United Nations Conference on the Law of the Sea

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Summary Records of the 6th to 10th 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))*

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.

4. Turning to article 33, he said that, since the merchant navies of many countries were now largely state-owned, his delegation did not consider that ships owned by governments and used solely for commercial purposes should have a more favourable status in international law than privately-owned commercial vessels. The distinction should be made not by ownership, but by the use to which the vessel was put. The immunity granted to warships and other vessels operated on strictly governmental business should not be extended to ships operated for commercial purposes, irrespective of their ownership. In the opinion of the Danish delegation, international law did not at present in that respect assimilate state-owned commercial ships to other state-owned ships.

5. Mr. BIERZANEK (Poland) said that his country's traditional policy with regard to the principle of the freedom of the high seas went back to more than fifty years before Grotius' dissertation on the *Mare Liberum*, when the King of Poland had engineered a coalition to safeguard freedom of navigation in the Baltic, and had instructed his envoy to the King of Denmark to state that the use of the sea was common to all, in accordance with natural law, and that therefore no one could be prevented from navigating on the high seas. Since then, the principle of free access to the sea had always been closely connected with Poland's political and economic independence. It was indicative that an attempt made in 1939 to cut off Poland's access to the sea had been the primary cause of the Second World War. Great efforts were being made to increase the size of the Polish merchant navy, and production from Poland's fisheries, which was six times as great as it had been before the war, came mostly from seas other than the Baltic. Although its profits from the seas could not yet be compared with those of traditional maritime states, the disparity would steadily decrease.

6. The Polish delegation considered that the Committee's main task was to analyse the principle of the freedom of the seas, not in order to weaken it by adjusting it in the face of changing conditions, but to strengthen it by fitting it to the requirements of economic life and modern techniques. Since Grotius, it had been customary to invoke two classical arguments as the foundation of the freedom of the high seas. The first was that the principle of that freedom should, so far as possible, meet the interests of all nations. The second was that the nature of the high seas did not permit them to be subject to occupation by any one state. Technical progress had robbed the second argument of much of its value, since the possibilities of controlling the high seas were now much more real than ever before. But the first argument had lost none of its cogency ; on the contrary, it had become more pertinent in view of the growing interdependence of specific aspects of the utilization of the sea.

7. The question before the Committee was how to provide for the freedom of the high seas within the framework of the codification and progressive development of the international law of the sea. In the past, the principle had been postulated in a variety of ways ; the Committee should now concern itself with the dangers which might threaten that freedom in the future.

8. The Polish delegation did not share the pessimistic view that the imminent threat to the freedom of the high seas lay in the desire of most states to extend the breadth of the territorial sea beyond the three-mile limit. Polish legislation in that domain was reasonable, providing for a territorial sea three miles broad bordered by a contiguous zone of another three miles, but that did not prevent his country from appreciating the desire of other sovereign States to establish their maritime frontiers somewhat beyond that limit. His delegation therefore considered that the International Law Commission had been wise to propose a limit somewhere between three and twelve miles.

9. Moreover, his delegation did not agree that one of the main objects of the proposed codification was to secure the freedom of the seas against the pirates who had in the past ranged the seas for gain or vengeance. But the high seas had now to be protected from acts of violence perpetrated for other motives. There was a real danger that such acts, the effects of which would be analogous to those of piracy in the strict sense, might be committed through abuse of the laws of sea warfare, and that local conflicts might serve as the pretext for such acts.

10. It might be argued that the Conference's task was to codify the law of the sea in time of peace, not war. While that was a valid legal objection, it should be borne in mind that the purpose of all law was to solve specific problems of human life. It would be unrealistic for legislators to ignore the danger of abuses and to assert that only the law of peace was concerned. Article 27 should therefore be supplemented by more detailed provisions concerning the scope of application of the rules of law in times of peace ; in particular, the obligations assumed by states under the Charter of the United Nations with regard to the illegality of war and hostilities should be applied *ad casum maris*. It was not for the Conference to go beyond the provisions of the Charter relating to the problems of world peace, but it was its duty to insist that the obligations of states should be no less progressive under the law of the sea than under the Charter. The Polish delegation therefore reserved the right to submit appropriate amendments to article 27.

11. Another serious threat to navigation on the high seas was that of tests of nuclear weapons either on the high seas, or elsewhere, if the effects extended to the high seas. Poland's position in the matter was determined by its general attitude to the use and manufacture of nuclear weapons, which was that partial solutions should be sought until a universal solution could be found. Although the problem of the prohibition of the use of atomic weapons lay outside the Conference's terms of reference, it was both the right and the duty of delegations to consider means of protecting the freedom of the seas from the effects of atomic tests. It followed from the principle that the high seas were open to use by all nations on a basis of equality that no nation could use the high seas in a manner capable of preventing their use by other nations. That view had been clearly stated by Mr. Scelle, a member of the International Law Commission.

12. The danger zones inevitably created by nuclear tests extended over 400,000 square miles, and the seas within that area could not be used for navigation or fishing

for long periods following the test. Apart from direct damage, however, there were indirect effects which might result in considerable impoverishment of the biological resources of the sea, and radio-active fall-out might extend to areas thousands of miles from the site of the test. It was regrettable that the International Law Commission should have stopped half-way in dealing with that question. Although it was stated in paragraph 1 of the commentary on article 27 that no state could exercise its jurisdiction on any part of the high seas, and that states should therefore refrain from any acts which might adversely affect the use of the high seas by nationals of other states, paragraph 3 unfortunately went on to say that the Commission had not made an express pronouncement on freedom to undertake nuclear weapon tests on the high seas. In that connexion, Mr. Gidel, an authority on the law of the sea, had written that nuclear tests had the effect of establishing a sovereignty of the experimenting state over the area affected by the explosion ; although that sovereignty was temporary, and was not proclaimed, it was nevertheless *de facto* sovereignty, since the area concerned was determined solely by the will of the experimenting state, to the absolute exclusion of all other users of the high seas.

13. That was the legal reason why the Polish delegation could not reconcile nuclear tests with the principle of the freedom of the high seas, and considered that a more accurate definition of that freedom was required. There had been much discussion of whether and to what extent international law should be codified at the present time, and some jurists had expressed doubts about the matter. If, however, the answer to the question was in the affirmative, the responsibility for solving such an important problem could not be evaded. Accordingly, the Polish delegation considered that paragraphs 2 and 3 of article 48 were inadequate, and agreed with the views expressed by the Indian and Tunisian representatives in the Sixth Committee of the General Assembly that the International Law Commission had not gone far enough in the matter. Mr. François, the Special Rapporteur, considered that the Commission was not competent to deal with technical and political questions, but that did not apply to the Conference, which was attended by diplomatists and technical experts. The problem should once more be analysed in detail and both the legal and the humanitarian and moral aspects taken into account.

14. Mr. ARREGLADO (Philippines) said that his delegation unreservedly accepted many of the draft articles submitted by the International Law Commission, which had made a contribution of great and lasting value to the progressive development and codification of international maritime law.

15. The Philippines, whose territory formed a compact archipelago in the middle of the ocean, found it extremely difficult, however, to accept the definition of the term " the high seas " in article 26. Unqualified acceptance of that article in conjunction with the articles on the delimitation of the territorial sea and internal waters would be tantamount to subjecting to the régime of the high seas a vast portion of the internal waters of the Phillipines lying between the thousands of islands and islets of the archipelago. That would destroy its legal unity. In drafting article 26, the International Law Commission had apparently disregarded the generally recognized principles that compact, outlying archipelagos should be treated as a whole, the waters lying between and within the islands, islets and rocks of such archipelagos being considered as internal waters, and that such archipelagos should be surrounded by a single belt of territorial sea. It had also seemingly disregarded the fact that those principles were justified by the theory of historic waters, as in the case of the so called historic bays. According to his country's legislation, all the waters lying in, between and around the different islands and islets of the archipelago formed an integral part of his country's maritime domain subject to its exclusive sovereignty, irrespective of their size.

16. States consisting of archipelagos, such as the Philippines, were entitled to the same measure of treatment and justice as that accorded to states with heavily indented coastlines.

17. The *Encyclopaedia Britannica* defined an archipelago as an " island-studded sea ", and the *Dictionnaire de l'Académie Française* defined it as " une étendue de mer parsemée, entrecoupée d'îles " (a stretch of sea studded and divided up by islands). These definitions fully bore out his contention that the sea areas linking the islands and islets of the Philippine archipelago were a single legal entity and as much a part of the archipelago as the islands themselves.

18. The perimeter of the Philippines group consisted of a continuous chain of islands or islets of varying sizes, lying so closely together that straight baselines of the kind to which article 5 applied could easily be drawn between appropriate points on outer islands or islets so as to encircle them all without crossing unreasonably large expanses of water. Inside that continuous chain of islands and islets there were several seas, of which the largest was the Sulu sea. Underneath the waters surrounding the chain was a shelf forming a continuous submarine platform which was nowhere more than 100 fathoms below surface. Thus, all the sea areas within the chain were surrounded and enclosed on all sides by the land domain of the Philippines.

19. Every principle laid down by the International Court of Justice in its judgement of 18 December 1951 in the Anglo-Norwegian fisheries case [1] was applicable to the waters between the islands of the Philippine archipelago. Although no hard and fast rule could be laid down for the delimitation of the territorial waters of outlying archipelagos, there were rules which took into account the special geographical, historical and economic peculiarities of states consisting solely of archipelagos, such as the Philippines, and they should be observed.

20. It was imperative that all coastal states should be able to determine their land and sea limits in complete security. Any such state which could not do so would be at the mercy of the play of international forces. Every nation should have the right to defend its possessions. The Philippines formed a single unit. The stretches of sea between its islands were part of that unit. If those stretches of sea were controlled by other states, the unity of the Philippines would be destroyed, and his country would lose its independence.

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[1] *I.C.J. Reports, 1951*, p. 116.

21. Mr. SEYERSTED (Norway) said that his delegation agreed in principle with the articles on the general régime of the high seas, proposed by the International Law Commission.

22. Paragraph 2 of article 26 might well be transferred to the part of the International Law Commission's draft concerned with the territorial sea, because it related to waters within the baseline of the territorial sea, and as such was not really relevant to the régime of the high seas ; moreover, that part of the draft lacked a precise general definition of the inner limits of the territorial sea.

23. The fact that many of the provisions of articles 28, 34, 35 and 36 had already been laid down in international conventions created a difficulty which would have to be overcome. However, to eliminate those provisions from the draft, as proposed by the United Kingdom representative at the fourth meeting, might not be the best way of surmounting the difficulty. He would, however, say no more on the subject for the time being, inasmuch as it was closely connected with the question of whether the articles should form the subject of a resolution or of a convention.

24. His delegation was prepared to accept article 29, which laid down that there must exist a " genuine link " between a ship and the state whose flag it flew, as a fair expression of the internationally accepted standard which all the traditional maritime states observed. There was a genuine link between those countries and the ships flying their flags, even though their registration regulations might differ. But it could not truly be said that there was a genuine link when a state did not exercise effective jurisdiction and control over ships flying its flag. It would of course be desirable if the requirements for a genuine link could be defined, but it would be a very difficult task. Article 34, on the safety of navigation, in conjunction with article 30 on the status of ships, indicated some of the measures required for establishing a genuine link. The relevant legislation and regulations of the different countries must vary according to their responsibilities and the size and distribution of their merchant navies.

25. The Committee might set up a small working party to complete the International Law Commission's study of the problem of ships operated by international organizations, regarding which there was no provision in the draft articles before the Committee.

26. He was opposed to the provision in article 33 that government ships used for commercial purposes should be assimilated to warships. He considered that both on the high seas and in the territorial sea they should be assimilated to private ships. States should enjoy the right of hot pursuit in respect of commercial vessels irrespective of whether they were owned by a government or by a private company.

27. He had noted that the term " government ships " was used in articles 22 and 23, whereas article 33 referred to " ships owned or operated by a state " and that in articles 39 and 40 the term " private ship " or " vessel " was used, whereas the term " merchant ship " was used in other articles. The terminology should be consistent throughout the rules. If other terms were necessary because of differences in meaning, those differences should be explained.

28. Mr. EL ERIAN (Egypt) asked the Secretary whether he could circulate a list of existing conventions relating to the law of the sea, indicating the parties to each of those conventions.

29. Mr. LIANG (Secretary of the Committee) undertook to do so. Mr. François, Expert to the secretariat of the Conference, had been requested to make a study of international conventions on special technical subjects not dealt with by the International Law Commission. A list of such conventions had been drawn up, and was being studied jointly by Mr. François and some or the legal experts of the Secretariat. He thought that the Secretariat could provide the Committee with all the technical information it needed about those conventions by means of oral statements, and Mr. François would be able to give the Committee the benefit of his personal views. He feared, however, that the conference staff, which was not very large, would be unable to make a scientific comparative study of the conventions while the Conference was meeting.

The meeting rose at 12.10 p.m.

SEVENTH MEETING

Monday, 10 March 1958, at 3 p.m.

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

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

General debate (continued)

STATEMENTS BY MR. VRTACNIK (YUGOSLAVIA), MR. URIBE HOLGUÍN (COLOMBIA), MR. TUNKIN (UNION OF SOVIET SOCIALIST REPUBLICS) AND MR. VITELLI (ITALY)

1. Mr. VRTACNIK (Yugoslavia) hoped that the Conference would put in the form of written rules the principles which had been formed over the centuries with regard to the rights and duties of states in relation to the high seas.

2. The principle that the high seas were open to all nations and that all nations had an equal right to use them was in accord with the United Nations' principle of the equality of all states. Again, the principle that ships on the high seas were subject only to the jurisdiction of the state whose flag they flew was in line with the United Nations' principle that no state should interfere in the domestic affairs of another state. The principle of peaceful international co-operation was also involved, for the resources of the high seas could only be put to their best use if all states co-operated and fully observed the rules relating to the high seas.

3. Although the present conference had no jurisdiction in disputes between individual states, he would venture to remind the Committee of the recent hold-up of the Yugoslav merchant vessel *Slovenija* on the high seas and the confiscation of part of its cargo as a provisional measure after the vessel had been escorted to Oran ; that had been a serious violation of the freedom of

navigation on the high seas, which was one of the fundamental principles of the high seas régime, and it showed how necessary it was for the Conference to codify the rules relating to the high seas so as once again to draw the attention of states to the need to respect those rules. The draft which the Committee would ultimately recommend should make it clear that no state was entitled to arrogate to itself, without the consent of the international community, any rights regarding the high seas except those laid down in rules adopted by joint agreement. The high seas should serve as a means of communication between nations and be treated as the common property of all.

4. No state should carry out nuclear tests or other dangerous experiments such as would prevent other states from using any part of the high seas.

5. Technical progress and economic development had made it necessary to set up certain institutions which had not existed when the principle of the freedom of the high seas had first been proclaimed, and a change had thereby been effected in the relationships between the flags flown on the high seas. The Committee should draw up rules regarding the freedom of the high seas suited to existing circumstances. His delegation had been glad to note that the International Law Commission had included in its text a number of provisions relating to new developments. That text provided a useful basis for the Committee's work.

6. His delegation might later submit some amendments of a technical nature and others on points of drafting to the Commission's articles on the high seas. Paragraph 2 of article 26, which dealt with internal waters, should be transferred from the section relating to the high seas to a more appropriate part of the text. Nor was his delegation satisfied with the provisions in the Commission's text regarding the flag and nationality of ships, the definition of government ships, the relationship between the Commission's text and existing international conventions — on which matter it shared the views expressed by the representative of Norway at the previous meeting — the right of hot pursuit and the legal status of the high seas or with some of the provisions regarding piracy.

7. Mr. URIBE HOLGUIN (Colombia) said that the only amendment which he would at the present stage propose to the International Law Commission's very valuable articles regarding the high seas was one affecting article 33, although some of the other articles required further clarification. He was opposed to the provision in article 33 that ships used on government service for commercial purposes should be "assimilated to... warships" and "have the same immunity as warships", although he agreed that ships used on government service for non-commercial purposes should have the same immunity as warships. He could not accept that provision without knowing the reasons why the Commission had agreed to include it in its draft. The Commission had not stated those reasons in its commentary on the article, which merely said that "there were no sufficient grounds for not granting to state ships used on commercial government service the same immunity as other state ships". One reason for opposing that provision was that it was inappropriate that the ships in question should have policing rights. A specific provision to that effect should be included in the draft. The Commission, too, had stated that it was against their exercising such rights.

8. In its comments on the draft articles,[1] the Belgian Government referred to four categories of ship: state-owned ships used on commercial government service; state-owned ships used on non-commercial government service; privately-owned ships used on non-commercial government service; and privately-owned ships used on commercial government service. A new text, covering the second and third categories, but not the first and fourth, should be adopted for article 33. He would therefore propose the following:[2]

> "Ships used exclusively on non-commercial government service owned or operated by a state shall enjoy the same immunity as warships in regard to the exercise of jurisdiction on the high seas by any state other than the flag state. Only warships may exercise policing rights."

9. Mr. TUNKIN (Union of Soviet Socialist Republics) observed that the Conference's task of codification and progressive development of the law of the sea carried with it the obligation to ensure that the resulting instruments would establish rules of international law acceptable by all states. Since the fundamental problem of contemporary international relations was that of ensuring peaceful co-existence among states, co-operation on the basis of equal rights must be secured in international law as well. There could be no doubt that the Conference's work would be evaluated according to the measure of its success in achieving that objective.

10. The Second Committee was in a more favourable position than some others because the principle of the freedom of the high seas had been for centuries reaffirmed in the effort to combat attempts by states to secure mastery over large maritime areas. The freedom of the high seas meant that they were open to all states on an equal footing, and that no state could claim sovereignty over them to the detriment of others; it was satisfactory to note that in modern times that principle had acquired a new and practical meaning for the peoples of countries which had recently won their independence.

11. The Soviet delegation was in general agreement with the provisions of article 27 of the International Law Commission's draft, and supported the statement in paragraph 1 of the commentary that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states. Members of the United Nations, bound by the Charter to promote the interests of peace and the development of international co-operation, must strive to strengthen that principle and must not allow the freedom of the high seas to be violated. In that connexion, the first question that arose was the question of the prohibition of tests of nuclear weapons on the high seas. The movement to secure the prohibition of all tests of nuclear weapons was undoubtedly spreading steadily. The Soviet Union, which had consistently striven to

[1] See *Yearbook of the International Law Commission, 1956*, Vol. II (A/CN.4/SER.A/1956/Add.1), p. 38, para. 9.

[2] Subsequently issued as document A/CONF.13/C.2/L.5 and Corr.1.

secure the unconditional prohibition of nuclear weapons, supported the view that tests of nuclear weapons must be immediately discontinued. Thousands of scientists throughout the world, including scientists in the United States of America, the United Kingdom, France and other countries, were speaking in support of these demands, which were upheld by the peoples of the whole world. International organizations such as the World Council of Peace, the World Federation of Trade Unions, the World Federation of Democratic Youth and the international women's organizations were demanding that tests of these frightful weapons should be discontinued. It should be borne in mind that the Conference was concerned, not with the prohibition of nuclear tests, but with the separate question of outlawing such tests in the open seas, because they undoubtedly constituted a violation of the principle of the freedom of the high seas. Recent tests of atomic and hydrogen weapons in the Pacific Ocean had affected vast maritime areas, rendering them unfit for navigation and fishing, and killing and injuring people more than a thousand miles away from the places where the tests were held. The states conducting the tests were therefore using the high seas as part of their internal waters. It was not surprising that some eminent jurists of the International Law Commission and many representatives at the eleventh session of the General Assembly had advocated outlawing nuclear tests on the high seas, and that the Commission as a whole had taken steps, however inadequate, to censure such tests.

12. The Soviet delegation also felt obliged to point out that certain states were violating the principle of the freedom of the high seas by taking over large areas for naval and air force manoeuvres. Thus, for some years the United States had used areas in the southern part of the Sea of Japan, including the Korean Straits, in the north-west Pacific, south and east of Japan, and in the Yellow Sea and Carribean Sea for such purposes, and, at the end of 1957, the United Kingdom had taken over for submarine manoeuvres large areas of the English Channel which were situated on international shipping routes. The freedom of the high seas was also frequently violated by military aircraft. With a view to developing friendly relations between states, it would be fitting that the Conference should adopt, on the basis of the principle of the freedom of the high seas, a decision prohibiting the establishment of military manoeuvre areas on the high seas near foreign shores and on international shipping routes, for such manoeuvre areas restricted the freedom of navigation and created a threat to the security of other states.

13. Turning to article 33, he pointed out that merchant shipping was a matter of government concern for countries whose commercial vessels were state-owned. Consequently, all measures of compulsion exercised against state merchant vessels, including measures for the purpose of securing claims advanced against the said vessels, were impermissible. The opponents of that view based their objections on the 1926 Brussels Convention, but the limited number of parties to that convention in itself implied the intention to establish an exception to the general rule, and it was obvious that the exception applied exclusively to those parties. The measures concerned could be applied to other states only in accordance with international agreements to which they had adhered. From the practical point of view, legal formulae to protect the interests of persons having claims on government merchant vessels could be worked out on the basis of a recognition of the immunity of such vessels and the consequent inapplicability to them of such measures of compulsion as arrest or detention.

14. Mr. VITELLI (Italy) said that his delegation did not believe that it would be difficult to reach general agreement on the régime of the high seas, since in that respect states acted, not on the grounds of their legal sovereignty, but in accordance with rules of international law, which conferred upon them certain freedoms and powers. Freedom of navigation required a maximum of co-operation from all states; no state could claim to subject any part of the high seas to its jurisdiction, provided it was deemed that the high seas comprised all seas beyond territorial waters.

15. The reference to internal waters in the definition of the high seas in article 26 of the International Law Commission's draft seemed to be inappropriate and the Italian delegation reserved the right to submit an amendment in that connexion.

16. Turning to the provision in article 29 whereby a genuine link between the state and the ship must exist for purposes of recognition of the national character of the ship, he observed that while it was difficult to find an infallible definition of that link, the principle involved must be clearly stated in an international convention. He recalled suggestions made by the International Labour Office at the Preparatory Technical Maritime Conference in London in 1956, by the International Transport Workers' Federation and the Organization for European Economic Co-operation, to the effect that the flag state should have such legislation and organization as would ensure effective legal control in administrative, technical and social matters and of a structure and effectiveness proportionate to the size and composition of the fleet. The provisions of article 34 on safety of navigation seemed to bear out the need for more definite provisions on the control exercised by the flag state over its shipping. Accordingly, the Italian delegation concurred in the amendment to article 29 proposed by the Netherlands representative at the Committee's fourth meeting. It was generally agreed that the main danger involved in flags of convenience was the undermining of public order on the high seas. Where there was no state sovereignty, it was obvious that such order depended on strict discipline and organization by the users. If ships sailing the high seas belonged to states which took no concern for discipline, matters of common interest such as safety and order would be jeopardized.

17. With regard to article 33, the Italian delegation considered that caution should be exercised in extending to ships owned or operated by a state the same immunity as that traditionally granted only to warships. Such immunity should not be granted to ships competing with others in free international trade, since inequitable treatment of that sort would be bound to upset the balance of trade and lead to total chaos.

18. Article 46, on the right of visit, was not likely to be open to abuse, as it was limited to the most serious cases. Article 47, on the right of hot pursuit, also seemed satisfactory, since it provided that pursuit of

a ship which had committed certain acts could be continued even when it had left the territorial seas of the pursuing state.

19. In connexion with certain provisions of the articles on safety of navigation, penal jurisdiction in matters of collision, duty to render assistance and slave trade, the Italian delegation considered that care should be taken to avoid overlapping with the provisions in existing general maritime conventions. The Conference should confine itself to a reference to those provisions. Otherwise, states might find themselves in a quandary with regard to the interpretation of varying provisions on the same subjects.

The meeting rose at 4.10 p.m.

EIGHTH MEETING

Tuesday, 11 March 1958, at 3.15 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. OHYE (JAPAN), MR. PFEIFFER (FEDERAL REPUBLIC OF GERMANY), MR. SIKRI (INDIA), MR. FAY (IRELAND), MR. WYNES (AUSTRALIA) AND SIR ALEC RANDALL (UNITED KINGDOM)

1. Mr. OHYE (Japan) said that the freedom of the high seas, the cardinal principle of the international law of the sea, was satisfactorily set forth in article 27 of the International Law Commission's draft. The Japanese delegation particularly welcomed the statement that no state might validly purport to subject any part of the high seas to its sovereignty.

2. He drew attention to the third sentence of paragraph 1 of the commentary on article 27 and to the first sentence of paragraph 3. It was well known that Japan opposed all nuclear tests, whether conducted on land or on the high seas, and that it was exerting every effort to achieve their prohibition. The first sentence of paragraph 3 of the commentary seemed to refer only to nuclear tests at sea, presumably on the ground that the effect of the tests was more extensive in such cases. But the Committee should be concerned with nuclear tests wherever they were conducted. The International Law Commission had passed a clear judgement on nuclear tests by stating in paragraph 1 of the commentary that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states; furthermore, according to the second sentence of paragraph 3 of the commentary, nuclear tests should not be permitted so far as they obstructed the freedom of the high seas. It was self-evident that most tests did in fact restrict such use; indeed, Japanese nationals had been victims of nuclear tests. His government was therefore in full agreement with the text of the commentary in so far as the relationship between nuclear tests and freedom of the high seas was concerned.

3. With regard to article 33, concerning the immunity of state-owned ships, he said the Japanese delegation found it difficult to agree that there were adequate grounds for assimilating the immunity of government vessels engaged in commercial activities to that of warships. Even if a vessel was state-owned, it was performing the function of a merchant vessel if it was engaged in trade. Moreover, practice varied greatly in that respect, and hence the uniformity of national legislation implied in the draft article was illusory. Since several other delegations had expressed the same view, it would seem advisable to consider the matter with special care.

4. Although the Japanese delegation understood the purport of the United Kingdom delegation's suggestion at the 4th meeting that three of the draft articles should be deleted, it was of the opinion that deletion of the articles might not necessarily be the most appropriate action. It should be borne in mind that the Conference was concerned with the entire régime of the sea. Furthermore, some states might adhere to those articles without being parties to any other multilateral treaties. It might therefore be better to simplify the articles, with a view to setting forth fundamental principles to serve as a basis for various multilateral treaties.

5. Mr. PFEIFFER (Federal Republic of Germany) observed that the basic principle set forth in article 28 of the International Law Commission's draft, that every state had the right to sail ships under its flag on the high seas, was supplemented by the new principle, laid down in article 29, that a genuine link must exist between the state and the ship for purposes of recognition of the national character of the ship. However, the draft did not draw all the logical conclusions that should follow from those two principles. In the first place, there was no provision stipulating that all ships should be not merely authorized but obliged to fly a flag and to have a nationality. Secondly, there was no obligation for states to register all ships when a genuine link existed.

6. Under the rules recommended by the Commission, therefore, ships could sail without flying a flag, without having a nationality and without being subject to the legislation of any state. That hypothetical "statelessness", which was mentioned in paragraph 1 of the commentary on article 31, was unsatisfactory to all nations which were concerned with safety at sea and the welfare of crews.

7. It was therefore in the interests of all nations that the Conference should establish the obligation for every ship to have a nationality and to be subject to the legislation of its state of nationality. But it was obviously impossible for ships to be free to choose any nationality. Most maritime nations imposed comparatively strict conditions in granting the right to fly their flag. Yet a ship which failed to fulfil these conditions had the simple alternative of applying for registration elsewhere, preferably in a state which granted convenient conditions.

8. If article 29 were adopted as drafted, it was conceivable that in many cases ships could no longer be registered by states offering convenient conditions, owing to the lack of a genuine link between the state and the ship, but would also not qualify for registration

in the state with which they had a genuine link, because of the strict conditions imposed. The regrettable result would be that the ship concerned would be condemned to statelessness by international law. The only way in which that situation could be avoided was to revise national laws relating to registration and to the grant of flags, in order to facilitate the registration of ships having a genuine link with the state. The Conference was competent to recommend the necessary modifications and to establish some general guiding principles. His delegation suggested three such principles. In the first place, all sea-going vessels should be obliged to have a nationality and to fly the flag of the state concerned; merchant ships might acquire the right to fly the flag of a state through registration in that state. Secondly, every state should be obliged to register merchant ships which were entirely owned by its nationals or by companies domiciled in its territory; a state might also register ships which regularly received their orders in its territory, provided that they were not already registered with another state. Thirdly, a state should not accept the registration of a ship if there was reason to believe that it was already registered in another state.

9. Mr. SIKRI (India) said that, with regard to article 33 of the International Law Commission's draft, concerning the immunity of government ships, the Indian delegation shared the views advanced by the United Kingdom representative at the 4th meeting. Before India had attained its independence, the status of ships owned by the East India Company and of those owned by the ruling princes had been controversial; the problem had been solved on the basis of the nature of the ships' activities, rather than on that of ownership. If the Commission's text were adopted, unjust discrimination against privately owned ships might be sanctioned. In any case, in the event of its adoption by the majority of the Conference, it would be desirable to agree on the external signs distinguishing state-owned commercial ships, so that they would not be liable to inspection by warships.

10. Although the Indian delegation supported the principle of the "genuine link" set forth in article 29, it did not consider that it was precisely enough stated and thought that the article should not be included in a convention for the time being. Further study by an expert body was desirable.

11. The Indian delegation was in general agreement with the Commission's views on the right of hot pursuit, as stated in article 47, but felt that the right should also be exercisable against ships in the contiguous zone which violated the coastal state's regulations applicable in that zone. Moreover, the principle that pursuit should be permitted in the case of an offence committed within territorial waters should, by analogy, be applicable to the contiguous zone, since otherwise the power of the coastal State to protect its interests would be largely nullified.

12. His delegation generally supported the Commission's comments on article 27, except where the legality of nuclear tests in the high seas was concerned. It had been said that the problem of nuclear tests fell within the competence of the Disarmament Commission of the United Nations Security Council. That was true, but the problem had three aspects — the disarmament aspect, the legal aspect and the humanitarian aspect — and the Conference was fully competent to deal with the latter two. Even if the great Powers agreed to permit nuclear tests, they could not determine the legality of such tests *vis-à-vis* the community of nations. The Indian delegation considered that such tests were illegal if they adversely affected the use of the high seas.

13. The Commission had rightly stated in the third sentence of paragraph 1 of the commentary on article 27 that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states. Furthermore, Mr. François (Special Rapporteur of the Commission) had said in the Sixth Committee of the General Assembly that the question of the lawfulness of specific tests should be judged in the light of the principle which the Commission had categorically laid down.[1] The Indian delegation therefore considered that some reference to that fundamental principle should be made in the article itself.

14. It was surprising that the Commission had not taken that next logical step. The reason it gave for not doing so was that it did not wish to prejudice the findings of the Scientific Committee on the Effects of Atomic Radiation. But it was hardly necessary to await those findings; there was ample evidence that all the nuclear tests hitherto conducted had adversely affected the freedom of the high seas, since navigation, shipping, the flying of aircraft and the laying of cables and pipelines had been barred absolutely in the areas concerned.

15. Sir Gerald Fitzmaurice, the United Kingdom representative to the Sixth Committee of the General Assembly, had tried to defend the legality of nuclear tests on the grounds that the experiments carried out in conditions calculated to preserve and cause the least possible damage were not inconsistent with the principle of the freedom of the high seas.[2] However, no argument had been adduced in support of that conclusion, which seemed to be that a state was entitled to cause damage and to interfere with rights, provided that it minimized the damage and interference as far as possible. If such a principle were accepted, however, it would destroy the whole fabric of international law. Furthermore, if the premise of the legality of nuclear tests was admitted, it would be necessary to consider clarifying article 48, paragraph 3, since it would be anomalous for legislators to regulate conditions under which illegal acts might be committed.

16. Turning to the humanitarian aspect of the problem, he said that no state was entitled to impose incalculable suffering on the human race by conducting experiments like nuclear explosions.

17. In conclusion, he disagreed with the suggestion made by the Netherlands representative at the 4th meeting that freedom to take part in international trade and to call at every port in the world flowed from the principle of freedom of navigation. Although the Indian delegation was in favour of that freedom and of the removal of hindrances to international trade, it considered that the subject was misplaced in a discussion of the law of the high seas.

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[1] *Official Records of the General Assembly, Eleventh Session, Sixth Committee,* 500th meeting, para. 40.

[2] *Ibid.,* 492nd meeting.

18. Mr. FAY (Ireland) said that as a maritime state, Ireland had the greatest respect for the principle of the freedom of the high seas. It recognized, however, that freedom rapidly degenerated into anarchy unless it was regulated and made the subject of law.

19. When the Committee came to discuss seriatim the articles submitted by the International Law Commission, he would urge that provisions on a number of matters mentioned in the Commission's commentary, but not in the articles themselves, should be added to them. In certain other instances, the definitions offered by the Commission should be drafted in more precise language.

20. Ireland was a party to certain international instruments relating to collisions and safety of life at sea which so effectively covered the matters to which articles 34, 35 and 36 of the Commission's text related that they should not be lightly thrust aside. The Committee should not do anything which would create a danger of a conflict between those instruments and any new general rule agreed upon at the Conference. On the other hand, it would be regrettable if, owing to the absence of any such general rule, states not parties to those instruments were not obliged to deal with those very important matters. If a fully satisfactory solution could not be found, he would support the proposal made by the United Kingdom delegation at the 4th meeting that the Conference should not proceed with the articles in question but should commend those instruments to countries which were not parties to them.

21. He fully agreed with the objects of article 29 which provided that there should be a "genuine link" between a ship and the state of nationality. He was aware, however, that a variety of standards could be applied in deciding what constituted such a link. He hoped that later the Committee would reach agreement on a more definite and useful text to achieve the objects of the article. In the meantime, his delegation accepted it merely as a statement of principle.

22. He considered article 33 unsatisfactory, because in his opinion ships owned or operated by a state and used on government service for commercial purposes should not enjoy greater advantages than were enjoyed by ordinary merchant vessels on the high seas.

23. Some of the International Law Commission's draft provisions suffered from a lack of precise definition. The word "ship" itself was not defined. The meaning of the term "private ship" in article 39 (the article defining piracy) was not clear. The Commission's commentary indicated that it might mean all ships other than warships or other government ships. But it might be significant that the right of visit which would be conferred on warships by article 46 in connexion with piracy and other matters was confined to "merchant ships". Were fishing boats covered by the term "private ship" in article 39? Were they covered by the term "pirate ship" in article 41 and by the term "merchant ship" in article 46? It would be very wrong if there were any doubt left as to the legal position of fishing boats on the high seas. Some states had taken steps to ensure the maintenance of law and order amongst fishing fleets on the high seas by making their own regulations and by subscribing to international agreements. But such international agreements were invariably of a regional character and limited in scope. He hoped that the Conference would draft precise provisions governing illegal acts of violence and depredation committed by the crew of a fishing boat of one nationality against a fishing boat of another nationality.

24. Mr. WYNES (Australia) said that the principles on which the articles referred to the Committee were based were generally acceptable to his delegation. He reserved the right, however, to submit or support amendments to some of them later, if considered necessary or desirable.

25. Australia, of course, subscribed to the fundamental principle of the freedom of the high seas, which all nations had accepted for a long time. His delegation also accepted in general the articles on the rights and obligations of states regarding navigation (articles 28 and 34 to 36). Australian law provided for everything which articles 34 and 36, if they were finally adopted, would require states to do. But the matters to which those articles and article 35 and much of article 48 related were already covered by existing international agreements, and his delegation was inclined to agree with the opinion expressed by the United Kingdom representative that there might be no need to draft new international instruments dealing with those matters in different terms.

26. The statement in article 29 that there must be a "genuine link" between ships and the state of which they flew the flag was not precise enough. But that matter could not be satisfactorily settled at the Conference. He thought the Conference should accept the principle of the article, making it clear that the last word had not been said on the matter, and that the question of criteria for deciding what constituted a genuine link should be fully considered by one or more appropriate bodies possessing the necessary technical and expert knowledge.

27. His delegation also considered that article 33 was unsatisfactory; for as it stood, it would make it possible for some states to claim immunity on the high seas for virtually the whole of their merchant fleet, and it would also defeat the purpose of article 66.

28. Sir Alec RANDALL (United Kingdom), with reference to the remarks about nuclear tests at sea made by the Soviet Union representative at the previous meeting and by the representatives of Japan and India during the current meeting, said that no government or people had shown such eagerness or made more persistent and honest efforts than the Government and people of the United Kingdom to bring about balanced and properly controlled disarmament, which would make it possible to arrest the development of weapons of mass destruction, suspend nuclear tests at sea and on land and to ban the manufacture of nuclear weapons. But the question of nuclear tests could not be separated from the question of disarmament in general. It would be wrong for the Conference to intervene in a matter which fell within the competence of the General Assembly and the Disarmament Commission.

29. The Soviet Union representative had also referred to the question of the disposal of radio-active waste in the sea and to the provision regarding that question in article 48. The United Kingdom had been compelled to

face that question. Its very stringent measures designed to ensure the greatest possible safety for all life and living resources in or on the sea were carried out in consultation with all likely to be affected and, so far as he knew, had been completely effective. It would be interesting to know the standards other countries, in particular the Soviet Union, had set up regarding the disposal of radioactive waste in the sea. The question, which was a highly technical one, was at present being studied by the United Nations Scientific Committee on the Effects of Atomic Radiation, and his delegation thought that perhaps the Conference should ask that committee to study particular aspects of the question. The International Law Commission's draft and commentary clearly indicated that it considered there was a link between the pollution of the sea by oil and the possible effects of the disposal of radio-active waste. His delegation would be happy to see that particular aspect of the matter considered by the Scientific Committee.

30. The Soviet Union representative had also mentioned other matters and when speaking on one of those matters had made a charge against the United Kingdom; he would refer to those matters at a later stage of the debate. For the moment he would merely say that it was well known that the Soviet Union navy frequently carried out naval exercises in certain areas of the high seas and purported to restrict the movements of shipping in the areas affected.

The meeting rose at 4.10 p.m.

NINTH MEETING

Thursday, 13 March 1958, at 3.15 p.m.

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

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

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. HANIDIS (GREECE), MR. PERERA (CEYLON), MR. COLCLOUGH (UNITED STATES OF AMERICA), MR. GHELMEGEANU (ROMANIA), MR. CHIT HLAING (BURMA), MR. GARCÍA-SAYÁN (PERU) AND MR. MACHÍN (SPAIN)

1. Mr. HANIDIS (Greece) said that the safety of navigation (article 34) and the pollution of the high seas (article 48) were purely technical matters which, as such, should be left to experts and specialized agencies for detailed study.

2. The questions of the immunity of government ships, penal jurisdiction in matters of collision and the duty to render assistance (articles 33, 35 and 36 respectively) were covered by existing multilateral conventions which were working satisfactorily and which could, in case of need, be revised in the light of changing conditions. Accordingly, he did not think there was any need for a new international instrument on those subjects. The drawing up of such an instrument might, quite unnecessarily, create conflicts.

3. The fact that the International Law Commission had thought it best merely to enunciate a guiding principle in regard to the link which should exist between ships and the state of nationality (article 29), showed that the problem of the nationality of ships was serious and complicated. In view of the divergent opinions on the subject, he though it would be preferable for the Conference to refer it to other bodies for further study, as the adoption of any version of a principle regarding the link, before a detailed study had been made, would lead to controversy and misinterpretation.

4. Mr. PERERA (Ceylon) said that the articles referred to the Second Committee — particularly articles 26 and 27 — should be viewed, not in the light of traditional international law, but in relation to contemporary conditions and to the ultimate objectives of international law. He recalled the fundamental rule laid down by the International Law Association at Vienna in 1926 that all states should enjoy absolute liberty and equality in the matter of navigation, transport, communications, industry and science in and on the seas and that no state or group of states could claim any rights of sovereignty over any portion of the high seas or interfere with the free and full use of the seas. That rule was an accurate statement of the law and practice accepted by states ever since the classic judgement of Sir William Scott in the case of the *Louis* in 1817.[1]

5. However, the rule stated in those terms was an ideal rather than a correct description of reality. Unfortunately, only a limited freedom of the seas had been achieved, for there was as yet no freedom from trade war in peacetime, no general security against obstacles to trade, no assurance of safety of life and resources against scientific experiments and no guarantee against the use of the sea for warlike purposes. Indeed, some states still held the view that the power to keep international sea routes open carried with it the power to close those routes at their discretion. Moreover, the meaning of the term "high seas" itself was still unsettled, owing to lack of uniformity in the rules concerning the breadth of territorial waters.

6. The Conference had been convened to discuss the freedom of the seas in a system of general security and had the limited objective of drafting a convention. In his delegation's opinion, the convention would have the effect of restricting the power of certain states to interpret freedom at their discretion and, sometimes, on the basis of expediency. As Professor H. A. Smith had said, the chief function of law was to impose limits on the exercise of power.

7. Article 27 should be regarded in the light of those remarks. The freedoms it proclaimed constituted, by implication, a limitation of the rights of the state. Those freedoms were qualified, in addition, by the terms of article 48. His delegation construed the terms of article 48, paragraphs 2 and 3, to mean that nuclear tests on the high seas constituted a violation of international law. There could be no freedom of the high seas while maritime areas and the air space above them were

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[1] See *Dodson, Reports, Admiralty*, vol. II, p. 210.

used for experiments resulting in the destruction of life and resources. In that connexion, he drew particular attention to paragraph 1 of the commentary on article 27. The Conference should seek either to establish the freedom of the high seas within the framework of a system of general peace and security by specifying all the freedoms which would not infringe upon the rights of others, or to strengthen the statement in paragraph 1 of the commentary on article 27 that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states.

8. The Conference's function was not simply to codify but rather to pronounce upon existing law. For that purpose it should recognize — as national legislatures had done — that the law should be placed at the service of the people, and not at that of a few individuals. It was owing to incomprehension of that principle that earlier conferences on the law of the sea had failed. The success of the present conference depended upon common agreement on certain principles of international conduct which precluded the advancement of the interests of any individual state, however powerful. Those considerations should receive expression in article 26, which should be amended accordingly.

9. His delegation approved in principle of articles 28 to 47, although it might support possible amendments to those articles.

10. Mr. COLCLOUGH (United States of America) said the high seas formed a repository of vast natural resources and the world's principal international highways. The common domain of the sea was one of the major equalizing influences in the community of nations, since smaller and less wealthy states were given an opportunity to offset some of the advantages of states with extensive or more productive land areas. The principle of the freedom of the seas had, though not without difficulty, gained general acceptance in the practice of states. The United States, which had often had to defend itself against infringements of the principle, therefore attached great importance to it.

11. After careful study, his government had concluded that the articles drafted by the International Law Commission contained two elements which ensured the vitality of the principle. The first was that the high seas were open to all nations, as was stated in the commentary on article 27. The freedom could not, however, be made effective without the second element, that of restraint, which was also referred to in the commentary. The purpose of such regulation was to safeguard the exercise of the freedom in the interests of the whole international community. It was in the light of those two elements that the Committee should examine the individual articles.

12. Several representatives had referred to the conducting of nuclear tests in connexion with article 27. In the opinion of the United States delegation, the whole problem of nuclear tests was essentially bound up with the question of disarmament, which was being considered by the competent organs of the United Nations. The Conference should therefore take care not to impede that important work in any way. The United States was willing to abide by any agreement for the effective control of nuclear weapons; unfortunately, no such agreement had been reached.

13. He could not agree with the Indian representative (8th meeting) that the question of the legality of nuclear tests and the humanitarian considerations concerned fell within the scope of the Conference. If the legal aspects of such tests could be isolated, they would indeed fall generally within the law of the sea. But his delegation did not consider that such a division of the problem was feasible. Moreover, the manner in which the United States conducted nuclear tests was not contrary to international law and was sanctioned by international practice. It could not be held that the use of the high seas was invalid solely because some inconvenience would result for other users. Any use of the high seas by one state temporarily denied to other states some degree of ability to use the seas, just as the use of a road by a motor-car to some extent restricted its use by others. For example, cable-laying ships, fishing fleets and even individual ships temporarily withdrew the right to use the areas concerned from other states. The legality of all uses of the high seas must be determined by the application of the test of reasonableness. Since the United States conducted nuclear tests under rigid control to ensure a minimum degree of interference with the use of the high seas by other states, it was convinced that such use was reasonable, and consequently legal.

14. With regard to the humanitarian aspects of nuclear tests, he said that the United States fully appreciated the danger which would beset the world in the absence of effective weapons control, and had established as one of the primary purposes of its nuclear tests the development of a "clean" weapon, which localized the danger of radiation, in order that the effects of the weapon might be restricted to military targets in the event of hostilities. His government did not treat its responsibility in the matter lightly, and therefore subjected its tests to strict control, in order to ensure that the resulting radiation would not be harmful to the people of the world and their resources. The level of radio-activity in the world was raised by explosions on land as well as by those at sea, and the United States therefore paid due attention to nuclear tests conducted by other nations, to ensure that the cumulative effects did not endanger humanity. It was to be hoped that other nations conducting such tests took similar precautions. In any case, the whole question was closely interlinked with the problem of disarmament, and if the Conference were to concern itself with a relatively narrow aspect, there would be a danger of upsetting delicate negotiations on a vital subject.

15. With regard to article 29, the United States delegation agreed that the question of the "genuine link" between a ship and the state of nationality warranted exhaustive study by the appropriate bodies. However, the precise definition of the link varied from country to country, since the question of the nationality of ships was primarily one of domestic law, as was acknowledged in the text of article 29. Moreover, the International Law Commission had provided no guide for the criterion to be used by a state questioning the nationality of a ship. The representative of the Federal Republic of Germany had rightly pointed out (8th meeting) that acceptance of the Commission's draft might result in the creation of a new category of "stateless" ships;

such a serious step should not be taken without thorough consideration and expert advice.

16. His delegation agreed with the Norwegian representative (6th meeting) that the immunity of state-owned ships on the high seas should not be based on ownership, but on the purpose of their activities. He would therefore support any amendment which would ensure that state-owned ships operated for commercial purposes should not enjoy an advantage over privately-owned vessels, and that the jurisdiction exercised by the coastal state in the contiguous zone would apply to such ships.

17. The United States was prepared to endorse any reasonable action to solve the complex problem of preventing or minimizing the pollution of the high seas by oil; an appropriate solution, however, involved the balancing of many interests, including the right of coastal States to protect their shores from pollution. The technical aspects must be emphasized. Those had been studied by the United Nations Transport and Communications Division and by the Economic Commission for Europe, which had requested a study of the problem by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO). It should be borne in mind that the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil, which would enter into force later in 1958, was regarded as an experimental measure, to be reconsidered in three years' time in the light of experience.

18. With regard to article 48, paragraph 2, the United States considered it necessary to encourage international action concerning the disposal of radio-active waste. With the rapidly growing use of atomic power for peaceful purposes, an increasing number of countries would have to face the problem. While the disposal of such waste in the high seas created a hazard to life and natural resources, some action could be initiated for the effective control of such disposal. It was questionable, however, whether the Commission's draft would fulfil the purpose, since it called only for action by individual states, which, if not co-ordinated, might lead to dangerous confusion. In any case, the draft article did not deal with the basic problem of international agreement on what constituted pollution. As the United Kingdom representative had stated, the Scientific Committee on the Effects of Atomic Radiation was already studying the question, and was better qualified than the Conference to undertake the necessary research.

19. The draft articles dealing with the protection of submarine cables and pipelines were taken almost verbatim from the Convention for the Protection of Submarine Cables of 1884. The absence of any reference to the other provisions of that instrument might raise doubts as to the continued validity of the Convention, which represented the entire existing international law on the subject.

20. In conclusion, he said that his delegation could not understand the U.S.S.R. representative's reference to the illegality of establishing military exercise areas on the high seas. The use of the high seas for such exercises was recognized in international law, and the navies of all nations used the high seas for those purposes. In September 1957, the Soviet Union itself had conducted surface and air manoeuvres in the Kara Sea and Barents Sea, and had established a danger area of approximately 760,000 square miles, apparently the largest danger area ever recorded.

21. Mr. GHELMEGEANU (Romania) said that the Conference should concentrate on systematizing the law of the high seas, in conformity with the generally recognized principles of international law and in the light of the profound changes that had recently taken place in the fundamental problems of the law of the sea and of the fact that many peoples which had recently won their independence had secured the right to participate in the regulation of international relations.

22. The Romanian Government considered that the traditional principle of the freedom of the high seas was an essential safeguard of the legitimate interests of all states. Nevertheless, that principle could not be stated in a declaratory manner; international conduct in maritime relations should be specified clearly in terms which made it possible to determine what constituted unlawful acts infringing the freedom of the high seas. His delegation agreed with others that nuclear tests on the high seas were illegal, since they interfered with navigation and fishing, endangered human lives and caused considerable impoverishment of the living resources of the sea. Furthermore, they caused pollution of the high seas and of the superjacent air space over vast areas. Although the general question of the prohibition of nuclear tests fell within the competence of certain international bodies, the Conference should concern itself with the question in so far as it affected the high seas. The freedom of the seas could not entail the right for a state or group of states to commit acts which would obstruct equal and free access to all users, and all limitations of the freedom must apply equally to all states. The Conference therefore had not only the right but the duty to ban nuclear tests on the high seas, in the interests of the international community as a whole.

23. The establishment of areas for military exercises near the coasts of certain states and on international shipping routes was also incompatible with the principle of the freedom of the high seas. Even in traditional international law, such manoeuvres near the frontiers of a state constituted a serious act, which warranted explanation; they were therefore unjustifiable in modern times, under the régime of the United Nations Charter. The Romanian delegation would therefore support the idea of prohibiting the establishment of such zones.

24. In the light of those considerations, the Romanian delegation thought that the draft articles should be supplemented by a specific provision to the effect that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states.

25. He could not agree with the view, expressed by certain delegations, that article 33 should not provide for the immunity of state-owned commercial ships in the same way as in the case of warships. The general principle of the immunity of state ships should not vary according to the category of the waters in which they sailed, and accordingly should be extended to article 22.

26. Mr. CHIT HLAING (Burma) pointed out that while it was unlikely that the four freedoms set forth in the second sentence of article 27 would be disputed, no freedom was absolute, and the commentary on the article rightly expounded certain limitations thereto. The Burmese delegation, while in general agreement with article 27, had some reservations concerning the regulation of the freedoms declared in it.

27. The term *inter alia* in article 27 indicated that the list of four freedoms was neither restrictive nor comprehensive. The omission of any reference to the limitation of freedom of scientific research was a serious shortcoming. The statement in paragraph 1 of the commentary on article 27 that states were bound to refrain from acts which might adversely affect the use of the high seas by nationals of other states and the supporting reference in paragraph 2 were praiseworthy, but states were not bound by the commentary. A specific prohibition of the pollution of the seas through scientific tests was desirable, and should be extended to tests conducted elsewhere than on the high seas, if those seas were thereby affected. The Commission had tried to regulate that problem in paragraphs 2 and 3 of article 48, but paragraph 2 was intended to cover such indirect pollution as the dumping of radio-active waste in rivers which flowed into the sea, and paragraph 3, instead of stipulating a general prohibition of dangerous tests, merely provided that states should co-operate in drawing up regulations for preventing pollution. That, in the Burmese delegation's view, was inadequate. Besides, the Conference would be failing in its duty if it left the problem to be settled by other bodies, for it was directly concerned with the one aspect of it. That consideration could not be regarded as political, since it was logically related to the effects of certain acts on a legal freedom.

28. Mr. GARCIA-SAYAN (Peru), dealing with articles 26 and 27 of the International Law Commission's text, said that his government's attitude was inspired by the tendency, accentuated in recent years, towards a geographical extension of the rights of coastal states as a result of increasing geographical and biological knowledge of their maritime zones and of certain human activities. A number of special régimes had been instituted to take account of those facts. The Conference should therefore endeavour to draw up international rules applicable to all states, but sufficiently flexible to permit of adaptation to certain special and vital requirements.

29. The definition of the high seas in article 26 was based on terms, "the territorial sea" and "internal waters", the extent of which had not yet been fixed. He did not agree with the provision in article 27 which recognized "freedom of fishing" without restrictions. It conflicted with the proclamation and exercise by Peru and other states of rights of sovereignty over sea areas adjacent to their coasts for the purpose of conserving and utilizing their marine resources. The coastal state's right to adopt conservation measures in the high seas under articles 54 and 55 of the Commission's draft did not constitute an exception of any real value to the provision in article 27; for, even if coastal states were authorized to adopt unilateral measures, those articles themselves would make the application of such measures quite ineffective.

30. The action taken by the Peruvian Government had been motivated by the factual situation and by legal, scientific, moral and human considerations. The coastal districts of Peru were, owing to natural circumstances, extremely rich from a biological point of view. A case which was peculiar to Peru was that of the guano-producing birds living off the coast and islands of Peru; they provided approximately 90% of the national requirements of fertilizers and a source of revenue to the state, which sold the guano. The stocks of fish (anchovetas) on which those birds fed were threatened with extinction as a result of indiscriminate fishing for the production of bait and fishmeal. Guano production in Peru thus depended on conservation of the anchoveta. Its extinction and the consequent disappearance of the guano-producing birds would be a calamity for the Peruvian economy.

31. He described the rugged territory of Peru and its arid coastal regions; there was a scarcity of arable land, and the inhabitants were under-nourished. The diet of the nine million inhabitants of Peru represented a daily average of only 1,860 calories per head, whereas the figure generally recommended by nutritionists was 2,900. It was estimated that the population of Peru would increase to twenty million within twenty-three years.

32. Though there was such a food shortage on land, there was an abundance of fish in the coastal waters offering an easy source of proteins, fats, mineral salts and vitamins, which compensated for the poverty of the country's resources. During the past twenty years, there had grown up a modern fishing industry in which $20 million had been invested, and which now employed more than 60,000 persons. More than 250,000 tons of fish and other products, including those derived from whales, were obtained annually by Peru from the sea.

33. The instruments of positive law which stated Peru's position were the decree of 1 August 1947 and the pact with Chile and Ecuador, referred to as the Santiago Declaration, signed in 1952. They proclaimed that national sovereignty and jurisdiction extended to the continental shelf and its superjacent waters and to the adjacent sea to a distance of 200 nautical miles, for the purpose of conserving and utilizing all the resources in or below that area. Neither the decree nor the Santiago Declaration had affected the right of other states as regards freedom of navigation in the area in question, nor had it deprived the governments of Peru or the other countries of the right to authorize nationals of other states to fish in their respective zones subject to certain conditions. That régime of the south Pacific, to which Costa Rica had subscribed and which coincided with the position adopted by El Salvador in 1950, had been supplemented by a series of additional agreements which gave the said régime the character of a genuine regional system. Under it, several licences had been granted to nationals of other states, and sanctions had been imposed on ships that had broken the rules.

34. It was the absence of any international rules for the utilization of the sea as a source of riches that had led to the unilateral adoption of measures of self-defence.

The Secretary-General of the United Nations, in a 1949 memorandum entitled *Survey of International Law* (A/CN.4/1/Rev.1), had stated that the adoption of such measures was "unimpeachable as a matter of equity and justice".[2] If one took into consideration all the special powers exercised by various states over areas beyond the traditional limits of their territorial waters, it could be said that, as the International Court of Justice had recognized in its judgement in the Anglo-Norwegian fisheries case,[3] such unilateral measures were valid in the law of the sea.

35. The 200-mile limit was the "biological limit" of those countries that had proclaimed their rights over such a stretch of sea. Species such as tunny and barrilete were mostly caught 20 to 80 miles from the coast; the same anchovetas of the coastal waters sometimes went 60 or more miles away; and the cachalot and whales were usually to be found more than 100 miles off. There was no intention, moreover, to establish the 200-mile limit for utilization of the resources of the sea as a uniform rule applicable to all States. Different geographical factors and biological limits would make it inapplicable to other states. The relativity or geographical concepts was an element to be taken into account in the law of the sea.

36. The requests formulated by Peru met the conditions necessary for their recognition as legally binding and applicable since first, they were the expression of principles recognized by law; secondly, they had a scientific basis; and thirdly, they responded to national vital necessities.

37. The economic reasons for those proclamations by Peru and other states were based on a natural and pre-eminent right deriving from geographical contiguity. Peru's right as a coastal state was thus an inherent right, founded on its geographical position, and therefore pre-existent to its formal international claim. The International Court of Justice had agreed, in the judgement referred to above, that sovereignty over parts of the sea was derived from the land. The coastal population had depended on the sea for food long before there had been any navigation and before the modern maritime Powers had unilaterally decided that vast areas of the oceans were primarily their property and had subsequently enunciated the principle of the freedom of the seas.

38. Legal concepts such as the freedom to fish, formulated at a time when the resources of the sea were thought to be inexhaustible, were no longer valid in the face of the destructive capacity of present-day fishing methods. Those who maintained that no restriction should be placed on fishing in the high seas were shutting their eyes to reality. Modern fishing enterprises had become so vast and efficient and had so great a capacity for destruction that the concepts of the past were no longer applicable. That was why in 1954 the Peruvian authorities had detained the larger part of a foreign-owned whaling fleet consisting of a factory ship and fifteen other vessels capable of capturing 15,000 whales per season. Such fleets from other continents had no right to prejudice the coastal states, which were by nature entitled to those resources. It would be unjust and illegal if private foreign interests were allowed to convert into private wealth the riches with which nature had endowed the domain of a country. That would be a debased form of the right to hunt and fish in the high seas, which had never been part of the accepted code of freedom of navigation, and which would benefit only the powerful and technically-advanced states.

39. As to the concept of sovereignty referred to in the proclamations of Peru and other states, it had no absolute meaning and was in fact identified with the notions of jurisdiction and control mentioned in President Truman's proclamation of 1945. The notion of sovereignty referred to the exercise of certain of the powers and prerogatives that constituted the traditional concept of maritime sovereignty, as the International Law Commission itself had recognized.

40. The Commission's draft was incomplete inasmuch as it did not take sufficient account of the biological and economic aspects on which the claims of exclusive fishing rights rested.

41. In view of the need to establish a new set of international rules on fisheries and the conservation of the resources of the sea, the Peruvian delegation would submit amendments to article 27 and others of the International Law Commission's draft.

42. Mr. MACHIN (Spain) said that in view of his country's traditions with regard to international law, the Spanish delegation felt bound to defend the principle of the freedom of the high seas. In one of the laws passed by Alfonso the Wise in the thirteenth century it was stated: "The things that belong in common to all creatures which live in the world are: the air, the rain and the waters of the sea." The essential purpose of the articles referred to the Committee was to proclaim and defend the freedom of the high seas. The purpose of the provisions in those articles which appeared to limit that freedom was in fact not to limit, but to regulate it. Any freedom that was to be exercised in the interest of all who were entitled to enjoy it must be regulated.

43. Careful attention should be paid to the relationship between flags flown by ships and their nationality. Provisions should be laid down in an international instrument, as in the domestic laws of his country, to ensure not only that ships were entitled to fly their flags, but also that there was a genuine link between the ship and the state. In order to prevent abuse, it should be laid down that no ship should change its flag during a voyage unless there was actually a change in the nationality and ownership of the ship.

44. Article 39 contained provisions for the protection of ships on the high seas and of persons and property in such ships against piracy, but there was no clause to protect aircraft either above or on the high seas. Some provision should be added to that effect.

45. Like several other representatives, he was opposed to the rule 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.

46. The Conference should not do anything likely to give rise to conflicts between existing conventions and

[2] United Nations publication, sales No.: 1948.V.1 (1), para. 72.

[3] *I.C.J. Reports, 1951*, p. 116.

any instruments it might adopt. It should lay down general principles which would not conflict with existing international standards and would permit of future development.

The meeting rose at 5.45 p.m.

TENTH MEETING

Friday, 14 March 1958, at 3.15 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. RADOUILSKY (BULGARIA), MR. CARDOSO (PORTUGAL), MR. LEAVEY (CANADA), MR. LÜTEM (TURKEY), MR. BEN SALEM (TUNISIA) AND MR. WEEKS (LIBERIA)

1. Mr. RADOUILSKY (Bulgaria) said that, since the international law of the sea was aimed at promoting the development of economic and cultural exchanges on a basis of equality and mutual respect, the work of the Conference was particularly favourable to the strengthening of international relations, provided it was conducted on the basis of the United Nations Charter and decisions of the General Assembly, particularly resolution 1236 (XII) entitled "Peaceful and neighbourly relations among states", adopted at the twelfth session.

2. The International Law Commission had rightly stated, in paragraph 1 of the commentary on article 27, the important principle of international law that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states. In his delegation's view, that principle was sufficiently important to be included in the actual text of the article.

3. The above-mentioned resolution should be considered in its relationship to the principle of the freedom of the high seas, and more especially the absolute nature of the rights deriving from that principle. Any exercise of freedom prejudicial to those rights would constitute not the exercise, but the abuse of a right. Furthermore, the resolution had an effect on the binding nature and future validity of existing legal standards and on the purposes of codifying the rules relating to the use of the high seas on the basis of relations between equal and sovereign states. The existing standards had been created at various periods in history and, first and foremost, on the basis of the practice and domestic legislation of countries possessing large fleets. All those rules must be subjected to review in the light of the principles adopted by all states members of the United Nations under the resolution, which, in his delegation's opinion, was a legal as well as a political document.

4. In the light of those considerations, some articles of the International Law Commission's text required amendment or completion. In connexion with paragraph 3 of the commentary on article 27, the freedom to undertake nuclear tests on the high seas was not generally admitted and constituted an abuse of the freedom of the high seas. Some delegations had urged that the Conference had been called in order to codify already existing international law. But there was no existing written or accepted rule allowing for nuclear tests. If unwritten law were involved, there should be a long history of practice, but that was not the case. Furthermore, the provisions of The Hague Convention IV of 1907 and of the Geneva Protocol of 1925, concerning the prohibition of such destructive methods as poison gas and bacteriological warfare, led to the direct conclusion that nuclear tests should be prohibited. That prohibition was also implicit in the United Nations Charter and in the documents adopted for the protection of human rights. Again it must be remembered that by rendering vast areas of the oceans unfit for navigation, fishing, flying and human life in general, nuclear tests on the high seas not only threatened but directly prejudiced the rights of states other than those conducting the tests. Moreover, freedom to conduct nuclear tests was contrary to the provisions of General Assembly resolution 1236 (XII). It could not be said that such tests were compatible with mutual respect and benefit, while the radio-activity released was a violation of the territorial integrity of neighbouring states.

5. The Bulgarian delegation therefore considered that the Conference should draft a text specifically prohibiting nuclear tests. The argument that the over-all solution of the problem should be achieved in international bodies dealing with disarmament, while correct, did not mean that certain aspects of the question could not and should not be solved separately. The Conference could not evade its responsibility for prohibiting acts violating the right of all states to use the high seas.

6. He agreed that all states enjoyed the right to conduct military exercises on the high seas, but they must not do so to the detriment of the rights of other states. Obviously, naval manoeuvres on shipping routes in straits used by other states, or near the coasts of other states, adversely affected the use of the high seas by others, and should therefore be prohibited. Moreover, they constituted an obstacle to peaceful and neighbourly relations.

7. Certain delegations had objected to article 33, on the ground that the entire fleets of certain states might enjoy the immunity prescribed therein. His delegation, however, not only considered that article 33 should be retained, but also that article 22 on government ships operated for commercial purposes should be brought into line with article 33. The question of the ownership of a fleet was a domestic problem arising out of the individual economic, political and social development of states. It would, however, be untrue to say that ownership of a fleet depended solely on the social and economic system of a state; although in principle the merchant fleets of socialist states were state-owned, that also applied to some capitalist states — to pre-war Bulgaria, for instance. Accordingly, from the legal point of view, ships belonging to states with different systems could have the common status of government ships, the immunity of which should be assimilated to that of warships. The objection that the entire fleets of some states could thus enjoy certain advantages did not flow from

considerations of international law, but from those of domestic systems and jurisdiction on ownership. Moreover, the objection was not in conformity with resolution 1236 (XII), which referred to the principle of respect for each other's sovereignty and non-intervention in one another's internal affairs.

8. Mr. CARDOSO (Portugal) observed that the general agreement which existed on the capital importance of freedom of the seas was not surprising since freedom of communications was essential to the well-being and security of all states. It was, however, astonishing that the pre-eminence of that principle over local considerations had not yet been securely established at a time when no state was powerful enough to subsist, prosper or defend itself without the co-operation of others. Some states still believed it important to bring additional areas of the sea under their total jurisdiction, although such action was bound to affect other countries' access to the high seas. But every act motivated purely by self-interest started a chain of effects harmful to the world community as a whole.

9. For those reasons, the Portuguese delegation regarded article 27 as one of the most important in the International Law Commission's draft, and considered that it should be made as comprehensive as possible. Since every freedom was restricted by the freedom of others, the article should clearly state the limitations involved. The Portuguese delegation had therefore proposed a new text for article 27 (A/CONF.13/C.2/L.7).

10. The absence of a definition of a "merchant ship" was a serious shortcoming in the draft articles. His delegation had some suggestions on the subject. International law did not permit that international military and/or diplomatic functions should be carried out by ships not owned or operated by a state. Such ships, for the purposes of the articles, were referred to as state ships. They could, therefore, be defined as ships owned or operated by a state for the purpose of carrying out military and/or diplomatic functions and/or other functions depending on or related to them. They must always be under the command or control of an officer duly commissioned by his government and were divided into two categories, warships and government ships. Since warships were defined in article 32, paragraph 2, government ships, for the purposes of the articles, were state ships other than warships. Consequently, a merchant ship was any ship other than a state ship.

11. The Portuguese delegation considered that the principle of the "genuine link", stated in article 29, was intrinsically correct and should be accepted. It clearly implied adequate conditions of ownership and registration, effective jurisdiction and control by the state in all international matters over ships flying its flag; the existence in the legislation of the flag state of a body of rules complying with international standards, and the possibility of enforcement of the rules by the flag state wherever its ships operated. However, since the International Law Commission, after years of work, had been unable to draft those complex implications in the form of practical rules, it would seem advisable for the Conference to endorse the principle, but not to attempt to resolve it into its practical components. He therefore supported the United Kingdom representative's suggestion (4th meeting) that the problem be left to international organizations or conferences which had the necessary knowledge and time.

12. Mr. LEAVEY (Canada) said that with certain qualifications his delegation was in general agreement with the International Law Commission's draft articles.

13. It believed that before the Committee reached any decision on article 27 it should take into account the outcome of the discussion of articles 49 to 60 in the Third Committee. It might be wise to postpone a decision on article 27, paragraph 2, until it was known what limitations, if any, the Third Committee might recommend with regard to fishing in the high seas since an appropriate reference to them should be made in article 27.

14. There seemed to be some inconsistency between paragraph 3 of the International Law Commission's commentary on article 27 which stated that the Commission made no express pronouncement on the freedom to undertake nuclear tests on the high seas, and the statement in paragraph 1 of the commentary that states were bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states. That broad principle was not strictly in conformity with international law, and should perhaps be qualified. If strictly applied, it would affect the freedom to conduct nuclear tests and naval exercises which had hitherto been regarded as permissible. Even if the criterion suggested in paragraph 1 were deemed acceptable, it was impossible to decide to prohibit nuclear teste until the report of the Scientific Committee on the Effects of Atomic Radiation was available. In his delegation's view it would be premature and unprofitable for the Conference to discuss the matter; moreover, the problem was related to the broader issue of disarmament, which was being dealt with in another United Nations organ.

15. Paragraph 8 of chapter II of the International Law Commission's report on the work of its eighth session stated that the Commission had left aside all those subjects which were being studied by other United Nations organs or by specialized agencies. In connexion with article 34, paragraph 1 (*b*), however, the International Labour Organisation had under consideration conventions on the accommodation of crews and on wages, hours of work and manning. In considering article 34 and other articles on which conventions already existed, it was important to ensure that the principles set forth therein would not derogate from obligations under instruments which might be wider in scope and more detailed and precise in drafting.

16. Mr. LÜTEM (Turkey) thought that the definition of "internal waters" contained in article 26 of the International Law Commission's text was out of place in the part relating to the régime of the high seas. That definition was not sufficiently clear. It failed to cover several stretches of water which were connected with the high seas by one or more straits and were surrounded by the land of a single state and which should be considered internal waters for both geographical and historical reasons.

17. 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 vessels used for commercial purposes.

18. The provisions in article 35 regarding penal jurisdiction in matters of collision and other incidents on the high seas were unsatisfactory. They were at variance with the judgement of the Permanent Court of International Justice in the *Lotus* case.[1] The Brussels Convention of 1952, from which those provisions had been taken, did not constitute part of international law, as it had not been ratified by many of the states which had signed it. The Committee should consider the establishment of some kind of international court with penal jurisdiction to deal with collisions and other incidents on the high seas, or a rule that they should be referred to an existing international authority. Perhaps a court might be set up to settle disputes regarding jurisdiction.

19. Article 65 also was unsatisfactory, since it had no legal foundation and there was no cause-and-effect relationship between the contingencies and the compensation to which it referred.

20. Mr. BEN SALEM (Tunisia) said that his country was closely concerned with the questions before the Committee because it had a long coastline, and much of its foreign trade was seaborne. It hoped soon to have a large fleet, as it had had in the previous century.

21. He regarded the high seas as a common domain which all nations were equally free to use as a means of communication and a source of wealth. No state had the right to exercise sovereignty on the high seas except in regard to ships flying its flag. No state had the right to police the high seas. No state had the right to interfere with the ships of another State on the high seas. The provisions relating to the slave trade and piracy were of purely historical interest. The provision regarding action based on a suspicion that a ship was engaged in the slave trade should not be used as a pretext for inspecting a ship when there was no warrant for such suspicion. Warships, although they had the right to determine what flag a foreign ship was flying, did not have the right to determine whether it had the right to fly that flag, or, *a fortiori,* the right to visit the ship.

22. Unfortunately, the fears he was voicing on that subject were justified by a number of acts of interference which had been committed recently. As the representative of Yugoslavia had indicated at the 7th meeting, certain states had arrogated to themselves the right to inspect and detain ships of other states on the high seas as if they owned the high seas. Such an act was an infringement of the law and a violation of the principle of the freedom of the seas. The detention of a ship on the high seas was such a serious matter that it should be laid down that the state of a ship which detained another ship on the high seas should report the reasons for that action to the second state.

23. The laws of Tunisia relating to the high seas were based on principles which had been adopted by the majority of states. But it should be pointed out that the flags flown by ships were only external signs of their nationality, except in the case of warships in peacetime; the proof of their nationality was their papers. Although a ship's papers might not be questioned while on the high seas, it would not, if its papers were not in order, call at a port without getting into trouble.

24. The people of Tunisia were very concerned at the dangers attendant on nuclear tests in, on or above the high seas. Such tests should be discontinued, and rules should be drawn up to prevent the pollution of the high seas and to protect human beings and the riches of the sea, which were the common heritage of all mankind. The carrying out of such tests was a violation of the freedom of the high seas. As the International Law Commission had stated in its commentary on article 27, any freedom that was to be exercised in the interest of all entitled to enjoy it must be regulated. There must be rules to safeguard the exercise of the freedom of the high seas in the interests of the entire international community.

25. Mr. WEEKS (Liberia) said that the articles in the International Law Commission's text formed a sound and indispensable basis for the Committee's deliberations. The fact that a very large number of states and organizations were represented at the Conference was concrete evidence of the desire of nations to come to agreement on issues which had for many years been a source of international friction and misunderstanding. The areas of disagreement were small.

26. The general debate had centred on two principal types of issue: The first related to matters on which there were genuine differences of opinion and in regard to which there were no uniform provisions in the laws and customs of states or positive principles of international law. In trying to settle those issues, it was the duty of the members of the Committee to allow themselves to be influenced by the weight of reasoning, the recognized demands of the times and the opinion of the majority. The second type consisted of issues in regard to which there seemed to be a desire to inject novel principles into the rule of law without regard to their effect on international relations. There was no genuine link between the insistence upon them and the need for the more precise formulation and systematization of rules of international law in fields where there had already been extensive state practice, precedents and doctrine. In the interests of the progressive development of international law and the promotion of better international relations, the Committee should completely dismiss those issues from its deliberations. There was no point in drawing up a draft convention containing provisions of so provocative a nature that some of the principal maritime nations would not subscribe to it. Instead of seeking to deal with new areas of friction which were not of great importance, the Conference should aim at drawing up draft international rules on points on which agreement existed.

27. Many of the points in the International Law Commission's commentary on the draft articles it had submitted should be added to the draft articles themselves.

28. His delegation accepted the principles enunciated in articles 26 and 27. The questions raised by one of the statements in the Commission's commentary on article 27, namely, "states are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other states", were outside the

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

jurisdiction of the Conference, because the United Nations General Assembly was dealing with them and they involved highly technical and specialized matters with which the Conference was not equipped to cope.

29. His delegation considered article 28 completely satisfactory.

30. Although Liberia rigidly observed the provisions of the International Load Line Convention of 1930, the International Convention for the Safety of Life at Sea of 1948, and the Final Acts of the International Telecommunication and Radio Conferences of 1947, it was opposed to the inclusion in a new convention of articles 34, 35 and 36, and to a more limited extent, of article 61. The same remark applied to article 48 in so far as it related to the pollution of the sea by oil. All the subjects dealt with therein were covered by existing conventions and to include them in a new convention might give rise to confusion. It might even involve a country in adherence to a convention to which it did not subscribe.

31. His delegation agreed with the provisions contained in the first two sentences of paragraph 1 of article 29 but recommended the complete deletion of the third sentence, which rendered the rest of the article contradictory and ambiguous. It represented an attempt to inject into international law a novel principle which, if successful, would create confusion and misunderstanding. It would be strange, when conceding the right of each state to register ships under its flag and to fix the conditions under which it granted its nationality to ships, to suggest that other states had the right to disregard the national character and flag of a ship of that state, notwithstanding the authenticity of the ship's papers. Moreover, article 42 stated: "The retention or loss of national character is determined by the law of the state from which the national character was originally derived." Many of the states which had expressed the intention of supporting the "genuine link" concept had nevertheless admitted that the provision in article 29 lacked precision and might have dangerous consequences and that it should receive further consideration.

32. He agreed that, in order to prevent abuse and friction, it should be laid down that the granting of a state's flag should not be a mere administrative formality with no accompanying guarantees. But no state had acted as irresponsibly as that. Lloyd's register of ships showed that the merchant navy of Liberia had an excellent record. Liberia was genuinely anxious not only to build up a fine merchant navy in order to foster and enhance the growth and development of its foreign and domestic trade in the interests of national security, but also by efficient administration of its maritime laws and regulations to maintain the high standards it had set. Ships registered under the Liberian flag were required to meet and maintain acceptable standards of safety which were set out in Liberian laws and in rules and regulations made under those laws. Those laws, rules and regulations were constantly being changed to meet the requirements and standards of the times. Revised laws on the subject — which might well be copied by other states — had come into force on 1 March 1958.

33. If, then, the problem was not one relating to the safety of ships or the control exercised by states over ships registered under their laws, why had the "genuine link" clause been introduced? Was the reason fear of competition from states with very liberal registration laws? One member of the International Law Commission had stated that the introduction of detailed conditions might have some effect on the freedom of the high seas, and should therefore be avoided.

34. Several criteria had been suggested for the determination of the hypothetical "genuine link", including the country of construction, the nationality of the crew, and the nationality of the company or persons owning the ship. No relationship was bound to exist between the country of construction and the nationality of a ship. Again, states were free to dispense — and did dispense — with all legislative restrictions on the national composition of crews without impairing any legal connexion existing between themselves and the ships of their merchant navy. Ownership by nationals of the flag state or by a company of the nationality of that state were no proper criteria, except in so far as they made it possible in wartime to determine whether a ship should be treated as enemy property.

35. The fact that the domestic laws and regulations of more than one state made one or more of those things a condition for the granting of its nationality to a ship did not invest them with an imperative character or make them a rule of international law. The purpose of those requirements was not to secure compliance with the rules governing the high seas; they were based merely on those states' domestic, economic or social policies. The only true criterion for determining the nationality of a ship and for the recognition of its national character by states other than the flag state was the ship's papers. Customs regulations and naval instructions provided ample support for that thesis.

36. The acceptance of the "genuine link" concept would result in conflicts in the field of public law. It would seem to accord to a state other than the flag state the right to issue rules and regulations for a "foreign" ship when it fulfilled the conditions of nationality while having no "genuine link" with the flag state. It would moreover seem that a state might claim the right to exercise criminal jurisdiction over a foreign ship by denying the nationality shown by its flag and documentation, if there was a "genuine link" between the ship and the claimant state. It might result in stateless ships plying the high seas. It might give rise to an unexpected and undesirable extension of the right of visit in time of peace, for which article 46 provided. It would be difficult to reconcile the proposition advocated in the "genuine link" requirement with the standard provisions of existing treaties which included no such requirement. The same provision would result in conflicts in the field of international private law; it was impossible to foretell the extent to which it might adversely affect relations between individuals, the existence of rights, duties and obligations and the transfer and vesting of property. It could also have the unfortunate and surprising effect of making many legal relationships dependent upon a fortuitous place of jurisdiction.

37. In addition to the deletion of the third sentence of article 29, he would propose the substition of the words "under its laws" for the words "in its territory" in the first sentence.

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