article 66 had stated that it did not

recognize either special security rights, or any exclusive fishing rights, or the right to decree unilateral measures of conservation in that zone. It could thus be concluded that in article 66 the Commission had clearly indicated that the breadth of the territorial sea should be considerably less than twelve miles, because otherwise within such a twelve-mile breadth the Commission would have recognized rights which it had, in fact, flatly denied in its commentary.

15. In his opinion, that was also the reason why the Commission had never considered the case where the exercise of rights in its territorial sea by one state might obstruct traffic to or from a port of another state, but simply the case where obstruction would result from the exercise of rights in the contiguous zone. And even then, considering the exceptional nature of the case, the Commission had not included a formal rule on the subject. He feared, however, that a tendency for a wide extension of jurisdiction over adjacent waters would make the case in point far from exceptional and, consequently, his delegation would press for the inclusion in the law of the sea of a statement of the essential right of access to the high sea.

16. Turning to the commentary on article 27, he pointed out that the Commission had merely specified four of the main freedoms of the high seas, but was aware that there were others. The Portuguese delegation considered that the freedom to undertake research, experiments and exploration was of prime importance, and should therefore be mentioned in article 27.

17. In supporting the Mexican representative's suggestion that a working party be set up, he wished to suggest that article 27 should be expanded to mention the right of every coastal state to direct access to the sea and the fact that the freedom of the high seas comprised at least the five freedoms enumerated in the Portuguese proposal.

18. Sir Alec RANDALL (United Kingdom) withdrew his delegation's amendment to article 26 (A/CONF.13/C.2/L.47), which would have deleted paragraph 2, in favour it the Greek proposal (A/CONF.13/C.2/L.54) to refer that paragraph to the First Committee.

19. Opposing the amendment submitted jointly by the Romanian and Ukrainian delegations (A/CONF.13/C.2/L.26), he said that the sentence from the International Law Commission's commentary on article 26 quoted by the Ukrainian representative at the previous meeting had never been intended to support such a principle as that stated in the joint proposal. The International Law Commission had intended to refer to the familiar cases of seas entirely surrounded by one coastal state, the access to which was bordered in both sides by that same state. A vague reference to a " special régime of navigation " could not be included in a section of the articles relating to the general régime of the high seas, nor could reference be made in such articles to archipelagoes, which the Ukrainian representative had also mentioned at the previous meeting.

20. Mr. GLASER (Romania) said that the proposal which his delegation had submitted jointly with that of the Ukrainian S.S.R. had been opposed by certain delegations on the ground that its provisions might lend themselves to abuse. He could not agree that a rule should be discarded on that ground alone ; measures could always be devised to prevent abuse.

21. The Committee had to take into account the special navigational régimes which existed for certain seas. If no such provision were made in article 26, it might be concluded that there were no exceptions to the general régime set forth in section 1 of part II. Many examples could be cited of such special régimes. The Baltic had been subject to a special régime until the Treaty of Copenhagen of 1857, and certain Powers claimed that it was still subject to special rules. From the Treaty of Kutchuk Kainardji of 1774 until the Montreux Convention of 1936, the Black Sea had been the subject of a series of international instruments laying down rules which derogated from the general régime of the high seas. Thus, article 18 of the Montreux Convention imposed certain limitations on the size of the vessels of non Black Sea Powers entering that sea and limited their stay in its waters to twenty-one days. That example proved that a special régime was compatible with the freedom of the high seas.

22. In the last sentence of its commentary on article 26 the International Law Commission stated : " These rules may, however, be modified for historical reasons or by international arrangement." That constituted recognition by the Commission of the special régime of certain seas, and there was no doubt that it had had the Black Sea in mind when drafting that comment. It would be desirable, however, to place that recognition in the article itself rather than in the commentary.

23. The United Kingdom representative had raised the question of the proper position in the rules for a provision on special navigational régimes. In the opinion of the Romanian delegation, since the draft had no general section applicable to both the territorial sea and the high seas, the proper place was in the part relating to the high seas, to the general régime of which the special régimes were an exception. The Romanian and Ukrainian delegations proposed that the provision should be placed in article 26, in order to make it clear that article 27 (Freedom of the high seas) applied not only to the general régime of the high seas but also to the special régime for certain seas.

24. Mr. BIERZANEK (Poland) introduced his delegation's amendment to article 27 (A/CONF.13/C.2/L.29).

25. The purpose of paragraph 1 thereof was to lay down in positive terms the right of all nations to use the high seas freely. That fundamental right was mentioned only obliquely in the text proposed by the International Law Commission.

26. Paragraph 2 was similar to the first sentence of the Commission's draft article 27, but it made clear that the high seas were open to all nations " on a basis of complete equality ".

27. Paragraph 3 reproduced the third sentence of paragraph 1 of the Commission's commentary on article 27 : " States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states." That important principle had been invoked by many speakers both in the Sixth Committee of the General Assembly and in the general debate in the present committee, and it would be better to include it in the articles themselves.

28. His delegation supported the Mexican proposal to set up a working party.

29. Mr. TUNCEL (Turkey) regretted that the Romanian representative should have deemed it necessary to refer to the Black Sea and to the Montreux Convention. But since he had done so, the Turkish delegation was obliged to point out that article 28 of that convention specified that it would remain in force for twenty years but added that the principle of freedom of transit and navigation affirmed in article 1 would continue without limit of time.

30. Much had been made of the last sentence of paragraph 2 of the commentary on article 26. In fact, it was clear from the summary records of the International Law Commissions meetings that that sentence had had its origin in a remark by Mr. Krylov, a member of that Commission, concerning " certain waters such as land-locked seas " which had " special characteristics ", a remark made during the discussion of the article on the definition of the high seas. Mr. Krylov had added that he was " not proposing to amend the article, but merely to insert in the commentary a reference to the fact that certain waters had special characteristics." [1] It was therefore perfectly plain that the statement in which the sentence in the commentary had its origin referred not to the Black Sea but rather to internal waters.

31. The essential purpose of the joint amendment was to create a general exception to the freedom of the high seas.

32. Mr. GLASER (Romania) explained that he had mentioned the Black Sea merely as an example to support his argument. It was by no means a far-fetched example ; indeed, it was the obvious one, because the Black Sea was the only sea to which Romania had direct access.

33. The special régimes laid down in such instruments as the Montreux Convention in no way conflicted with the principle of the freedom of the high seas. In any event, it had never been the intention of the Romanian delegation to ignore those provisions of the Montreux Convention to which the Turkish representative had referred.

34. Mr. KAWASAKI (Japan) opposed the two-power proposal. The Japanese Government considered that it ran counter to the very principle of freedom of navigation on the high seas by introducing exceptions to the general rule. Its adoption would introduce an undesirable element of uncertainty into article 26.

35. The Japanese delegation would support the Yugoslav amendment to article 27 (A/CONF.13/C.2/L.15), provided that the words " authority or control in any way whatsoever, except in the cases provided for by these articles " were deleted from paragraph 2 (*a*), as they implied that the articles actually provided for cases in which a state could subject the high seas to its sovereignty.

36. His delegation considered that most nuclear tests, whether carried out on land or on sea, had the effect of restricting the use of the high seas. Paragraph 2 (*b*) of the Yugoslav proposal would safeguard the freedom of the high seas against that particular curtailment.

37. Lastly, his delegation warmly welcomed the idea expressed in paragraph 3 of the Yugoslav proposal that the sole purpose of regulating the exercise of the freedom of the high seas was to ensure the latter's use in the interests of the entire international community.

38. Mr. GIDEL (France), introducing his delegation's amendment to article 27 (A/CONF.13/C.2/L.6), said that paragraph 1 of the proposal was drawn from the Commission's text of article 27 and from its commentary thereon. The new text made it clear that the freedom of the high seas ruled out any claim to sovereignty by particular states.

39. Paragraph 2 was drawn from paragraph 5 of the commentary on article 27, which the French delegation considered should be incorporated in the text of the article itself in order to make it explicit that the freedom of the high seas was subject to regulation by international law.

40. An important feature of his delegation's proposal was the elimination of the enumeration of freedoms ; that enumeration, preceded as it was by the words *inter alia,* was extremely dangerous. An enumeration which was not exhaustive could not fail to introduce all manner of uncertainties.

41. Mr. LAMANI (Albania), introducing the amendment to article 27 submitted by the delegations of Albania, Bulgaria and the USSR (A/CONF.13/C.2/L.32), said that his delegation considered that article to be one of the most important in the International Law Commission's draft. The purpose of the three-power amendment was to ensure that no military zones were established on the high seas, because they not only violated the freedom of those seas but also interfered with navigation and endangered human life.

42. Mr. LEAVEY (Canada) agreed with the statement in paragraph 5 of the International Law Commission's commentary on article 27, that any freedom that was to be exercised in the interests of all entitled to enjoy it must be regulated. He therefore supported the Mexican amendment (A/CONF.13/C.2/L.3).

43. Mr. KEÏLIN (Union of Soviet Socialist Republics) said that an objective study of the question was not greatly helped by the note of passion which some delegations had introduced into the debate on the joint amendment put forward by the Ukrainian S.S.R. and Romania (A/CONF.13/C.2/L.26). It was necessary to adopt a judicial viewpoint and not resort to journalistic methods.

44. The attitude of the Soviet Union delegation to the juridical status of the high seas was very clear. It approved article 27 of the International Law Commission's draft with the Polish delegation's amendment (A/CONF. 13/C.2/L.29). The high seas should be open to all nations on a basis of equality, and no state whatever should lay claim to sovereignty over any part of the high seas or use the freedom of the high seas to the detriment of the rights and interests of other states. That was his delegation's conception of the freedom of the high seas ; it was well known, and attempts to distort it were fruitless.

[1] *Yearbook of the International Law Commission, 1956,* Vol. I (A/CN.4/SER.A/1956), 339th meeting, paras. 7 and 14.

45. As regards article 26, the Soviet Union delegation was not opposed to paragraph 2 being referred to the First Committee for insertion in part I of the draft.

46. The amendment to article 26 submitted by the Ukrainian and Romanian delegations was perfectly clear. It dealt with the special régimes of navigation which might be required for seas bounded by a limited number of states and communicating with the high seas only by a channel skirting the shores of the coastal states. It should not be overlooked that those waters had in the past been used for aggressive purposes by states which did not border the sea in question. The importance of a special régime of navigation for those seas was due to the security requirements of the coastal states which had to be borne in mind in consequence of numerous historical circumstances or the conclusion of international agreements. He would also remind the Committee of the statement on that subject contained in paragraph 2 of the Commission's commentary on article 26, where it was pointed out that the rules defining the regime of navigation might be modified "for historical reasons or by international arrangement". The joint proposal of the Ukrainian S.S.R. and Romania was thus well founded and the Committee would be fully justified in adopting it.

47. As regards the amendment submitted jointly by the Albanian, Bulgarian and U.S.S.R. delegations (A/CONF. 13/C.2/L.32), the head of the Soviet Union delegation had drawn the attention of the Committee in the general debate (7th meeting) to the fact that certain states were violating the principle of the freedom of the high seas by establishing huge manoeuvre and training zones on the high seas for air and naval forces. In view of those facts, the Committee should take its stand on the principle of the freedom of the seas and decide to prohibit the designation of military training areas in the neighbourhood of the coasts of foreign states and on international sea routes which curtailed the freedom of navigation and menaced the security of other states. The Soviet Union delegation had no doubt that those delegations which sincerely subscribed to the principle of the freedom of the high seas would support the three-power proposal.

The meeting rose at 6 p.m.

SIXTEENTH MEETING

Wednesday, 26 March 1958, at 10.50 a.m.

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

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

ARTICLES 26 (DEFINITION OF THE HIGH SEAS) AND 27 (FREEDOM OF THE HIGH SEAS) (A/CONF.13/C.2/L.3, L.6, L.7, L.15, L.21, L.26, L.29, L.30, L.32, L.34, L.45, L.54, L.63 to L.68) (continued)

1. Mr. KEÏLIN (Union of Soviet Socialist Republics) suggested that the proposal submitted by Poland, U.S.S.R., Czechoslovakia and Yugoslavia (A/CONF.13/C.2/L.30) should be considered separately.

2. The CHAIRMAN said that that proposal, which dealt with a separate problem, could be examined after the Committee had concluded its consideration of articles 26 and 27. He suggested that the United Kingdom proposal (A/CONF.13/C.2/L.64) could be considered at the same time.

It was so decided.

3. Mr. GARCIA-SAYAN (Peru) said that his delegation's amendment to article 27 (A/CONF.13/C.2/L.34) had been drafted to take into account the existence of the rights of coastal states. The text of article 27 in its present form was too categorical, and stated the freedoms of the high seas as if they were unlimited. That was not the case, however, owing to the existence of generally recognized rights which implied the exercise of special competence or prerogatives based on sovereignty, which might itself be subject to certain limitations, as was clear from article 68. Similarly, it was obvious that although the rules referred to in paragraph 5 of the Commission's commentary on article 27 comprised a body of special — and to a certain extent exclusive — rights exercised by states on the high seas, none of those rights implied an unrestricted exercise of sovereignty. They were all, without exception, compatible with the fundamental principle that the high seas were open to all states. That principle, by which the Peruvian delegation stood firm, had been embodied in its proposal. The latter therefore started with the statement of that principle, but omitted over-emphatic and categorical prohibition contained in the first sentence of the article.

4. Another point to be noted was that his delegation's proposal used the word "right" instead of the word "freedom" used in the Commission's article 27, the object being to bring the wording of the article into line with that used in sub-sections A and B and in article 61.

5. Next, his delegation had tried, in paragraph 2 of its proposal, to indicate that the right to fish was not unrestricted. That would seem to be clear from articles 54 and 55 which, subject to certain requirements, recognized the right of a coastal state to adopt unilateral conservation measures "in any area of the high seas adjacent to its territorial sea". His delegation had intended to submit an amendment to those articles in the Third Committee, specifying the coastal state's inherent right to adopt measures for the conservation and utilization of the living resources in the high seas adjacent to its territorial sea. No decision had, however, been taken as yet on articles 54 and 55, and, since the Second Committee had already embarked upon its consideration of article 27, the Peruvian delegation felt that it would be better to amend paragraph 2 of its proposal to read "The right to fish, without prejudice to the rights of the coastal state under this convention".

6. That view, which was shared by a number of other Latin American delegations, was based on the 1945 proclamation of the President of the United States of America concerning the continental shelf and fisheries; in particular, the areas of jurisdiction and control to which the President had referred reflected the position of Peru and other countries on the subject. The claims and the natural and prior rights of the coastal states to adopt conservation measures in respect of the waters along their coasts must be recognized. Unfortunately,