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Summary record of the 290th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.

CONTENTS

* 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

pirates all those nations that had exercised belligerent rights during the past few centuries.

11. In the autumn of 1954, Poland had brought the same issue in similar fashion before the General Assembly, where, as was to have been expected, the case had failed. He had no doubt that the Polish Government would also fail in the attempt now being made in the Commission. But he felt that he must express his regret, as Mr. Edmonds had done at an earlier meeting,[1] that Poland should have seen fit to endeavour to make ill-considered use of United Nations organs, political or technical.

12. That said, it remained true that all proposals could be treated on their merits, no matter how unworthy the purposes for which they might have been made. He therefore reserved his right to speak again should the Commission decide to deal with the Polish proposal.

13. Mr. ZOUREK pointed out that Mr. Hsu had not even attempted to justify the criminal acts committed in the China Seas against merchant vessels on the high seas and was astonished how anyone could think of suggesting that it was for the governments of the victims of piratical attacks to prove that their vessels had been boarded and looted. Such a procedure would be tantamount to transferring the burden of proof from the criminal to his victim, which was absolutely inadmissible. The acts of piracy committed in the China Seas were well-known and had been recounted in detail in the documents which had been transmitted to the Commission in accordance with General Assembly resolution 821 (IX) of 17 December 1954, and circulated to each member. The facts about the violation of the principle of freedom of navigation by Chiang Kai Shek's ships had been summarized in the Polish Government's memorandum transmitted to the Commission by Mr. Jan Balicki, official observer for the Polish Government. It was common knowledge that the vessels had been attacked or stopped on the high seas, forcibly taken to Taiwan, the cargoes looted and the crews forcibly detained or subjected to ill-treatment or threats. He emphasized that such piratical attacks had not been made against Polish vessels only but also against vessels of other nations including those of Denmark, Italy, Japan, the Netherlands, Panama, the Soviet Union and the United Kingdom.

14. The Government of Poland had acted entirely within its rights in submitting its observations to the Commission and that for two reasons. To begin with, it was entitled to do so as a Member of the United Nations which had suffered considerable loss owing to the systematic violation of the freedom of navigation in the China Seas. But in addition the General Assembly resolution of 17 December 1954 expressly invited States Members to transmit to the Commission their views on the principle of the freedom of navigation on the high seas.

15. In accordance with that resolution (821 (IX)) the Polish Government's memorandum (A/CN.4/L.53) expounded that government's view about the principle of freedom of navigation on the high seas and at the same time adduced specific facts which undoubtedly constituted a violation of that principle. It should be emphasized that the facts had never been denied by those responsible for them. For the time being he did not wish to go into details because the Commission must first decide how to deal with the problem. It could either examine the facts recorded in the documents transmitted by the General Assembly and to which the Polish memorandum also referred, or it could declare, as some members seemed to have suggested, that it was not competent under the terms of its Statute to examine those facts. He would bow to the Commission's decision, being prepared if called upon to give further details on the facts or on points of law.

16. Mr. SANDSTRÖM did not think that, in transmitting to the International Law Commission the records and documents of the relevant meetings of the *Ad hoc* Political Committee, the General Assembly's intention had been that the former should pronounce judgment on a particular case. Its purpose had been merely to give governments an opportunity of making known to the International Law Commission their views on freedom of navigation on the high seas.

17. The Commission's task was limited to examining the rules governing piracy on the high seas in general; it had no competence to deal with specific cases. But that did not prevent members of the Commission from making use of any material contained in the Polish complaint which, in their opinion, might be relevant, by way of example, in the discussion of piracy in general.

18. Mr. HSU agreed with Mr. Sandström. He would therefore refrain from replying in detail to the points raised by Mr. Zourek—particularly the question of merchant vessels other than those flying the Polish flag. He could not but regret that Mr. Zourek should have seen his way to supporting the Polish complaint which was tantamount to seizing the International Law Commission of a matter which did not concern it.

19. Mr. SCELLE agreed with Mr. Sandström. The Commission was about to consider article 23 and to make an objective examination of piracy. It was therefore incumbent upon it to set aside all questions of a subjective character.

20. Mr. KRYLOV said that the duel the Commission was witnessing might well have taken place between Mr. Hsu and the eminent British jurist who had just been elected to the Commission. For, indeed, no less than 140 British ships had been arrested, detained or seized in recent years by "unknown ships" in the China Seas.

21. In any discussion of article 23, it was desirable that members should be in possession of all relevant facts.

[1] 288th meeting, para. 58.

Therefore the Polish complaint and Mr. Zourek's remarks were both entirely justified. He would revert to the matter when the text of article 23 came up for examination, when he would have occasion to quote the authoritative opinion of Mr. Lauterpacht. At the present stage, he would say only that he had confidence in the Commission's decision.

22. The CHAIRMAN congratulated members on the manner in which they had dealt with the questions raised by the memorandum submitted by the Polish Government. The General Assembly resolution did not ask the Commission to deal with the Polish charge: it simply invited governments to transmit to the Commission their views concerning the principle of freedom of navigation on the high seas. Members had now had an opportunity of making known their views on the Polish memorandum, the only one to be submitted by a government in pursuance of General Assembly resolution 821 (IX). All the Commission could do was to take note of the memorandum and members' remarks, all of which would be taken into consideration when article 23 was discussed. It was not for the Commission to express either approval or disapproval of the memorandum; nor was it incumbent upon it to go into the facts of the case, for it was not a court of justice.

23. Each member was at liberty, when contributing to the discussion on article 23, to take into consideration the Polish memorandum and the comments thereon; indeed, they might well derive inspiration from them for the amendment of that article.

24. Mr. SCELLE said that it was necessary first to make an objective examination of article 23; only after such discussion would it be possible for each member to decide whether in his opinion the particular case at issue constituted an act of piracy.

25. Mr. ZOUREK considered that the view expounded by the Polish Government in its memorandum was correct. Indeed it had neither been questioned nor had the facts given in the memorandum been denied. He pressed for a formal decision concerning the objection that the Commission was not competent to discuss the facts relating to the violation of the freedom of navigation in the China Seas which were the subject both of the documents transmitted to the Commission in pursuance of General Assembly resolution 821 (IX), and of the Polish Government's memorandum.

It was decided by 8 votes to none, with 2 abstentions, that the Commission had no competence to deal with the complaint made by the Government of the Polish People's Republic in its memorandum (A/CN.4/L.53).

26. Mr. GARCÍA AMADOR explained that he had not abstained. He had deliberately taken no part at all in the vote. In accordance with the terms of its Statute (A/CN.4/4),[2] the Commission had for its exclusive object the promotion of the progressive development of international law and its codification. The Polish memorandum therefore raised an issue upon which the Commission was explicitly forbidden to take a vote.

27. Mr. AMADO said that he too had refused to take part in the vote for the same reasons.

Article 23 [14]: Policing of the high seas[3]

28. The CHAIRMAN invited Mr. François (Special Rapporteur) to open the discussion on article 23 of his draft articles on the régime of the high seas.

29. Mr. FRANÇOIS (Special Rapporteur) said that the subject of piracy had been studied very thoroughly by the Harvard Research Centre, to which Professor Joseph W. Bingham had submitted an exhaustive report, together with the text of a draft international convention consisting of 19 articles published by the Harvard Law School in 1932.[4] He had felt that he could not do better than to take the principal articles in Professor Bingham's report, and the comments thereon, as a basis for the discussion on the subject of piracy, dealt with in articles 23 *et seq* of his own sixth report. His own draft had only six articles on piracy, namely, articles 23 to 28. He had attached no comment to his individual articles, that appended to the Harvard articles, to which he referred members, being exhaustive and entirely satisfactory.

30. The Commission was concerned with the notion of piracy in international law, and not with the national concept of that crime. Under the legislation of some States, certain acts were treated as piracy if they were committed in their territorial sea. Such was the case with the United Kingdom, the laws of which treated as piracy any attempt to carry on slave trading in waters under British jurisdiction. The concept of piracy in international law was a narrower one: it applied only to those acts which were liable to prosecution by the authorities of any State, even if the interests of that State were not at stake.

31. As the Commission was concerned only with piracy in international law, it was not concerned with municipal law on the subject.

32. Turning to article 23, the drafting of which was admittedly somewhat complex, he explained that it was

[2] United Nations publication, Sales No.: 1949.V.5.

[3] Article 23 read as follows:

"Piracy is any of the following acts committed in a place not within the territorial jurisdiction of any State:

"1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without the *bona fide* purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

"2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

"3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article."

[4] *Research in International Law* (Harvard Law School, Cambridge, 1932), pp. 769–838.

based on three important principles: the principle that *animus furandi* did not have to be present; the principle that only acts committed on the high seas could be described as piracy; and the principle that acts of piracy were necessarily acts committed by one ship against another ship—which ruled out acts committed on board a single vessel.

33. The Harvard draft did not consider *animus furandi* a necessary element in the definition of piracy. The Harvard definition of an act of piracy included acts of "violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property", the comment thereon adding:

> "... some writers have insisted that a purpose of private gain is essential. Others have argued that the motive may vary and that even vengeance or bare malice may be the inspiration of piratical attacks. The historical evidence in support of each side of this dispute need not be canvassed, for it is clear that the function of this draft convention—the definition of the common jurisdiction of all States over certain types of major offences committed beyond the territorial jurisdiction of every State—will not be well accomplished unless the common jurisdiction (and therefore as a matter of convenient terminology, the definition of piracy) covers all serious offences otherwise like traditional piracy, although the motive of the offender may be an intention to slay, wound, rape, enslave or imprison or to destroy property and not an intention to rob or to gain wealth otherwise."[5]

34. There were dissenting views; for instance, the Dutch writer on international law, J. de Louter, in his *Droit international public positif* (Vol. I, p. 412), defined piracy as any act of armed violence at sea *dans un but de lucre.*

35. Most authorities, however, shared the opinion expressed in the Harvard draft. Mr. Matsuda, Rapporteur of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, had summed it up as follows in his report:

> "Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification 'for private ends.' It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives. ..." (League of Nations publication, *V. Legal, 1927,V.1., document C. 196.M.* 70.1927.V., p. 117)

36. L. Oppenheim, perhaps more guardedly, had expressed a similar opinion:

> "The object of piracy is any public or private vessel, or the persons of the goods thereon, whilst on the open sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks her. On the other hand, the cargo need not be the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy; it is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo." (L. Oppenheim, *International Law* (fourth edition), sect. 275, Vol. I, pp. 503-504).

37. Other concurrent opinions included those of Wheaton and Dana, and W. E. Hall and Pearce Higgins:

> "It has sometimes been said that the act must be done *lucri causa,* and the English common-law definition of *animus furandi* has been treated as a requisite; but the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons, or classes of persons, or by a particular national authority. ..." (Wheaton, *International Law* (eighth edition), sect. 124, footnote by Dana)

> "The distinctive mark of piracy is seen to be independence or rejection of State or other equivalent authority. It becomes clear that definitions are inadequate which, as frequently happens, embrace only depredation or acts of violence done *animus furandi."* (W. E. Hall, *International Law* (eighth edition, by Pearce Higgins), p. 311)

38. Following the Harvard precedent, he had defined as piracy acts of violence or of depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose. As was explained in the Harvard comment:

> "... the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of States, or of recognized belligerent organizations, or of unrecognized revolutionary bands. Under present conditions there seems no good reason why jurisdiction over genuine cases of this type should not be confined to the injured State, the State or recognized government on whose behalf the forces were acting, and the States of nationality and domicile of the offender." (*loc. cit.,* p. 786)

39. The injured State was not, of course, debarred from taking such action as it saw fit in cases of that nature, but that did not mean that such incident could be

[5] *Ibid.,* p. 790.

described as piracy, because the characteristic of piracy was the possibility of repression by any State, even where it was not the injured party.

40. In the matter of political motive, the Matsuda report stated:

> "Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law." (*loc. cit.*, p. 117)

41. That view was shared by the authors of the Harvard report:

> "Although States at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all States, it seems best to confine the common jurisdiction to offenders acting for private ends only. There is authority for the view that this accords with the law of nations. ..." (*loc. cit.*, p. 798)

42. The report went on to quote L. Oppenheim:

> "Private vessels only can commit piracy. A man-of-war or other public ship, so long as she remains such, is never a pirate. ..." (*loc. cit.*, section 273)

43. In cases of a political nature, it was open to the aggrieved State to take reprisals or to claim damages, or, again, to take certain other measures:

> "The provisions of this convention do not diminish a State's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy." (*Research in International Law*, Harvard Law School, p. 857)

44. The situation described in the Polish Government's memorandum (A/CN.4/L.53) could only be dealt with on the basis of the principles thus enunciated. No warship, even if it belonged to a government which was not recognized by some States, could be described as a pirate ship in the international sense of the word. The principle of common jurisdiction, according to which a pirate was treated with universal public enmity, could only exist where the political element was lacking and where the ship concerned was not the public property of a State.

45. All that was made clear by the words "for private ends", as used in article 23, and the Polish memorandum was in fact a challenge to that element of his definition of piracy. He would insist on those words being retained.

46. The subsequent phrase in the definition, namely: "without the *bona fide* purpose of asserting a claim of right", had been included in the Harvard draft in order to leave outside the scope of piracy quarrels between fishermen arising from rival claims to catch.

47. The second essential element of the Harvard definition of piracy was that it must occur on the high seas.[6]

48. The view adopted in the Harvard draft had been followed by the majority of States and of writers.

> "Piracy as an 'international crime' can be committed on the open sea only. Piracy in territorial coast waters has as little to do with international law as other robberies within the territory of a State. Some writers maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea. They maintain, therefore, that if 'a body of pirates land on an island unappropriated by a civilized Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy.' With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea." (L. Oppenheim, *loc. cit.*, sect. 277)

49. Exclusion from common jurisdiction did not preclude the possibility of prosecution, as was made clear in the Harvard comment:

> "The State in whose territory the act is committed would have jurisdiction independently of the convention and in many cases other States would have jurisdiction also." (*loc. cit.*, page 789)

50. W. E. Hall had expressed a dissenting view:

> "If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the State through descent from the sea, by a body of men acting independently of any politically organized society." (*loc. cit.*, p. 314)

51. Commenting upon the phrase "acts committed in a place not within the territorial jurisdiction of any State", which he had included in article 23 following the Harvard precedent, he emphasized that in that context the words "territorial jurisdiction" were to be construed in their narrowest sense as comprising the land territory, the inland waters, and the territorial sea of a State, but not ships flying the flag of that State.

52. Finally, the third element of the definition of piracy was the requirement that the act complained of should be committed by one ship against another. The Harvard comment thereon was as follows:

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[6] *Research in International Law*, *op. cit.*, p. 809.

"This limitation also is designed to exclude offences committed in a place subject to the ordinary jurisdiction of a State. The limitation follows traditional law. Some definitions of piracy are broad enough to include robberies and other acts of violence or depredation committed on broad a merchant ship on the high sea by a passenger or a member of the crew who is not in control of the ship. Mutiny on the high seas has sometimes been included. The great weight of professional opinion, however, does not sanction an extension of the common jurisdiction of all States to cover such offences committed entirely on board a ship which by international law is under the exclusive jurisdiction of a State whose flag it flies. Even though a mutiny succeeds, the common jurisdiction would not attach. It should attach, however, if the successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation (of the sort specified in Article 3, 1) on the high sea or in foreign territory." (*loc. cit.*, pp. 809-810)

53. T. J. Lawrence had expressed a dissenting view:

"A single act of violence will suffice, such, for instance, as the successful revolt of the crew of a vessel against their officers. If they take the ship out of the hands of the lawful authorities, they become pirates, though if their attempt fails and lawful authority is never superseded on board, they are guilty of mutiny and not piracy." (T. J. Lawrence, *The Principles of International Law*, fifth edition, p. 233).

54. L. Oppenheim summed up better the consensus of legal opinion on that issue:

"If the crew, or passengers, revolt on the open sea, and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is private or public. But a simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, not at least as far as international law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use." (*loc. cit.*, sect. 274)

55. In conclusion, he invited members' views on the three leading principles of his definition of piracy, which he suggested should be put to the vote one by one.

56. Mr. GARCÍA AMADOR recalled that he had not been elected to the Commission till after it had discussed the subject of piracy. He would therefore ask the Special Rapporteur why a fairly detailed study of piracy had been embodied in the draft articles, considering that the latter were not meant to be an exhaustive codification of the law of piracy. The matter of collisions on the high seas, for instance, had been the subject of only one article.

57. Mr. FRANÇOIS (Special Rapporteur) said that the Commission had originally at its second session (1950) decided not to codify exhaustively the international law of the sea, but to examine only certain aspects thereof. Later, at its fifth session (1953) the Commission had instructed him to expand the report so as to include other topics in maritime law, and he had accordingly drafted the text which appeared in his sixth report. He felt that it would have been a serious omission not to have included a careful examination of the problem of piracy. He agreed that only the main principles of the régime of the high seas should be dealt with, but could not accept the deletion of the six articles on piracy.

58. Mr. LIANG (Secretary to the Commission) regretted that it was impossible to circulate the Harvard report. In making that exhaustive study, Professor Bingham had considered piracy only in relation to the jurisdiction of States on the high seas; it had not been his intention to study piracy as a crime against the law of nations, or to report on international criminal law.

59. Mr. SALAMANCA wondered whether the Commission should not consider whether it could adequately deal with piracy in six abridged articles; if it came to a negative conclusion, it would either have to make a more detailed study or omit the subject altogether.

60. The CHAIRMAN said that it would be proper for members to consider at that stage whether the issue raised by Mr. Salamanca amounted to a prior question, namely, a proposal to exclude the subject of piracy.

61. Mr. AMADO observed that, if Mr. Scelle's thesis concerning the policing of the high seas had been accepted, the section of the Special Rapporteur's draft at present under discussion would have been divided into two parts, comprising, first, general provisions and secondly, special provisions. Had Mr. García Amador borne in mind the fact that the title of the section was "Policing of the high seas", he would have realized that his observations lost some of their force.

62. It was a customary rule of international law that piracy in the classical sense, that was, any act of violence committed by a ship on the high seas in a private capacity, was a crime against the *jus gentium*. The scope of that concept had now been extended by analogy to include acts committed in the air, and the element of private gain had almost disappeared, giving place to the political motive. In that connexion, he would draw the Commission's attention to article 3 of the Treaty relating to the Use of Submarines and Noxious Gases in Warfare of 6 February 1922,[7] though that instrument had never come into force, and the Nyon Arrangement of 14 September 1937,[8] both of which illustrated the manner in which the traditional concept had evolved.

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[7] Manley O. Hudson, *International Legislation*, vol. II, p. 794.

[8] *Ibid.*, vol. VII, p. 831.

63. He did not find the Special Rapporteur's formulation derived from the 19 articles of the Harvard draft particularly satisfactory, for it seemed to have taken the form of an enumeration, instead of an abstract statement of principle. However, it was for the Commission to decide whether the text was adequate.

64. Mr. KRYLOV, reserving the right to speak again later, said, by way of preliminary comment, that difficulties inevitably arose over legal concepts that dated back to the Middle Ages. In view of the development of the concept of piracy, the definition given in article 23 must be modified, since it was difficult to understand in its present form. According to Lauterpacht's edition of Oppenheim's *International Law,* the historical notion of piracy as an act of violence committed on the high seas by ships acting in a private capacity had now been replaced by a wider interpretation.

65. He accordingly proposed the deletion of the words "for private ends without the *bona fide* purpose of asserting a claim of right". The first three words in that passage were now out of date, and the others wholly unacceptable.

66. Mr. SANDSTRÖM considered that the exception under discussion to the general rule enunciated in article 7, that merchant ships on the high seas were subject solely to the jurisdiction of the flag State, was so important that it called for the insertion of a provision on the lines of article 2 of the Harvard draft, appropriately modified to make it conform with article 21 of the Special Rapporteur's text.

67. He also believed that the Special Rapporteur's text was unduly complicated, largely because he had taken into account piracy committed in places not within the territorial jurisdiction of any State. In his view, it would suffice to restrict the provision to acts committed on the high seas.

68. In conclusion, he suggested that, in view of the complexity of the subject, the Commission should dispose of the points raised one by one.

69. Mr. HSU observed that the authors of the observation submitted by the Polish Government (A/CN.4/L.53) had not examined the English text of article 23 carefully enough. If a comma were inserted after the word "person" and the comma after the word "property" deleted, the intention of paragraph 1 would be perfectly clear.

70. Mr. SCELLE deplored the tendency to formalism. He would be unable to support a provision defining piracy by reference to jurisdiction and not the nature of the act. Article 23 as at present drafted was based on a methodological error. According to such a text the Barbary corsairs would not have been pirates, because their acts had been committed on land.

71. Mr. ZOUREK said that, as demonstrated by the Special Rapporteur, the principle of *animus furandi* was not an essential element in the concept of piracy.

72. He could not agree, however, with his view that piracy could only be committed by private ships. Many authorities, including L. Oppenheim, held that state-owned vessels could also be guilty of piracy, and that notion had been further substantiated by the 1937 Nyon Arrangement.

73. Some members had referred to the penal aspect of the problem, but that should raise no difficulty since, under customary law, piracy was recognized as an international crime.

74. The Harvard text was defective in several respects. It was, for instance, impossible to justify robbery, rape or wounding by asserting a claim of right, and he therefore supported Mr. Krylov's amendment.

75. Mr. FRANÇOIS (Special Rapporteur) did not think that either the Treaty relating to the Use of Submarines and Noxious Gases in Warfare of 1922, which was not in force, or the Nyon Arrangement had altered the doctrine in general acceptance before those two instruments had been drawn up, namely, that no act committed by a warship could fall within the definition of piracy. He was therefore convinced that the contrary doctrine, according to which piracy could only be committed by private vessels, still held good.

76. He shared the doubts of other members of the Commission about extending article 23 to include an attack in or from the air, as in the Harvard draft, and would be prepared to delete the reference thereto from paragraph 1.

77. He could also agree to delete the words "without the *bona fide* purpose of asserting a claim of right"; a justification which might always be invoked. The question of fishing disputes could be elucidated in the comment. On the other hand, he could not accept Mr. Krylov's proposal to delete the words "for private ends", which, as he had already explained, were crucial.

78. He would be prepared to accept Mr. Sandström's proposal concerning the incorporation of the substance of article 2 of the Harvard draft, since article 26 of his own text dealt only with seizure and did not cover punitive action.

79. Mr. Scelle, in his keen concern to establish an international police, considered that acts committed on land should be treated on the same footing as acts committed on the high seas, thereby departing from the doctrine held by most authorities whereby States could only take steps against acts of piracy committed on the high seas. The acceptance of the new idea propounded by Mr. Scelle would only serve to complicate the issue.

80. Sir Gerald FITZMAURICE reminded the Commission of the peculiar feature of the events leading up to the Nyon Arrangement, namely, the sinking of ships in the Mediterranean by submarines of which no country was willing to admit ownership. As no government admitted responsibility, it had been possible to assume that the submarines had been pursuing their private ends without any authority from their government. If

he was right in arguing that the Nyon Arrangement had been based on that fact, the Special Rapporteur's point that piracy was essentially a crime committed by private individuals not in the performance of a public or authorized duty was reinforced. But the point might perhaps be brought out a little more clearly, since the expression "for private ends" did not immediately convey that an act committed by a vessel of war on the authority of its government did not constitute piracy in the ordinary sense of the term as understood in international law, though it might be an act of aggression.

81. Mr. KRYLOV observed that vessels other than submarines had also been considered at the Nyon Conference, to which the Special Rapporteur had perhaps not given sufficient attention.

82. Mr. AMADO, referring to the Special Rapporteur's remarks, said that he had mentioned the Nyon Arrangement to illustrate his argument about the way in which the theory of piracy had evolved. He had certainly not overlooked the traditional concept, and had not drawn any legal conclusion from that instrument.

83. As the Special Rapporteur had declared his willingness to accept some of the proposals made during the discussion, perhaps he would submit a revised text of article 23 for consideration at the following meeting.

84. The CHAIRMAN, announcing that he had no more speakers on his list, said that the general discussion might be regarded as closed, and requested members to prepare their amendments for submission at the following meeting.

The meeting rose at 1 p.m.

291st MEETING

Friday, 13 May 1955, at 10 a.m.

CONTENTS

* 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.

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 23 [14]: Policing of the high seas (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 23.

2. Mr. FRANÇOIS (Special Rapporteur) said that, in the light of the discussion at the previous meeting, he had prepared and circulated a revised version of article 23, from which he had omitted the provisions contained in paragraphs 2 and 3 of the original text, since they dealt with details of international penal law. His new text read as follows:

> "Piracy in the sense of these rules is any act of violence or depredation, committed for private ends by the crews or the passengers of a private vessel against another vessel on the high seas, with intent to rob, rape, wound, enslave, imprison or kill a person, or with intent to steal or destroy property.
>
> "The acts, committed on board a public vessel, whose crew mutinies, directed against other vessels, are assimilated to acts committed by a private vessel."

3. Mr. EDMONDS submitted a new text as an amendment to paragraph 1 of the original version of article 23. It read:

> "... any act of violence or depredation committed on the high seas or in the superjacent air with intent to rob, rape, wound, enslave, imprison, or kill a person or to steal or destroy property for private ends, except in the course of the *bona fide* assertion of a claim."

4. His text, though simpler, was essentially the same as that of the Special Rapporteur's first draft apart from some minor editorial changes. The Commission would note that, in view of modern technical progress, he had retained a provision dealing with acts committed in the air and also the very important exception to the definition in the case of a *bona fide* assertion of a claim.

5. The CHAIRMAN pointed out that Mr. Edmonds had drafted his amendment which in reality constituted a new proposal, before he had had sight of the Special Rapporteur's revised text. The Commission would therefore have to decide which of the two versions should be regarded as the basic text.

6. Mr. KRYLOV moved that the Commission defer further consideration of article 23 until the following meeting in order to give members more time to