

Document:-
A/CN.4/L.58

**Observations of the Government of the Union of South Africa, concerning freedom of
navigation on the high seas**

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

Extract from the Yearbook of the International Law Commission:-

1955, vol. II

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

national conventions which entitle foreign men-of-war to apply means of compulsion. Thus the application of such means was an act of utter lawlessness. As follows from the above, the very act of stopping the ships by the use of force was illegal and has no justification whatsoever. In this way the right of the flag, which follows from the principle of state sovereignty, was violated.

10. It should also be pointed out that the stopping of ships on the high seas violates the freedom of navigation. Merchantmen carrying cargoes in trade exchange between countries are seriously endangered and their possibility of unhampered sailing on sea routes is thus restricted.

11. The acts committed in the China seas constitute a most serious crime — namely, piracy.

12. The circumstances of the seizure of both Polish ships clearly show that violence was used against them. On the high seas two Polish merchant ships were stopped by warships and brought to the island of Taiwan. This was committed under the threat of the use of weapons involving a constant danger to the lives of the members of the crews. This is thus the main evidence that the act committed against the Polish vessels has marks of piracy.

13. In these concrete cases there also was *animus furandi* — i.e., the intent to plunder for gain confirmed by many lawyers as an element of piracy.

14. The seizure of Polish ships which finds no justification in international law is qualified as piracy, as *delictum jure gentium*, and it should be treated accordingly. All authorities in international law agree that a crime thus committed on the high seas open to all states must be prosecuted by all states, as freedom of navigation is not an abstract notion but involves certain rights and duties. It involves not only the duty for a state not to hamper by its activities the free use of navigation routes by ships of other states, but also the duty of adopting an

active attitude by the state with regard to the observance of that principle.

15. In view of the principles enunciated above, some of the formulations contained in the sixth report on the régime of the high seas cannot but give rise to doubts. Articles 22 and 23 of the draft articles relating to the régime of the high seas are particular cases in point.

16. It seems advisable in article 22 to stress the importance of the general repression of piracy — the first two sentences of the article to read as follows :

"All states are required to co-operate for the more effective repression of piracy and of the slave trade on the high seas. They shall adopt efficient measures to prevent and punish piracy and to prevent the transport of slaves on vessels authorized to fly their colours and the unlawful use of their flag."

17. The formulation of article 23 of the draft is in conflict with established views on piracy. It should be clear that the words "*bona fide* purpose of asserting a claim of right" cannot be used in connexion with such actions as robbery, rape, wounding, enslavement and killing. It should be clear, for instance, that robbery or enslavement, being by their nature illegal and criminal, could not be committed with a *bona fide* purpose. Similarly the words "for private ends" should be omitted, since no ends, even when described by the perpetrators as not being "private" (i.e., "public") can justify acts of piracy. The present wording of article 23, if accepted and embodied in an international convention, could be used by pirates to justify any action by maintaining that their action had the *bona fide* "purpose of asserting a claim of right" and that they were not acting "for private ends".

18. Finally it should be stated that the draft articles do not appear to contain a clear and unambiguous formulation of the acknowledged principle of freedom of navigation on the high seas.

DOCUMENT A/CN.4/L.58

Observations of the Government of the Union of South Africa, concerning freedom of navigation on the high seas

Note verbale from the permanent delegation of the Union of South Africa to the United Nations — dated 10 May 1955

[Original text: English]
[17 May 1955]

1. The Deputy Permanent Representative of the Union of South Africa presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the latter's Note No. PSCA.264/26/013 of 7 January 1955, concerning the resolution which the General Assembly adopted on 17 December 1954 on the item entitled "Complaint of Violation of the Freedom of Navigation in the area of the China Seas".

2. In connexion with the request that the Union Government submit their views to the International Law Commission concerning the principle of freedom of navigation on the high seas, the Deputy Permanent Representative has been directed to state that the Union Government's attitude towards the resolution under reference was explained in the *Ad Hoc* Political Committee by the Union's Representative on the Committee. On that occasion he stated that the delegation would abstain

from voting on the proposed resolution transferring the records of the debate to the International Law Commission and inviting Member States to submit to that body their views on the principle of freedom of navigation. He pointed out that as the *Ad Hoc* Committee had not debated the principle of freedom of navigation, the records would hardly be useful to that Commission; and that as the Commission was engaged in a study of the question, it should be for them or for the Sixth Committee to invite the comments of Member States.

3. In the circumstances the Union Government do not propose at this stage to offer their views on the general principle of the freedom of navigation. The question will, however, be studied when the International Law Commission has formulated the first draft of the proposed articles and when it invites the comments of Member States, in accordance with its usual practice.