

Document:-  
**A/CN.4/SR.289**

**Summary record of the 289th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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54. The CHAIRMAN suggested that in the meantime, as there seemed to be general agreement that a right of verification of the flag existed when there was reasonable ground for suspecting that the vessel was engaged in piracy or the slave trade, the text of article 21 might be referred to the Drafting Committee for re-examination in the light of the discussion.<sup>10</sup>

*It was so agreed.*

*Article 22 [12]: Policing of the high seas*<sup>11</sup>

55. Mr. FRANÇOIS (Special Rapporteur) observed that, although the practical importance of article 22 was not very great, it did serve a useful purpose in imposing upon States an obligation to co-operate in suppressing the slave trade. The provision might perhaps be extended to cover the suppression of piracy as well.

56. Mr. AMADO expressed doubts about the way in which the last sentence of article 22 was drafted. Any slave finding himself on territory where slavery was not recognized obviously ceased *ipso facto* to be a slave.

57. Mr. FRANÇOIS (Special Rapporteur) explained that the provision was taken from the Slavery Convention of 1926:<sup>12</sup> he would not insist on its retention.

58. Mr. EDMONDS stated that he had been extremely surprised at the memorandum (A/CN.4/L.53) submitted by the Polish Government in connexion with the article under discussion. The memorandum reproduced statements already made in the *Ad hoc* Political Committee of the General Assembly and there found to be without substance. The Commission was a quasi-legislative body, and did not possess either an arbitral or a judicial status. It could in no sense be regarded as the proper tribunal for the submission of assertions that acts of piracy had been committed by certain countries, including the United States of America, and calling for the imposition of sanctions. The Commission must consider article 22 solely in the light of the principles of law involved. It could not take into account allegations of fact, the truth of which it was in no position to determine. He was unable to understand how any government could submit such a memorandum to an international body exclusively engaged in drafting legal texts.

59. The CHAIRMAN wondered whether the Polish Government's observations did not relate more closely to article 23, since to the best of his recollection they did not raise the question of slavery.

60. Mr. EDMONDS said that he had raised the question at the present stage because the fifteenth and sixteenth paragraphs referred to article 22; indeed, the latter contained an amendment to it.

<sup>10</sup> See *infra*, 289th meeting, para. 1.

<sup>11</sup> Article 22 read as follows:

"All States are required to co-operate for the more effective repression of the slave trade on the high seas. They shall adopt efficient measures to prevent the transport of slaves on vessels authorized to fly their colours and the unlawful use of their flag. Any slave who takes refuge on board a warship or a merchant vessel shall *ipso facto* be set free."

<sup>12</sup> League of Nations, *Treaty Series*, vol. 60, p. 255.

61. Mr. HSU considered that it was immaterial at what stage of the discussion the Commission took up the Polish Government's observations, since they did not relate to any of the articles before it.

62. Mr. FRANÇOIS (Special Rapporteur) pointed out that, although article 22 might be regarded as in the nature of an introduction to the provisions on piracy, it might be more convenient, for practical reasons, to discuss the Polish observations in conjunction with article 23, when it would be essential to consider such questions as piracy committed on the responsibility of individuals or of States.

63. Mr. EDMONDS said that he would have no objection to that course.

64. The CHAIRMAN said that, in view of Mr. Hsu's remarks, he would put to the vote the motion that the Polish Government's observations be discussed under article 22.

*The motion was rejected by 4 votes to 3, with 3 abstentions.*

65. Mr. SALAMANCA considered that the Commission had voted too hastily. The question of when the Polish Government's observations should be discussed might be left to the discretion of the Chairman, particularly as the relevant documents and records of the *Ad hoc* Political Committee were not yet in the hands of some members.

66. Mr. SANDSTRÖM, explaining his vote, said that he had supported the motion because the Polish Government had submitted an amendment to article 22.

67. Mr. ZOUREK observed that the Commission could take account of that amendment, since the Special Rapporteur had already said that he was prepared to amplify the scope of article 22 to include piracy.<sup>13</sup>

The meeting rose at 1.07 p.m.

<sup>13</sup> See *infra*, 289th meeting, para. 43.

## 289th MEETING

Wednesday, 11 May 1955, at 10 a.m.

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\* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

**Régime of the high seas (item 2 of the agenda)**  
(A/CN.4/79) (continued)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (continued)

*Article 21 [21]: Policing of the high seas*  
(resumed from the 288th meeting)

1-2. The CHAIRMAN called upon the Commission to decide whether it wished to recognize the existence of a right of verification of the flag, on which a decision had been deferred at the previous meeting to give members time for reflection and further study.

3. Mr. SANDSTRÖM said that L. Oppenheim<sup>1</sup> certainly held the same view as the Special Rapporteur, that there existed only the right of warships to verify the flag of merchant vessels flying the same flag as their own. He himself was inclined to agree, as he had not been convinced by Mr. Scelle's argument about the matters for which international policing of the high seas was essential.

4. As the whole question had given rise to considerable divergence of opinion, he believed that a provision was necessary concerning the right of verification in the limited sphere of piracy and the slave trade.

5. Mr. SCELLE said that he was pressing for the recognition of a right to verify the flag because in the absence of such a right it would be impossible, first, to insist that no ship should possess more than one nationality, and secondly, to institute proceedings in cases of, for example, pollution of the sea by oil leading to wholesale slaughter of fish, because States would naturally disown vessels flying their flag if they were not entitled to it.

6. Mr. FRANÇOIS (Special Rapporteur) said that among the authorities—they did not include Ch. Rousseau—whom he had had time to consult since the previous meeting, he had found none to support Mr. Scelle's thesis.<sup>2</sup> It was interesting to note that the French Chamber of Deputies had refused to ratify the General Act of the Anti-Slavery Conference held at Brussels in 1890, in the belief that the reciprocity provided for would be ineffective because of the supremacy of the

British Navy. France had subsequently reserved its position on all the articles dealing with the verification of nationality.

7. If Mr. Scelle's proposal were adopted, any warship would be entitled to verify a ship's papers even if there was no suspicion whatsoever about the true nature of its activities. Surely, the commander of a warship was not the proper authority to decide whether a merchant vessel was entitled to the flag it was flying. Mr. Scelle, who claimed to be the champion of the freedom of the seas, was in fact gravely compromising it, and his proposal would lead to anarchy.

8. Mr. SCELLE said that, if there were an international police for the high seas he would fully agree with the Special Rapporteur, but at present such police functions had to be discharged by warships. The dangers to which the Special Rapporteur had referred were very slight, because warships would hardly act without reasonable ground for suspicion, since otherwise compensation would be claimed for unjustifiable stoppage. He personally was convinced that it was as important to prevent ships from sailing under false colours as it was to suppress slavery and piracy.

9. As Gidel had carefully explained, there were two competing jurisdictions on the high seas: the national and the international. The aim of progress should be a well-ordered international community and with that consideration in mind he contended that unless a provision recognizing the right of verification were included, the value of the whole draft would be seriously impaired.

10. Mr. AMADO said that, as he had made clear at the previous meeting, he had been surprised that the Special Rapporteur should have omitted all reference to existing customary law concerning the policing of the high seas and the verification of the flag. He had listened with great interest to the Special Rapporteur but could not accept his statement that none of the authorities recognized the right to verify the flag. He would draw the attention of the Commission to the following passage in Oppenheim's *International Law*:

"*Verification of flag*: It is a universally recognized rule of international law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious... It is, however, quite obvious that this power belonging to men-of-war must not be abused, and that the home State is responsible for damage, etc."<sup>3</sup>

"...

"*Abuse of flag*: It is another universally recognized rule that the men-of-war of every State may seize, and bring to a port of their own for punishment, any foreign vessel sailing under the flag of such State without authority."<sup>4</sup>

<sup>1</sup> *International Law*, 7th edition, edited by H. Lauterpacht (London, New York, Toronto, Longmans, Green and Co., 1948), p. 553.

<sup>2</sup> *Droit international public* (Paris, Sirey, 1953), pp. 418-421.

<sup>3</sup> *Op. cit.*, p. 553.

<sup>4</sup> *Ibid.*, p. 555.

11. With regard to the right of approach, Charles Rousseau in his *Droit international public* stated :

... *En haute mer, le navire ne relève que de l'Etat auquel il ressortit. Un Etat ne peut même pas saisir un criminel en haute mer sur un navire qui ne porte pas son pavillon. L'Amirauté britannique revendiquait autrefois le droit d'arrêter à bord des navires étrangers les sujets réfractaires au service de la marine royale. Employé aux XVIIe et XVIIIe siècles, ce procédé, connu sous le nom de "presse" des matelots, donna lieu à de vives protestations de la part des Etats tiers; il fut la cause de la guerre de 1812 entre l'Angleterre et les Etats-Unis. En haute mer le navire de commerce reste soumis à ses autorités nationales, c'est-à-dire à la police des navires de guerre de sa nationalité, qui peuvent exercer à son égard un droit de visite et de perquisition (visit and search). Mais tout navire de guerre a le droit de vérifier le pavillon (right of approach) d'un navire de commerce quelconque qui lui paraît suspect. Cette mesure a pour but de constater la nationalité du navire et son droit au pavillon qu'il arbore (enquête sur le pavillon); ordre est donné au navire de s'arrêter par porte-voix, signaux optiques ou radioélectriques, ordre qui sera éventuellement appuyé par un coup de canon de semonce et, si le navire refuse de stopper, par un coup de canon dans les avants; si le navire obéit, le bâtiment de guerre vérifie ses papiers de bord pour connaître sa nationalité.*<sup>5</sup>

12. Knowing the energy and conviction with which Mr. Scelle defended the freedom of the high seas, he had given the most serious consideration to his proposal, and was convinced that students of international law would wonder why the Commission had omitted any general provision about the policing of the high seas, and why it had confined itself solely to special measures connected with the suppression of piracy and slavery.

13. Mr. FRANÇOIS (Special Rapporteur) wished to make clear that he had said only that none of the authors whom he had consulted since the previous meeting shared Mr. Scelle's opinion. Mr. Sandström's perusal of Oppenheim had led him to the opposite conclusion to that reached by Mr. Amado. He (the Special Rapporteur; had based his views on the passage from Oppenheim's *International Law* quoted in his second report (A/CN.4/42),<sup>6</sup> from which it was clear that Oppenheim only recognized the right to verify the flag when piracy was suspected. He must reiterate that he could not admit that there was any general rule of international law of the kind claimed by Mr. Scelle.

14. Mr. KRYLOV said that the time had come for the Commission to take a decision. He had studied Rousseau, but still agreed with the Special Rapporteur that at present there was no general rule in international law concerning the policing of the high seas in general. However, he would be prepared to accept the

provisions of article 21 for the two special cases of piracy and slavery.

15. Mr. EDMONDS said that most authorities, though not all, were of the same opinion as the Special Rapporteur. Oppenheim only admitted verification of the flag when there was reasonable ground for suspecting the vessel of being engaged in piracy or the slave trade. He considered that the third contingency mentioned by Mr. García Amador at the previous meeting should also be covered, and therefore proposed the addition at the end of the first sentence in article 21 of the words: "or, during times of imminent peril to the security of the State, in activities hostile to the State of the warship".

16. Mr. ZOUREK said that the arguments adduced at the present meeting proved that there was no generally recognized rule in international law concerning the policing of the high seas. Even the exponents of Mr. Scelle's thesis only admitted the right of approach when there was a well-founded suspicion of piracy or slavery. The lengthy discussion had arisen partly because the Special Rapporteur had failed to draft an introductory paragraph to article 21 stipulating that merchant ships on the high seas were subject only to the jurisdiction of the flag State. The exceptions to that rule should then be stated in a second paragraph. Unless the article were formulated in that manner, difficulties of interpretation would be inevitable.

17. He was also in favour of qualifying the reference to the slave trade by re-introducing some such wording as "as in the maritime zone in which it still exists", which the Special Rapporteur had used in his second report.

18. Without such modifications article 21 might open the way to arbitrary interference.

19. Mr. EDMONDS suggested that Mr. Zourek's suggestion was already covered by article 7, which had been provisionally accepted.

20. Mr. SCELLE said that to him, though perhaps not to some of the members of the Commission, it was the value of an opinion that was important, not the number of its exponents. In consulting treatises on international law, it was essential to bear in mind the context and the circumstances in which the views had been put forward. He attached, perhaps, less importance to the opinion of lawyers than to the Commission's duty of ensuring the progressive development of international law and, consequently, the integration of the international community. The theory of state sovereignty had had its day, and even though it still retained some utility, it would eventually have to give way to an international society which was inconceivable without a *res communis* and hence an international police.

21. Any thorough examination of the textbooks would reveal that so far as the high seas were concerned a clear distinction was drawn between general and special police measures. He must again warn the Commission

<sup>5</sup> *Op. cit.*, p. 419.

<sup>6</sup> *Yearbook of the International Law Commission, 1951*, vol. II, p. 82.

that it was taking the wrong road which could only lead to anarchy, since there could be no freedom without order.

22. Mr. HSU said that, although he was in general sympathy with Mr. Scelle's efforts on behalf of the cause of the community of nations, he wondered, since it was not yet a reality, whether it would be wise to follow him in the present instance, since a general provision of the kind envisaged would be open to serious abuse.

23. He believed Mr. Edmonds' amendment would be acceptable, since in present times of uncertainty it was undesirable for States to be precluded from taking positive steps until their security was actually threatened.

24. Mr. SANDSTRÖM supported the addition proposed by Mr. Edmonds.

25. The CHAIRMAN then put to the vote the question of principle, namely, whether the Commission should recognize that there existed a general right of verification of the flag.

*The Commission decided in the negative by 6 votes to 2, with 2 abstentions.*

26. Mr. EDMONDS explained that he had abstained from voting because he felt that the issue had been framed in too general a way. He favoured a right to verify the flag in the case of suspected piracy, slave-trading or immediate threat to the security of a State.

27. The CHAIRMAN then invited the Commission to consider Mr. Edmonds' amendment.

28. Mr. GARCÍA AMADOR said that he had been responsible for raising the question of security, and would be interested to hear the Special Rapporteur's views.

29. Mr. FRANÇOIS (Special Rapporteur) considered it to be self-evident that a warship could verify the flag of a vessel suspected of threatening the security of its own State, and therefore felt it unnecessary to include a specific provision on that point. Moreover, the scope of such a provision might be unduly extended.

30. Mr. ZOUREK observed that such a new exception to the principle of the freedom of navigation might destroy that freedom altogether, since States would tend to invoke the argument of legitimate defence to justify any act of interference.

31. Mr. LIANG (Secretary to the Commission) said that publicists used to assert as a rule of customary international law that some departure from the principle of freedom of the seas was permissible in certain circumstances involving considerations of self-preservation; a thesis to which Gidel had devoted considerable space. That thesis had been urged in the case of the S.S. "Virginius", and he recalled the lengthy discussion in the Dana edition of Wheaton's treatise on Interna-

tional Law.<sup>7</sup> If he might express an opinion, he would be inclined to agree with the Special Rapporteur that it was unnecessary to make an addition of the kind proposed by Mr. Edmonds, particularly as the right of legitimate self-defence had never been questioned and was in a different category from the question of piracy and the slave trade.

32. Mr. SANDSTRÖM pointed out that the entry into Norwegian ports in 1940 of German vessels carrying troops was the kind of case which would be covered by Mr. Edmonds' amendment. If it were not accepted, the question of State security could be dealt with in the comment.

33. Mr. SCELLE said that Mr. Edmonds' amendment would serve a useful purpose, but perhaps did not go far enough. In his view, article 21 should cover, for example, cases of illicit arms traffic, pollution of the sea, damage to submarine cables, etc.; otherwise it would be impossible to obtain compensation.

34. Mr. GARCÍA AMADOR said that he had raised the question of State security because article 21 as at present drafted would only allow interference when there was suspicion that a vessel was engaged in piracy or the slave trade, although interference was recognized to be justified in other instances. Perhaps the Commission might revert to the Special Rapporteur's earlier reports in considering how the article might be modified so as to protect the requirements of legitimate defence, which were unquestionably admitted in international law.

35. Mr. HSU, in reply to the Secretary's remarks, observed that in the present state of world tension it would be well to recognize explicitly the rights of self-defence.

36. Mr. ZOUREK, referring to Mr. Liang's attempt to present the right of self-defence as a rule of customary international law, said that no concept had been subject to greater abuse because it could not be defined. It would be remembered that the British Navy had sought to apply such a principle on the high seas during the nineteenth century and some English legal authorities had sought to justify those efforts, but their views had been rejected by other States. The right of legitimate defence did exist, but could only be exercised in proportion to the force used on the other side. There was no right to board a vessel on the ground that it was suspected of threatening the security of a State, except in cases expressly provided for in international law.

37. Mr. SALAMANCA drew the attention of the Commission to the fact that it was engaged in codifying international law for times of peace. Moreover, Article 51 of the United Nations Charter fully recognized the principle of legitimate self-defence. It was true that existing tensions and difficulties should be taken into account, but that could be done in the Sixth Committee of the General Assembly. In the mean-

<sup>7</sup> Wheaton, *International Law*, 8th edition, edited by R. H. Dana (Boston, Little, Brown and Co., 1866), pp. 638-661.

time, he did not think that any practical purpose would be served by Mr. Edmonds' amendment, which might lead the Commission into political argument. Regional agreements concluded in accordance with the Charter could provide measures against illicit arms traffic. He therefore agreed with the Special Rapporteur that there was no need to amplify article 21 by reference to the requirements of self-defence.

38. Mr. GARCÍA AMADOR maintained that the problem was one of drafting: the Commission could not change existing rules of international law relating to self-defence. In spite of arguments to the contrary, he still believed that article 21 required revision to avoid exclusion of the right to verify the flag in cases other than those connected with suspected piracy or slave traffic.

39. Mr. SALAMANCA said that although he agreed in principle with the previous speaker, he felt that the point could be adequately covered in the comment.

40. The CHAIRMAN asked whether Mr. Edmonds would be satisfied if it were made clear in the comment that article 21 did not exclude the exercise of the right of legitimate self-defence.

41. Mr. EDMONDS said that in submitting his amendment he had been guided by the consideration that it was the Commission's task to codify existing international law. However, he would not press his amendment if it were not favoured by the majority.

42. Mr. FRANÇOIS (Special Rapporteur) said he would re-draft article 21 and the comment in the light of the discussion.

*Further discussion of article 21 was deferred.*

*Article 22 [12]: Policing of the high seas  
(resumed from the 288th meeting)*

43. Mr. FRANÇOIS (Special Rapporteur) had little to add to his previous remarks on article 22, except that it would be re-drafted to bring piracy as well as the slave trade within its scope.

44. Mr. SANDSTRÖM thought that article 22 should be re-drafted, because the word "co-operate" was inadequate. In the first place, the first sentence of the article placed an obligation on States, and it seemed paradoxical to talk of an obligation to co-operate. Furthermore, the article referred to the repression of the slave trade on the high seas (and would eventually refer to that of piracy as well); clearly States could not be obliged to take action on the high seas, and it would seem more accurate to say that they had the right, rather than the obligation, to participate in measures to prevent the slave trade.

45. The CHAIRMAN thought that Mr. Sandström's objections might be met by explaining in the comment what precisely was meant by the term "co-operation".

46. Mr. FRANÇOIS (Special Rapporteur) said that the language of article 22 had been borrowed from article 1

of the General Act of the Anti-Slavery Conference of 1890.<sup>8</sup> A change had been made, in that the words "slave trade on the high seas" had been substituted for the words "slave trade in certain zones" used in the original.

47. Mr. SANDSTRÖM said that the scope of article 22 was not very clear to him. Was it suggested, for example, that Sweden should be required as an obligation to participate in the repression of the slave trade in the Red Sea?

48. The CHAIRMAN said that the construction to be placed on article 22 was that all States had an obligation to co-operate in the repression of the slave trade on the high seas according to the circumstances of the moment. The main consequence would be that no warship should refuse its assistance for that purpose when called upon to do so.

49. Mr. KRYLOV recalled that Mr. Zourek had proposed that article 22 be re-drafted to refer to certain specific zones instead of to the high seas in general; he would like to hear the Special Rapporteur's views on that point.

50. The CHAIRMAN asked whether Mr. Zourek wished to move a formal amendment.

51. Mr. ZOUREK formally proposed that article 22 be amended by replacing the words "on the high seas" at the end of the first sentence by the words "in the zones covered by the treaties in force".

52. Mr. FRANÇOIS (Special Rapporteur) recalled that Mr. Zourek had made a similar proposal in respect of article 21.<sup>9</sup> He had the impression that he had not pressed the point, and that the Commission had thereupon agreed that policing should cover the high seas as a whole, and not just certain restricted areas.

53. The CHAIRMAN said that, as he understood Mr. Zourek's proposal, a vote would have to be taken on both article 21 and article 22, to decide whether their scope was to be restricted to the zones covered by existing conventions.

*Article 21 [21]: Policing of the high seas  
(resumed from para. 42)*

54. Mr. GARCÍA AMADOR, speaking to a point of order, recalled that article 21 had still to be re-drafted. It would therefore be premature to move an amendment to it.

55. The CHAIRMAN said there could be no objection to a vote on the principle, subject to final drafting.

56. Mr. GARCÍA AMADOR said that Mr. Zourek's amendment would deprive article 21 of its general nature.

<sup>8</sup> Martens, *Nouveau Recueil Général de Traités*, 2nd Series, vol. 16, p. 3; Malloy, *Treaties, Conventions, etc., between the United States and Other Powers*, vol. 2, pp. 1974-1982.

<sup>9</sup> See *supra*, para. 17.

57. Mr. ZOUREK explained that the main purpose of article 21 was to enable ships suspected of engaging in the slave trade to be investigated, with a view to the suppression of that trade. It would therefore be logical to restrict its scope to those zones covered by the relevant existing treaties.

58. Mr. FRANÇOIS (Special Rapporteur) recalled that in his second report he had drafted article 21 as follows: "All States are required to co-operate for the more effective repression of the slave trade in the maritime zone in which it still exists."<sup>10</sup>

59. Mr. KRYLOV said it would be difficult to determine in which exact maritime zones the slave trade still existed. A reference to the existing treaties would be much more precise; the Anti-Slavery Convention of 1890, for example, gave very precise geographical indications.

60. The CHAIRMAN said that the issue before the Commission was simply whether the right of interference, in the interests of repression, should be recognized all over the world, or be limited to certain specific zones.

61. Mr. AMADO enquired what was the position with regard to piracy.

62. Mr. ZOUREK said that his remarks applied to the slave trade alone.

63. Mr. SCELLE said that article 22 related only to the slave trade. As the traffic in women and children was not covered by that article, its adoption would imply the retrogression rather than the development of international law.

64. Mr. AMADO said that the fact that article 22 concerned only the slave trade proper was an argument in favour of Mr. Zourek's proposal.

65. Mr. LIANG (Secretary to the Commission) pointed out that, although article 22 only concerned the slave trade, article 21 dealt with other matters as well. The two articles could not therefore be treated in the same manner.

66. The CHAIRMAN put to the vote Mr. Zourek's proposed amendment, to the effect that the scope of the right of interference laid down in article 21 be restricted to the maritime zones covered by existing anti-slavery conventions.

*Mr. Zourek's amendment was adopted by 7 votes to none, with 3 abstentions.*

*Article 22 [12]: Policing of the high seas  
(resumed from para. 53)*

67. Mr. SCELLE said article 22 laid down a rule of international law which placed an obligation upon States. However, to stop at that would be tantamount to

expressing a mere pious wish. That was clearly inadequate, and the article should provide a sanction by prescribing the international responsibility of any State which infringed its obligations under the article. Such a stipulation of liability would make it possible for other States to claim compensation from the State at fault.

68. Mr. GARCÍA AMADOR agreed with Mr. Scelle that provision must be made for international responsibility. Unfortunately, the obligation in article 22 was a very indefinite one, and it was impracticable to provide a sanction. It was in fact what was known in French as *une obligation imparfaite*, one to which no sanction attached. The same was true of Spanish law.

69. Mr. HSU asked the Special Rapporteur whether the slave trade was still prevalent in the zones covered by the relevant treaties. If the problem had lost its urgency, perhaps it would be undesirable to include provisions concerning it in the draft articles relating to the régime of the high seas, which were not meant to be a complete codification.

70. Mr. FRANÇOIS (Special Rapporteur) wished to make it clear that, if Mr. Zourek's amendment were adopted, the obligation on States to co-operate in the repression of the slave trade would be restricted to certain maritime zones. There was no limitation, however, on the number of States under such obligation. It therefore followed that all those States which accepted the draft articles would be required to co-operate in the repression of the slave trade in the maritime zones in question, instead of only those States which were at present parties to the anti-slavery treaties. That implied an extension of the existing system of repressing the slave trade.

71. Replying to Mr. Hsu, he stated that the slave trade was, unfortunately, still a very real problem in certain areas, that the United Nations was alive to the problem and was taking steps to deal with it.

72. Mr. AMADO said that Mr. Scelle's objection to the somewhat paradoxical phrase *obligation de coopérer* could be met by opening the article along the following lines: *Tous les Etats sont tenus de coopérer.*

73. Mr. SCELLE agreed with Mr. García Amador that in French and, indeed, in Latin-American jurisprudence the term *obligation imparfaite* meant a duty or an obligation to which no sanction attached. But it was precisely in order to transform the imperfect obligation into a true obligation (*obligation parfaite*) that he proposed the provision of sanctions. It would of course be difficult to determine in every specific case whether there had been an infringement of a treaty obligation; that was a classic problem and one to which the classic answer was to allow the court of competent jurisdiction to determine whether, in the particular instance, the law had been infringed. He would give a simple example: nothing was more difficult than to distinguish between voluntary homicide and culpable involuntary homicide, but in every country competent courts were

<sup>10</sup> A/CN.4/42, *Yearbook of the International Law Commission, 1951*, vol. II, p. 85.

deciding particular instances of that kind every day. His proposal was therefore that a sanction be laid down, to enable the compulsory jurisdiction of the Permanent Court of Arbitration to function, in other words, to enable any interested State to have recourse to such arbitration where an infringement of the draft articles occurred.

74. With reference to Mr. Amado's suggestion concerning the opening words of article 22, he said that if the Commission was unwilling to impose on States an obligation to co-operate, but only to express a wish that they do so, the best French drafting would be: *Tous les Etats devraient coopérer*. It was clear that unless a sanction was provided, the draft articles which the Commission was discussing would read like a moral decalogue instead of a set of legal principles.

75. Mr. LIANG (Secretary to the Commission) said that all the draft articles had sanctions attached to them, although provision for sanctions in case of infringement was of course not repeated in every one of them. Thus article 2, which laid down that "the high seas shall be immune from all acts of sovereignty or territorial dominion on the part of any State", certainly entailed sanctions in case of violation of the rule embodied in it. Article 22, as drafted in Mr. François' sixth report (A/CN.4/79), was not in the form of a *voeu*.

76. Whatever changes might be deemed advisable in the French text, the English text of article 22 imposed a clear obligation which necessarily implied international responsibility. It would be undesirable to refer specifically to international responsibility, or to the liability of States, in that particular article, for if that were done the other articles in which no such provision had been included could be misconstrued as lacking any sanction in respect of their provisions.

77. Mr. SCALLE proposed that the compulsory jurisdiction of the Permanent Court of Arbitration be specifically provided for in both article 21 and article 22. Omission to provide for such compulsory arbitration would make the draft articles equivocal.

78. Mr. ZOUREK said that article 22 was in no sense an imperfect rule of law. Should such a construction be placed upon it, the same might be said of many other rules of international law which did not provide for compulsory arbitration. The provision contained in article 22 was essential in the interests of the maintenance of international co-operation without it being necessary to provide for compulsory arbitration.

He proposed that the article be amended, first, by inserting the words "and piracy" after the words "the slave trade" in the first sentence; second, by inserting the words "and punish" after the words "to prevent" in the second sentence; and third, by inserting a comma, followed by the words "and piracy by," after the words "the transport of slaves on" in the same sentence.

79. Finally, he took exception to the last sentence, which implicitly recognized the existence of slavery.

80. Mr. SANDSTRÖM said that the second sentence of article 22 provided for prevention of the practice referred to in the first sentence. It would therefore be inadvisable to restrict the scope of the first to certain specific maritime zones, because that would imply consequential geographical limitation of the preventive measures. The net result would be that any slave-trading operations carried on outside the zones specified would be immune from repression.

81. Finally, he formally proposed that the final sentence be deleted.

82. The CHAIRMAN put to the vote Mr. Zourek's proposal that piracy be included within the scope of article 22.

*The proposal was adopted by 8 votes to none, with 2 abstentions.*

83. The CHAIRMAN then put to the vote Mr. Zourek's proposal that the scope of article 22 be restricted to the maritime zones covered by existing international treaties relating to the suppression of the slave trade.

*The proposal was adopted by 6 votes to 3, with 1 abstention.*

84. Mr. SANDSTRÖM said that he was opposed to limitation to any particular zones and had accordingly voted against Mr. Zourek's proposal. The slave trade was subject to penalties in the penal codes of all States, but there was certainly no State which restricted such provisions to slave trade in particular maritime zones.

85. Mr. LIANG (Secretary to the Commission) said that, in view of the amendments just adopted to the first sentence of article 22, the second sentence should be made a separate article. It was necessary to make clear that the prevention of the transport of slaves was not limited to any particular zone.

86. Mr. SANDSTRÖM said that Mr. Liang's proposal did not meet his requirements. He had voted on the understanding that article 22 constituted a whole. He construed the obligations imposed in the first sentence in the light of the sense of the second sentence, which provided for the implementation of those obligations.

87. Mr. LIANG (Secretary to the Commission) maintained that the first and second sentences of article 22 could well be separated. The second sentence was narrower in scope than the first, which stipulated the general obligation resting on States to co-operate in putting down the slave trade. That co-operation might well be achieved by means which would not necessarily be confined to measures for preventing the transport of slaves on the high seas.

88. The CHAIRMAN called for comments on the proposal that the last sentence be deleted.

89. Mr. SANDSTRÖM said that the last sentence was a truism; it went without saying that a slave taking refuge on another ship became a free man: unless that were so, it would be impossible to put down the slave trade.

90. Mr. SALAMANCA thought it necessary to provide specifically that the captain of a ship arresting a slave-trading ship was entitled to set the slaves free; he would not merely inform the master of the prize that his traffic was illicit.

91. Mr. KRYLOV could not agree that the sentence in question should be deleted. Some eternal truths should be repeated as often as possible. It went without saying that a slave taking refuge on board a ship became free *ipso facto*; but that fact was still worth stating explicitly on the principle that *ce qui va sans dire va encore mieux en le disant*. He proposed, however, that the sentence should be amended to read "shall *ipso facto* be free", instead of "shall *ipso facto* be set free". That change would add force to the concept of automatic recovery of freedom.

92. Mr. SANDSTRÖM supported Mr. Krylov's proposal, in favour of which he formally withdrew his own.

93. Mr. AMADO also expressed support for Mr. Krylov's proposal: certain commonplace sayings were none the less sacred.

94. The CHAIRMAN, referring to Mr. Scelle's proposal concerning compulsory arbitration, said that it concerned all the draft articles, and not merely one of them. It might therefore be more appropriately discussed after the Commission had completed its first reading of the draft articles.

95. Mr. GARCÍA AMADOR said that perhaps Mr. Scelle's requirements could be met by the arbitration and jurisdiction clause included among the usual final clauses.

96. The CHAIRMAN then called for a vote on article 22 as a whole and as amended.

*Article 22, as a whole and as amended, was adopted by 7 votes to none, with 3 abstentions.*

The meeting rose at 12.55 p.m.

## 290th MEETING

Thursday, 12 May 1955, at 10 a.m.

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\* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

### Installation of new member

[Installation of Sir Gerald Fitzmaurice]

### Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.53)

(resumed from the 289th meeting)

### DRAFT ARTICLES (A/CN.4/79, SECTION II)

(resumed from the 289th meeting)

### Observations of the Government of Poland

7. Mr. HSU, referring to the observations of the Polish Government concerning freedom of navigation on the high seas (A/CN.4/L.53), wished to place the following comments on record:

8. In its memorandum, the Polish Government had made a charge against the Republic of China, as well as two proposals to the Commission concerning articles 22 and 23 of the draft articles relating to the régime of the high seas included in the Special Rapporteur's sixth report on that subject. One of those proposals, which was of no significance in itself, had already been dealt with by the Commission at the previous meeting; he would therefore comment upon the charge and the second proposal.

9. The charge was that the Republic of China had committed acts of piracy by seizing vessels on the China Seas, including two tankers flying the Polish flag. But, according to the Republic of China, the tankers were the property of its enemy, the Chinese Communists, and therefore had no right to fly the Polish flag. But even if they were bona fide Polish vessels, they would, according to the Republic of China, still be subject to seizure, as they were engaged in contraband traffic. Hence, unless Poland could prove that the two tankers had not been engaged in such traffic, the charge against the Republic of China could not stand.

10. The Polish Government, of course, had made no attempt to prove the charge. What it had done was simply to propose such a change in the law on piracy as would lend colour to the charge and, in support of that proposal, to allege that the law which the Special Rapporteur correctly stated in his report was in conflict with established international legal opinion. By so doing, apart from laying a false charge against the Republic of China, it had questioned the technical competence of the Special Rapporteur and branded as