United Nations Conference on the Law of the Sea

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Summary Records of the 1st to 5th 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))*

SUMMARY RECORDS OF THE SECOND COMMITTEE

FIRST MEETING

Wednesday, 26 February 1958, at 4.45 p.m.

Acting Chairman: Prince WAN WAITHAYAKON (Thailand)

Election of the Chairman

1. Sir Gerald FITZMAURICE (United Kingdom) nominated Mr. Gundersen (Norway).

2. The ACTING CHAIRMAN said that, as there was only one candidate, he felt that the Conference might wish to elect Mr. Gundersen by acclamation. Unless he received any proposal to the contrary, he would assume that that procedure was generally acceptable.

Mr. Gundersen (Norway) was elected Chairman by acclamation.

The meeting rose at 4.50 p.m.

SECOND MEETING

Friday, 28 February 1958, at 4.20 p.m.

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

Election of the Vice-Chairman

1. Mr. EL ERIAN (Egypt) nominated Mr. Glaser (Romania).

2. The CHAIRMAN, after recalling rules 51 and 53 of the rules of procedure, said that, as Mr. Glaser was the only candidate, he assumed the Committee would have no objection to electing him by acclamation.

Mr. Glaser (Romania) was elected Vice-Chairman by acclamation.

Election of the Rapporteur

3. Mr. GROS (France) nominated Mr. Madeira Rodrigues (Portugal).

4. The CHAIRMAN said that as there was again only one candidate, he assumed the Committee would have no objection to proceeding in the same way as for the election of the Vice-Chairman.

Mr. Madeira Rodrigues (Portugal) was elected Rapporteur by acclamation.

The meeting rose at 4.25 p.m.

THIRD MEETING

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

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

Organization of the work of the Committee

1. The CHAIRMAN, after referring to the report of the General Committee (A/CONF.13/L.2) adopted at the 4th plenary meeting of the Conference, consulted members on the question whether the Committee should start with a brief general debate or proceed directly to a discussion seriatim of the articles assigned to it.

2. Mr. TRUJILLO (Ecuador) thought that a division of the Committee's work into two separate stages would lead to loss of time. He favoured the third method suggested in the General Committee's report — namely, a combination of a short general debate and a discussion of the articles one by one.

3. The CHAIRMAN thought that the alternatives before the Committee were either to restrict the debate to one article at a time or to extend it to cover a number of articles.

4. Mr. COMAY (Israel) pointed out that the articles assigned to the Committee fell into several distinct groups. He suggested, as a compromise between the views advanced by the representative of Ecuador and the Chairman, that the Committee should divide the articles submitted for its consideration into groups and have a first reading of the articles within each of those groups. The International Law Commission had divided part II, section I of its draft articles (A/3159, para. 33) into three sub-sections : A. Navigation ; B. Fishing ; and C. Submarine cables and pipelines. It might later be found expedient to divide those sub-sections still further, but for the present the Committee might be guided by the classification adopted by the International Law Commission.

5. Mr. SETTE CAMARA (Brazil) supported the suggestion made by the representative of Israel. The subjects before the Committee were so diversified that the only practical method of work would be to divide the articles into separate groups.

6. Mr. WYNES (Australia) agreed with the representatives of Israel and Brazil.

7. The CHAIRMAN noted that the Committee was in favour of holding a general debate on several groups of articles. The next point to be decided was how to group the articles assigned to the Committee.

8. Mr. CARBAJAL (Uruguay) thought that the Committee should first make an analytical study of the articles and hold over a discussion of individual articles until a later stage. It should be left to the discretion of representatives to establish relationships between articles where necessary.

9. The CHAIRMAN felt that the grouping of articles for purposes of discussion required further consideration and said that he would try to work out definite proposals for the next meeting.

The meeting rose at 3.30 p.m.

FOURTH MEETING

Tuesday, 4 March 1958, at 3.15 p.m.

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

Expression of sympathy in connexion with the loss of the Turkish vessel Uskudar

1. Mr. COMAY (Israel) expressed his delegation's sympathy in connexion with the loss of the Turkish vessel *Uskudar*.

2. The CHAIRMAN, speaking on behalf of the Committee, associated himself with the statement of the representative of Israel.

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

3. The CHAIRMAN drew attention to document A/CONF.13/C.2/L.1, which had been prepared in accordance with the wishes expressed by the Committee at its previous meeting.

4. Mr. COMAY (Israel) felt that the suggested grouping of articles was satisfactory and would help to expedite the Committee's work. Adoption of the proposed procedure would not mean that a general debate would take place on each group of articles. On the contrary, it would relieve delegations of the obligation to participate in the general debate and only those wishing to do so would precede the discussion of any group of articles with a general statement or introductory observations.

5. In reply to a question by Sir Alec RANDALL (United Kingdom), the CHAIRMAN said that the proposed procedure was quite flexible and that, in the first stage of the Committee's work, delegations would be at liberty to speak on any one article, group of articles or all the articles assigned to the Committee.

The proposals contained in the note by the Chairman (A/CONF.13/C.2/L.1) were adopted.

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)

General debate

STATEMENT BY MR. CARDOZO (PORTUGAL), MR. RIPHAGEN (NETHERLANDS) AND SIR ALEC RANDALL (UNITED KINGDOM)

6. Mr. CARDOSO (Portugal), while congratulating the International Law Commission on its draft articles, felt that the final text of the articles to be drafted by the Committee should not be accompanied by commentaries, and said that his delegation would at a later stage press for the incorporation of some of the Commission's more substantive commentaries into the text of the articles themselves so as to ensure complete clarity and avoid possible misunderstandings.

7. To do successful work, the Committee should regard itself as a body of technical advisors, eschew half measures and define its subjects to the best of its ability, even in areas where complete clarity depended on the work of other committees. Differences of opinion should be discussed openly, goodwill displayed and concessions made on all sides. National interests should not be defended obstinately but equated with those of other countries for the common good. Arguments based on the idea that a certain proposal was inadmissible simply because it was inconsistent with domestic law should not be used; efforts should instead be made to overcome any difficulties of that sort which might arise. Arguments which relied solely on the concept of sovereignty should also be discarded.

8. The articles drafted by the Committee should be as precise and specific as possible, even at the cost of sacrificing unanimity. If opinions on the text of any article were equally divided, it would be better to submit an alternative text, to which as few reservations as possible might be admitted, rather than a vague compromise draft.

9. Mr. RIPHAGEN (Netherlands) said that the principle of *mare liberum* was common to all the draft articles under consideration by the Conference. One aspect of that principle of direct interest to the Second Committee was the use of the high seas as a means of communication, a term which postulated certain freedoms, the most important being freedom of navigation.

10. A distinction must, however, be made between the two aspects of the *mare liberum* principle — namely, that of jurisdiction, which was dealt with incidentally in draft articles 27 and 30, and that of the right of use — i.e., freedom of navigation. The reason for making that distinction lay in the difference in the legal character of those two aspects. The right to use the high seas for purposes of navigation had legal consequences that went beyond the concept of the high seas in the geographical sense of the term. No purpose would be served by proclaiming freedom of navigation on the high seas if that freedom could be enjoyed only in the geographical area of the high seas to the exclusion of territorial and internal waters. The "freedom of navigation" concept should imply the right of ships of all flags to engage in international trade, because in principle it covered the right to carry goods and passengers between various ports throughout the world.

11. The geographical area of the high seas, however, had a different meaning with respect to the legal consequences of the *mare liberum* principle in the field of jurisdiction. It was that area and that area alone which could not be subjected in any way to the sovereignty of a state, and it was within that area, and not beyond it, that the jurisdiction of the flag State over its ships was exclusive.

12. The Netherlands delegation therefore considered that the articles dealing with those two distinct aspects of the *mare liberum* concept should be drafted in a slightly different way. The general articles of part II, section I, should begin with an article on the right to use the high seas which might read as follows: [1]

"The high seas are open to all nations. Freedom of the high seas comprises, *inter alia*:

[1] Subsequently issued as document A/CONF.13/C.2/L.21.

(1) Freedom of navigation ; . . ." etc.

13. Next, there should come an article defining the jurisdictional aspect of the *mare liberum* in the following terms :

" 1. No state may validly purport to subject any part of the high seas to its sovereignty.

" 2. Ships on the high seas shall be subject to the exclusive jurisdiction of the state whose flag they are entitled to fly, save in exceptional cases expressly provided for in international treaties or in the present articles."

14. Finally, there should be an article defining the geographical area of the high seas along the lines of the International Law Commission's article 26.

15. Sub-section A, entitled " Navigation ", should begin with an article on the right of navigation which should be drafted along the following general lines :

" Every States has the right to sail ships under its flag on the high seas. Ships of all flags shall have the right to take part in international trade."

16. The freedom of the high seas, as was rightly pointed out by the Commission in the first paragraph of its commentary on draft article 30, had its counterpart in the jurisdiction of the flag state. Indeed, the right to use the high seas for the purposes of navigation imposed certain responsibilities on the flag state, and the rule that ships on the high seas in general had immunity from the jurisdiction of any state other than the flag state could be justified only by the effective jurisdiction of the flag state over those ships.

17. The navigation of ships on the high seas must be subject to certain rules for which provision had been made in the draft articles. The flag state was under an obligation to issue certain regulations in conformity with internationally accepted standards, and it was required by international law to ensure that ships flying its flag complied with such regulations.

18. The responsibilities assumed by the flag state in that connexion could be discharged only if it granted the right to fly its flag under conditions which enabled it to control the operation of the ship. For that reason proof of a genuine link between the state and the ship must be required. Draft articles 34 and 35, among others, dealth with the measures and action that had to be taken by the flag state. Those measures must be enforced effectively, but that was possible only if there was in fact a sufficiently close connexion between the flag state and the ship, its crew and the ship's operators — in other words, if the flag state was in control of its ships. In the absence of that genuine link, the flag state would be unable to ascertain whether navigational regulations were being complied with or to enforce such regulations by imposing penalties or taking other measures against persons responsible for the operation of the ship. In those circumstances, there would be no guarantee of orderly navigation in accordance with internationally accepted rules, and it would be difficult to recognize the right of the ship concerned to use the high seas and enjoy immunity from foreign interference.

19. The question therefore arose as to what would in fact constitute proof of that " genuine link " and what were the minimum conditions that must be fulfilled before a state could validly entitle a ship to fly its flag. The real point in that connexion being the exercise of effective jurisdiction and control, it would appear difficult for the present conference to draw up a complete list of the factors involved. For instance, complications would arise in the case of international companies and ships operated by persons other than the owners. There was, however, no need to agree on a detailed formula at the present stage ; the important point was that the underlying principle should be accepted.

20. Draft article 29, which dealt with the legal consequences of the absence of a " genuine link ", was rather vague and lent itself to a variety of interpretations. His delegation would therefore propose that it should be amended as follows : [2]

" Each state shall fix the conditions for the grant of the right to fly its flag to ships in such a way that there exists a genuine link between the ship and the state, enabling the latter to exercise the control necessary to ensure observance of the rule and regulations concerning navigation on the high seas."

21. Sir Alec RANDALL (United Kingdom) paid a tribute to the patience, ability and care with which the International Law Commission had studied the questions under consideration and the competence it had shown in producing its draft articles on the law of the sea. He expressed particular appreciation of the outstanding services of the Special Rapporteur, Mr. François. While the United Kingdom delegation would be unable to accept some of those articles and would propose amendments to others, that in no way detracted from its gratitude to the International Law Commission.

22. All the articles before the Committee were of great importance to countries that possessed, or had any ambition to possess, a merchant fleet ; their importance to the United Kingdom, which had the largest active merchant fleet in the world, was self-evident. At the present stage the United Kingdom delegation would, however, confine its observations to the first four groups of articles set out in the note by the Chairman on the organization of the work of the Committee (A/CONF. 13/C.2/L.1).

23. The United Kingdom delegation was broadly in agreement with the terms of articles 26 and 27 (group I) although it might later propose certain drafting amendments to article 26 and certain extensions of article 27.

24. Articles 34, 35 and 36 in group II were related to matters that already formed the subject of existing international conventions or agreements as specified in the United Kingdom's comments on the articles (A/CONF. 13/5). There appeared, therefore, to be no need for the creation of new international instruments dealing with the same matters. It would be difficult, if not impossible, for states which had accepted the existing conventions and agreements to accept new obligations covering broadly the same ground but in different terms. There would be a danger of conflict where the old and the new instruments differed, as well as difficulties in subsequently developing and amending on parallel lines two sets of instruments on the same subject. The United Kingdom delegation therefore believed that the most useful task which the Committee could perform in that

[2] The text of this proposal was subsequently redrafted and issued as document A/CONF.13/C.2/L.22 and Corr.1, 2 and 3.

respect would be to commend the existing instruments to states, and not to proceed with the adoption of the articles in question.

25. Article 29, in group III, was of considerable importance to all maritime countries. It dealt with a subject on which there was great diversity of practice in domestic law. While agreeing that it was desirable to obtain international agreement on the principles which should guide states in framing rules to govern the nationality of ships and the right to fly the national flag, the United Kingdom delegation felt that problems of great technical difficulty would be involved. The International Law Commission had recognized that difficulty and had confined itself, in drafting article 29, to the expression of a broad statement of principle.

26. The United Kingdom delegation accepted article 29 as a statement of principle and a guide, and endorsed the conclusion that there should be a genuine link between the ship and the state whose flag it flew. It felt, however, that in its present form the article lacked the precision which would enable it to be incorporated in an international agreement. The concept a genuine link had been carefully considered in the United Kingdom, but a more precise definition had not yet been found.

27. The criteria for determining the existence of a genuine link between state and ship included the conditions of ownership and registration of ships ; the ability of the flag state to exercise effective jurisdiction and control over ships flying its flag in matters of general concern to states ; and the possession by the flag state of a body of law regulating commercial maritime questions and adequate provisions for the effective administration and enforcement of the law. States need not necessarily all adopt the same criteria in establishing the link, but at all events it should be one of substance rather than a mere administrative formality.

28. In view of the complexity of the issue, the United Kingdom delegation believed that the effective translation of the principle of the genuine link into practical rules required further thought and discussion. Each aspect of the problem would have to be studied separately if international differences were to be successfully reconciled. Such study must initially be the task of States working together in international organizations and conferences which had the time and expert knowledge to deal fully with the subject. The magnitude of the other tasks before the Conference and the limited time available to it would preclude it from giving full consideration to the particular problem of the genuine link. The United Kingdom Government suggested, therefore, that the Conference should endorse in general terms the principle set forth in article 29 and refer the matter for further examination to other bodies.

29. Article 33 in group IV accorded to ships owned and operated by a state the same immunity of the high seas as that given to warships. One of the difficulties arising from that concept was the fact that many vessels engaged in international trade were owned or operated by a state, so that some countries would be in a position to claim state immunity outside the territorial sea for virtually the whole of their merchant fleet. That meant, in turn, that such immunity could be claimed in the contiguous zone proposed in article 66 for the purposes of preventing and punishing infringements of customs, fiscal and sanitary regulations. The provisions of article 33 might thus defeat the purpose of article 66. The United Kingdom delegation was unable to agree to the proposed distinction as regards immunity between ships which were owned or operated by a state and those which were not, where both were engaged in international trade in the common acceptance of that term. Equally, if it accepted article 66, it could not exempt large blocks of tonnage from the application of that article.

The meeting rose at 4.20 p.m.

FIFTH MEETING

Wednesday, 5 March 1958, at 10.30 a.m.

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

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

General debate (continued)

STATEMENTS BY MR. DUPONT-WILLEMIN (GUATEMALA) AND MR. BAZ (LEBANON)

1. Mr. DUPONT-WILLEMIN (Guatemala) said that the draft articles which had been referred to the Committee were generally acceptable to his government. He hoped that no changes, other than minor amendments, would be made to them.

2. One of the articles which the Committee should perhaps amend was article 29, dealing with the nationality of ships. The Committee should study very carefully the advisability of using the concept of nationality to define the link between states and the ships under their jurisdiction. He agreed with the view expressed by the representative of France at the 493rd meeting of the Sixth Committee of the General Assembly during its eleventh session — namely, that the introduction by the International Law Commission of that concept into the draft under discussion was fraught with danger, and that all mention of it should be deleted.[1] There was no mention of the " nationality " of ships in the laws of Guatemala or in those of some thirty-six other states. He also agreed with the views expressed by the French representative on the same occasion — namely, that the principles regarding nationality laid down by the International Court of Justice in its judgement of the Nottebohm case [2] did not apply to ships.

3. A clause covering merchant vessels legitimately defending themselves against attack should be added to the articles relating to piracy. He hoped that the Committee would agree to keep article 47, on the right of hot pursuit ; it was most important that that right should be enjoyed in the circumstances mentioned in the article.

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[1] *Official Records of the General Assembly, Eleventh Session, Sixth Committee,* 493rd meeting, para. 19.

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

4. Mr. BAZ (Lebanon) said that his country, which had inherited the traditions of the Phoenicians — the first navigators — was very interested in problems relating to the sea.

5. He considered that the definition of the term " internal waters " in article 26 should be transferred to article 1, particularly in view of the fact that at the eleventh session of the General Assembly some delegations had expressed the view that the sovereignty of coastal states extended to zones of the sea adjacent to their internal waters as well as to zones adjacent to their coasts, a matter with which articles coming before article 26 were connected.

6. Additional clauses might be added to article 27 providing for freedom of scientific research and exploration and other kinds of freedom mentioned in the commentary of the International Law Commission.

7. His government welcomed the wording of article 35 (Penal jurisdiction in matters of collision), especially because it provided a good means of putting an end to the uncertainty caused by the decision taken by the Permanent Court of International Justice in the *Lotus* case.[3] The Commission had adopted the principle laid down in the Brussels Convention of 1952 on that subject. To prevent difficulties arising from the adoption of provisions similar in content to those of existing conventions, but differently worded, the Conference could either simply refer to such provisions in such a way as to make them an integral part of the instruments it itself drafted, or recommend states to accede to those conventions.

8. The sentence in article 29 reading " Nevertheless, for purposes of recognition of the national character of the ship by other states, there must exist a genuine link between the state and the ship " was too vague. In his opinion, these should be a genuine link between the real owner of the ship and the state, which could be demonstrated to be such a link according to both the letter and the spirit of the domestic laws of the state concerned. The problem could never be solved in a really satisfactory way unless some states modified their domestic legislation.

9. He was not in favour of the provision in article 31 that a ship sailing under the flag of two or more states might be assimilated to a ship without nationality. He thought that other sanctions should be applied.

10. The use of the terms " warships " and " government ships " in articles 32 and 33 should be reconsidered in the light of the information supplied by the International Civil Aviation Organization (ICAO) regarding similar provisions relating to aircraft.

11. As a representative of Egypt had suggested at a meeting of the Sixth Committee of the General Assembly, careful consideration should be given to the question whether the provisions of article 46 on the right of visit were in accordance with the present legal situation regarding the slave trade and piracy.

The meeting rose at 11.20 a.m.

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

SIXTH MEETING

Friday, 7 March 1958, at 10.35 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 (continued)

STATEMENTS BY MR. OLDENBURG (DENMARK), MR. BIERZANEK (POLAND), MR. ARREGLADO (PHILIPPINES) AND MR. SEYERSTED (NORWAY)

1. Mr. OLDENBURG (Denmark) stressed the importance his government attached to the problems with which the Committee was faced. The Danes had been seafarers for more than one thousand years of their known history, for communications between the different parts of the country and with other countries were easier by sea than by land. His country's interest in ocean shipping had steadily increased and, despite heavy losses during the two world wars, it now had a merchant navy of approximately two million tons gross, the income from which was extremely important to the national economy.

2. The fundamental basis of shipping was the freedom of the high seas, and in particular the freedom of navigation. Moreover, the right of all ships freely to use the high seas in accordance with accepted international practice was indispensable to the development of world trade, since approximately 90% of all international trade was carried on by sea. The Danish delegation therefore fully supported the principles laid down in articles 27 and 28, and considered that any encroachment upon those rules of law in the selfish interests of any state would in the long run harm both the interests of the world community and those of the state concerned.

3. Referring to articles 29 to 31, on which his delegation would have detailed comments to make at a later stage, he drew attention to the principle stated in article 29, that for purposes of recognition of the national character of a ship by other states, there must exist a genuine link between the ship and the state granting permission to fly its flag. The Danish delegation agreed that registration of a ship should never be a mere formality, and that authorization to fly a flag should entail appropriate obligations in respect of the ship concerned on the part of the country of registration. Those obligations implied complete jurisdiction and the exercise of effective control, especially with regard to internationally adopted standards of safety and social conditions of the crew. In view of the progress that had been made over the past fifty years in establishing such standards, states must have control over ships flying their flag, in order that they might give effect to the international instruments in force. A more detailed definition of the principle of the " genuine link " would be welcome, but the difficulties involved were great, given the considerable variety or registration requirements. The general principles had been largely covered by the United Kingdom representative's statement at the 4th meeting, but the matter should be studied in greater detail.