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Summary record of the 291st meeting

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

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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

examine the texts just submitted. That of Mr. Edmonds was extremely interesting and, being brief, especially attractive.

7. The CHAIRMAN said that, as the Commission had already discussed the original text of article 23 at considerable length, he saw no reason why it should not take up the new texts immediately; it could postpone its decision until the next meeting.

8. Mr. AMADO, while considering Mr. Krylov's request perfectly legitimate, felt that the Commission could proceed forthwith to discuss Mr. Edmond's amendment.

9. Mr. FRANÇOIS (Special Rapporteur) pointed out to Mr. Krylov that his own new text was also short and extremely simple. Moreover, as it contained no new element, he did not see why it should not be disposed of without further delay. If discussion of article 23 were postponed, there would be little for the Commission to do at the present meeting, since it would have to leave aside the remaining articles on piracy and fisheries, and the articles on the right of pursuit and water pollution would not call for much discussion, their substance having been approved at the third session.

10. Mr. KRYLOV could not agree that the Special Rapporteur's text was perfectly clear. It departed very considerably from the original, and required careful study. He was therefore obliged to press his proposal.

11. Mr. EDMONDS said that, in order to save time, he would be perfectly prepared for the time being to withdraw his text in favour of the Special Rapporteur's.

12. Mr. SANDSTRÖM agreed with the Special Rapporteur about the conduct of the discussion. The Commission could still take its final decision at a later meeting.

13. Mr. ZOUREK suggested as a compromise that the Commission should take up articles 29 - 34 forthwith and revert to article 23 if there were still time at the present meeting.

14. Mr. HSU, on the assumption that Mr. Krylov's motion was rejected, asked whether further discussion of article 23 would be possible before the vote. In his view, the new texts before the Commission called for some debate, and it would hardly be reasonable to postpone it until the following meeting.

15. Mr. AMADO said that the procedure suggested by Mr. Zourek would be acceptable to him.

16. Mr. GARCÍA AMADOR said that if Mr. Zourek's suggestion were accepted he would propose that the articles concerning fisheries should not be taken up until the report of the Conference on the Conservation of the Living Resources of the Sea had been circulated.

17. The CHAIRMAN observed that, as most members seemed to favour postponing the decision on article 23 until the following meeting, the Commission might defer discussion of the articles on policing of the high seas and proceed with article 29.

It was so agreed.

Article 29 [22]: Policing of the high seas[1]

18. Mr. FRANÇOIS (Special Rapporteur) said that he had drafted article 29 in conformity with the decisions taken by the Commission at its third session, when the substance of the article had been discussed at length.

19. Mr. KRYLOV asked whether such a provision properly belonged to the régime of the high seas. Was it not more closely related to the régime of the territorial sea?

20. Mr. FRANÇOIS (Special Rapporteur) replied that, since it related to the policing of the high seas and laid down the exception to the general rule that merchant ships on the high seas were subject solely to the jurisdiction of the flag State, its place was in the present draft.

21. Mr. ZOUREK, observing that certain difficulties were raised by the last sentence of paragraph 1 concerning pursuit begun within the contiguous zone, reminded the Commission that the final decision on the matter of that zone had not yet been taken. If paragraph 1 were put to the vote, it must be on the understanding that that sentence would be subject to further modification.

22. Sir Gerald FITZMAURICE asked the Special Rapporteur to elucidate paragraph 4, the meaning of which seemed somewhat obscure, perhaps because of the use of the word "authorized".

23. Mr. FRANÇOIS (Special Rapporteur) explained the the purpose of paragraph 4 was to cover such cases as that of the *S.S. Martin Behrman,* in 1947 in Indonesia, which had raised the question of whether a vessel arrested in territorial waters and escorted to a port for examination could claim the right to be set at liberty if some portion of the high seas had been traversed on the way. Certain authorities had held that such cases should

[1] Article 29 read as follows:

"1. The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inlands waters or the territorial sea of that State, may be continued outside the territorial sea provided that the pursuit has not been interrupted. It is not necessary that, at the time when the foreign vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. If the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against any interest for the protection of which the said zone was established.

"2. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

"3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea. The commencement of the pursuit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

"4. The release of a vessel arrested within the jurisdiction of a State and escorted to a port of that State pending proceedings before the competent authorities shall not be authorized solely on the ground that a portion of the high seas was crossed by such ves el in the course of its voyage."

be assimilated to hot pursuit, and their view had been accepted by the Commission at its third session.

24. Mr. LIANG (Secretary to the Commission), referring to the point raised by Sir Gerald Fitzmaurice, said that the word "authorized" in the English text was not a faithful translation of the French, which would be better rendered either by "required" or by "claimed". The Spanish text was correct.

25. Sir Gerald FITZMAURICE was not certain that he could agree with the Special Rapporteur about the substance of paragraph 4, since he believed that there was a real difference between the case dealt with there and hot pursuit. A vessel actually arrested in the territorial sea and then taken out on to the high seas regained her freedom and ceased to be lawfully liable to detention. Since the territorial sea was a continuous zone round the coast, there was no need for a vessel to be taken outside it at all while under escort to port. He doubted, therefore, whether paragraph 4 was correct, and was not convinced of the need to assimilate cases of the kind described by the Special Rapporteur to hot pursuit.

26. Mr. FRANÇOIS (Special Rapporteur) said that in certain circumstances it might not be possible to conduct a vessel to a port without traversing the high seas.

27. Mr. LIANG (Secretary to the Commission) recognized that it was necessary to envisage the impossibility of reaching a port without crossing the high seas, or of the wrong route being taken, leading outside the territorial sea, or of a dispute concerning the limits of the contiguous zone. Nevertheless, he found it difficult to persuade himself that the principle of hot pursuit was involved at all. He did not, therefore, believe that, if the Commission adopted the substance of paragraph 4, it should follow provisions concerning hot pursuit, particularly since as at present drafted the paragraph did not require the initial arrest to be made in the territorial sea after hot pursuit.

28. Sir Gerald FITZMAURICE observed that, although special circumstances making it impossible to remain within the territorial sea while escorting might justify such an exception, if that thesis were accepted the purpose and limitation of the provision should be made clear by adding at the end of paragraph 4 such wording as "where circumstances rendered it impossible to avoid traversing a portion of the high seas".

29. He agreed with the Secretary that, as it was difficult to perceive the connexion between such a provision and those relating to hot pursuit, it should be transposed to another section of the report.

30. Mr. SANDSTRÖM was opposed to an unduly stringent provision, considering that it should be broad enough to cover other cases as, for example, the arrest of a vessel in the territorial sea of an island separated from the coastal State by part of the high seas. As the matter bore some relation to hot pursuit, he did not think there was any need to incorporate it in a separate article.

31. The CHAIRMAN observed that Sir Gerald Fitzmaurice's amendment appeared to be generally acceptable; the question of the proper place for paragraph 4 might be left to the Drafting Committee.

32. Mr. AMADO considered that, as the last sentence in paragraph 4 was a considerable extension of the theory of the right of pursuit, it called for special mention in the comment.

33. Sir Gerald FITZMAURICE asked for a separate vote on the third sentence in paragraph 1.

34. Mr. ZOUREK considered that the vote on that sentence should be deferred for the reasons he had already given.

The first two sentences of paragraph 1 were adopted unanimously.

35. Mr. SANDSTRÖM suggested that the Commission might consider whether the last sentence in paragraph 1 could appropriately be included in an article on the right of pursuit.

36. Mr. FRANÇOIS (Special Rapporteur) explained that at first the Commission had considered assimilating the contiguous zone to the territorial sea for cases of hot pursuit, but had later decided that pursuit could be undertaken in the former only if the vessel had trespassed against any interest for the protection of which the zone had been established.

37. Mr. SCELLE agreed with Mr. François that the contiguous zone was a special extension of the territorial sea for the protection of specific interests. A. de Lapradelle[2] had been untiring in his efforts to secure the substitution of the doctrine of contiguous zones for that of the territorial sea, with all the difficulties of establishing a uniform limit that the latter involved. He (Mr. Scelle) could fully support the stand taken by the Commission at its third and fifth sessions, and would only point out that the words "any interest" in the third sentence of paragraph 1 were not sufficiently clear. The meaning would be better expressed by the words "special interests".

38. Mr. GARCÍA AMADOR agreed that some reference should be made to the contiguous zone, which the Commission had agreed to assimilate to the territorial sea for purposes of the exercise of the right of pursuit, but as it had not yet finally determined which interests were to be protected by the establishment of a contiguous zone, or, in particular, whether fisheries were to be covered, the decision taken on the last sentence of paragraph 1 must be subject to reservation.

39. Mr. LIANG (Secretary to the Commission) wondered why the Special Rapporteur did not reproduce the article on the contiguous zone adopted at the fifth session.[3] He felt that similar, if not identical,

[2] A. de Lapradelle, *La Mer* (Paris, 1934).

[3] "Report of the International Law Commission on the work of its fifth session" (A/2456), *Yearbook of the International Law Commission, 1953*, vol. II.

wording should have been used in the present draft. The word "rights" should be used instead of the word "interest", that was, rights conferred by customary law or international conventions.

40. Mr. SANDSTRÖM considered that the last sentence in paragraph 1 would cause confusion and conflicted with article 3.

41. Sir Gerald FITZMAURICE wished to draw attention to one important point concerning the distinction between the territorial sea proper and the contiguous zone. He agreed with Mr. Amado that the third sentence in paragraph 1 represented a very considerable extension of the concept of the high seas. The territorial sea as such was subject to the jurisdiction of the coastal State. That State had no jurisdiction over the waters of the contiguous zone, but possessed certain rights in respect of vessels traversing it. It was therefore open to question whether the doctrine of hot pursuit was applicable to the contiguous zone in the same way as to the territorial sea ; if it were, its application must clearly be limited to the particular rights exercized in that zone.

42. Mr. AMADO, referring to the French text, urged the Commission to consider very carefully the consequences of using the word *entamer,* which would mean abandoning an established principle of international law. In his view, the word should be *poursuivre* or *continuer.*

43. Mr. SCELLE observed that, so far as the French language was concerned, the word *intérêts* had the same significance in the present context as the word *droits.*

44. Referring to Sir Gerald Fitzmaurice's objection, he said that the whole concept of the territorial sea was too rigid, and was inadequate to meet all needs. The theory of the contiguous zone was, in his opinion, a great advance, but if it was to serve any useful purpose at all, any trespass against the interests for whose protection the zone had been established must be prevented or punished, and therefore pursuit must be allowed.

45. Mr. AMADO noted that Mr. Scelle had made a considerable concession by relaxing his determined defence of the high seas. For his part, however, he could not reconcile himself to the use of the word *entamer.*

46. The CHAIRMAN, speaking as a member of the Commission, observed that hitherto the recognized rule in international law had been that pursuit could only begin in the territorial sea. Personally, he had no knowledge of any dissenting opinion on that point. He therefore agreed that the text put forward by the Special Rapporteur was an innovation and that it was for the Commission to decide whether such a new rule should be created.

47. Sir Gerald FITZMAURICE observed that the distinction between the territorial sea and the contiguous zone went deeper than would appear from Mr. Scelle's remarks.

48. As he saw it, foreign vessels in the territorial sea were subject to the laws of the coastal State, whereas in the contiguous zone international law recognized that the coastal State had a right to enforce certain of its laws if it could, but also that foreign vessels had no actual obligation to obey. The position was, in some respects, analogous with that of the right of warships of belligerent States to enforce laws concerning contraband in respect of neutral vessels. If the doctrine he had expounded was correct, it was logical to allow hot pursuit against an infringement of the law of the coastal State committed within its territorial sea, but the situation was not the same in the contiguous zone, where it was legitimate for foreign vessels to avoid, if they could, the enforcement of laws by vessels of the coastal State.

49. Mr. SCELLE observed that the preceding speaker had expounded the classical concept of the absolute division between the territorial sea and the high sea, the sovereignty of coastal States in the former being sacrosanct. He (Mr. Scelle) conceived sovereignty in that context as the defence of rights. The contiguous zone was a necessary projection of the coastal State's jurisdiction over the sea, and he used that word advisedly because he believed in the indivisibility of the sea. However, that apart, his principal argument was that unless the right of pursuit applied also to the contiguous zone, it would be idle to create such a zone, and Sir Gerald Fitzmaurice's thesis left him unmoved.

50. The CHAIRMAN said that, in view of the opinion upheld by Sir Gerald Fitzmaurice, Mr. Amado and Mr. Sandström, with which he himself agreed, he would put to the vote a proposal to delete the third sentence from paragraph 1.

The proposal was rejected by 6 votes to 5, with 1 abstention.

51. Mr. ZOUREK explained that he had abstained from voting because he had moved that the decision be deferred until the Commission had finally disposed of the article on the contiguous zone contained in the draft on the territorial sea.

52. The CHAIRMAN observed that, as a result of the vote, the Commission had adopted the Special Rapporteur's text, in which he would suggest the substitution of the word "right" for the word "interest".

It was so agreed.

53. The CHAIRMAN said that paragraphs 2, 3 and 4 would be put to the vote subject to drafting changes to accommodate Mr. Sandström's observations concerning the advisability of introducing a reference to the contiguous zone in paragraph 3 and Sir Gerald Fitzmaurice's amendment to paragraph 4, which had been accepted by the Special Rapporteur.

Paragraphs 2, 3 and 4 were adopted unanimously, subject to the above reservation.

54. Mr. AMADO reserved his right to reconsider his views on those three paragraphs at the second reading.

55. Mr. GARCÍA AMADOR similarly reserved his opinion, but only in respect of the question of the contiguous zone.

Articles 30-32 [25-28]: Fisheries; and article 33: Sedentary fisheries [4]

56. The CHAIRMAN recalled that at its fifth session the Commission had adopted three draft articles on fisheries, which had been submitted to the General Assembly in the report on that session.[5] Those draft articles were now the responsibility of the General Assembly, so that the Commission had no reason to adopt a different set of rules. Articles 30, 31 and 32 of the Special Rapporteur's draft were identical with those in the report on the fifth session. Only for the most serious reasons—or if the General Assembly specifically requested it to do so—should the Commission reconsider the articles in question.

57. Mr. GARCÍA AMADOR recalled that, by resolution 900 (IX) adopted on 14 December 1954, the General Assembly had decided to convene an international technical conference in Rome on 18 April 1955 on the conservation of the living resources of the sea.

58. That conference, which had ended on 10 May 1955 —three days ago—was, as required by operative paragraph 1 of the enabling resolution, making "appropriate scientific and technical recommendations", which, in accordance with paragraph 6 of the resolution, were to be referred to the International Law Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report" which it was to prepare "pursuant to resolution 899 (IX) of 14 December 1954".

59. It was accordingly clear that the General Assembly intended that the report of the Rome Conference [6] should be addressed not to governments for comments, but rather to the International Law Commission, in order to enable the latter to re-examine in its light the three draft articles on the international regulation of fisheries adopted in 1953. His interpretation of the General Assembly's intention was confirmed by the fact that the Rome Conference had been convoked in pursuance of a suggestion made by the International Law Commission itself.[7]

60. The powers of the Commission in matters of form and procedure were very different from those it possessed on substantive issues. On questions of substance the Commission was completely free, but on questions of procedure it must abide by the instructions of the General Assembly.

61. He was not suggesting that the Commission must necessarily amend the three articles on fisheries; but he wished to emphasize that it was the Commission's right, indeed its duty, to re-examine those articles in the light of the report of the Rome Conference, which it should receive within a week.

62. Mr. FRANÇOIS (Special Rapporteur) explained that he had drafted articles 30 to 32 in terms similar to those of the 1953 articles on the assumption that the Commission would not re-open the question of fisheries, but would simply confirm the three articles. It was, however, clear from Mr. García Amador's remarks that those articles would have to be reconsidered in the light of such recommendations as might have been made by the Rome Conference. He therefore withdrew them for the time being.

63. Mr. LIANG (Secretary to the Commission) said that the Rome Conference had been called in order to study the technical aspects of fisheries conservation and to furnish technical information to the International Law Commission.

64. He recalled the conclusion reached in the Commission's report on its fifth session to the effect that the protection of fisheries was a highly technical matter. But the Commission had indicated that that objective could best be achieved by means of detailed conventions, preferably on a regional basis.[8] He had participated in the work of the Rome Conference for the first two weeks and it was his feeling that its recommendations would not be cast either in the shape of draft conventions or as a set of draft articles.

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[4] Articles 30 to 33 read as follows:

Article 30:

"A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall at the request of one of the interested parties be referred to the international authority referred to in article 32."

Article 31:

"In any area situated within 100 miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area."

Article 32:

"States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State."

Article 33:

"Subject to the existing rights of the nationals of other States, the sovereign rights of a coastal State over its continental shelf shall extend to sedentary fisheries."

[5] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 94, in *Yearbook of the International Law Commission, 1953*, vol. II.

[6] *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea* (United Nations publication, Sales No. 1955.II.B.2).

[7] Report of the I.L.C. (A/2456), *op. cit.*, para. 104.

[8] *Ibid.*

65. Mr. SALAMANCA agreed with Mr. García Amador and with the Secretary. He pointed out that the General Assembly resolution 900 (IX) had been preceded by resolution 899 (IX), adopted at the same plenary meeting.

66. Resolution 899 (IX) opened by recalling that, in resolution 798 (VIII) of 7 December 1953, the General Assembly, "having regard to the fact that the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters were closely linked together juridically as well as physically", had decided not to deal with any aspect of those matters "until all the problems involved had been studied by the International Law Commission and reported upon by it to the General Assembly". Following that reference to resolution 798 (VIII), the General Assembly had gone on to request the International Law Commission to "devote the necessary time to the study of the régime of the high seas, the régime of territorial waters and all related problems in order to complete its work on these topics and submit its final report in time for the General Assembly to consider them as a whole, in accordance with resolution 798 (VIII), at its eleventh session".

67. It was clearly incumbent upon the Commission to make a reappraisal of all the "related problems" thus referred to it by the General Assembly.

68. Such was the procedural position. But the factual situation which the International Law Commission had to face lent even greater strength to his argument. The Commission had taken up the "related problems" one by one; that fragmentary approach had, not unnaturally, yielded piecemeal solutions. The lack of uniform criteria had been one of the reasons why certain States had adopted unilateral measures concerning the continental shelf and fisheries—measures which they felt were justified by their own peculiar geographical situation and conservation problems. Those measures had been considered excessive by many other States.

69. The Commission had, in fact, created four maritime zones: the territorial sea, the contiguous zone, the waters superjacent to the continental shelf, and the high seas proper. It was imperative that some integrated system should be devised for dealing with the "related problems". Could the Commission present such a system to the States which had taken the unilateral measures he had mentioned, the latter might be induced to revise their attitude and to adopt the Commission's system for protecting their fishery rights as well as their interests in the continental shelf. Thus the Commission might reconcile them with those other States which objected to the unilateral measures they had been obliged to take in the absence of guidance from the Commission.

70. The CHAIRMAN agreed with Mr. García Amador's and Mr. Salamanca's reading of General Assembly resolutions 899 (IX) and 900 (IX). The Commission had been invited to take into consideration the conclusions reached by the Rome Conference, and should re-examine the articles on fisheries in their light.

71. Mr. ZOUREK pointed out that article 33 was a new provision dealing with sedentary fisheries, which had not appeared in the articles approved in 1953; it might therefore be useful to retain it.

72. Mr. FRANÇOIS (Special Rapporteur) said that article 33 was based on paragraph 71 of the Commission's report on its fifth session; but a separate provision of that kind was not absolutely necessary in the draft articles on the régime of the high seas.

73. Mr. KRYLOV said that a comment such as that contained in paragraph 71 of the Commission's report on its fifth session was not enough. A comment was binding only upon its author.

74. Mr. GARCIA AMADOR said that at the Rome Conference sedentary fisheries had been discussed from the point of conservation. Article 33 of Mr. François' article dealt with the question of sovereign rights over sedentary fisheries. Sovereign rights and conservation, however, were intimately connected in the matter of fisheries, and it was therefore highly desirable that the discussion of article 33 should, like that of the three preceding articles, be deferred until the Commission received the report of the Rome Conference.

Further discussion on articles 30 to 33 was deferred.

Article 34 [23]: Water pollution[9]

75. Mr. FRANÇOIS (Special Rapporteur) said that article 34, dealing with water pollution, resembled the provisions included in his report in respect of safety of shipping and the use of signals (articles 13 and 15). Those subjects were of a highly technical nature, and it was out of the question for the Commission to examine them in any detail; all that the Commission could do was to lay down general directives.

76. He recalled that at the 285th meeting he had agreed to use the expression "the majority of vessels engaged in international seafaring" in both article 13 and article 15, article 13 as originally drafted having read: "the majority of maritime States".[10] He proposed to make a similar amendment to article 34.

Article 34 was adopted in principle by a unanimous vote.

77. Mr. GARCIA AMADOR pointed out that the adoption by the Commission of article 34 in principle could only be a provisional decision. It was clear from the comment to that article that water pollution was detrimental to fish rather than to navigation. It therefore followed that the decisions of the Rome Conference would affect the final drafting of article 34.

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[9] Article 34 read as follows:

"All States shall draw up regulations, consistent with those agreed upon by the majority of maritime States, to prevent water pollution by fuel oil discharged from ships."

[10] 285th meeting, para. 19.

Proposed article 35 : Arbitration

78. Mr. SCELLE recalled that, during the discussion on certain of the draft articles on the régime of the high seas, he had made proposals relating to compulsory arbitration, but had withdrawn them on the understanding that a single provision on arbitration should be included at the end of the draft articles.

79. He therefore proposed the following additional article :

> "Disregard or violation of the positive or negative obligations imposed on governments or private persons by the provisions of the present rules on the use of the high seas constitutes an unlawful act for which States may be held responsible. States agree to submit any disputes arising therefrom to an arbitral tribunal constituted in accordance with the procedure prescribed in the Convention of 1907 on the Permanent Court of Arbitration, or with that prescribed in the rules on arbitral procedure drafted by the International Law Commission."

80. The CHAIRMAN said that, although the English, French, Russian and Spanish texts of the proposed new article would only be available at the next meeting, it might be useful if members could indicate their views on the general principle involved.

81. Mr. SCELLE said that his proposal for compulsory arbitration was essential to the draft articles, in that it provided for sanctions. Some of the provisions in the draft articles were, perhaps, not sufficiently clear, and it was necessary to emphasize that they constituted binding rules of international law : for example, the rule that no State was entitled to use a signalling system differing from that adopted by the majority of vessels engaged in international seafaring.

82. There were many cases in which the Commission had attached a compulsory arbitration clause to its drafts, and he felt it was equally necessary to do so in the present instance.

83. Mr. SANDSTRÖM recalled that he had also proposed a compulsory arbitration clause in the matter of collisions on the high seas.

84. Mr. GARCÍA AMADOR said that the compulsory arbitration clause was embodied in most treaties, and had now become virtually a standard clause ; it could therefore be considered as part of international practice. He accordingly strongly supported Mr. Scelle's proposal.

85. However, it was necessary first to agree on the substantive provisions of the law before laying down the procedure for enforcing it. He would quote as an example the case of piracy. In Mr. Scelle's draft, provision was made for the liability of States in respect of illicit acts on the high seas ; no provision was made for the liability of individuals. But piracy, which the Commission would be examining at its next meeting, was characterized by the fact that it was a crime committed by individuals in defiance of the authority of all States, including their own. It seemed, therefore, that the substantive provisions relating to, *inter alia,* piracy should be discussed before the Commission proceeded to draft in detail a provision for compulsory arbitration such as that put forward by Mr. Scelle.

86. Mr. ZOUREK said that Mr. Scelle's proposed article 35 came, perhaps, somewhat prematurely. The provision for compulsory arbitration formed part of the usual final clauses which were attached by the Commission to its drafts when the latter had taken their final shape. At present, the Commission was engaged on preparing a first draft, which would be submitted to governments for their comments. When those comments were forthcoming, the Commission would, in their light, prepare a final draft : then would be the appropriate moment to discuss compulsory arbitration.

87. Mr. LIANG (Secretary to the Commission) recalled that, at its fifth session in 1953, the Commission had discussed at length the matter of a general arbitration clause in connexion with the articles adopted by it at that session dealing with the continental shelf ; paragraphs 86-90 of the Commission's report for that session (A/2456, *op. cit.*) contained detailed comments thereon.

88. The relevant draft article adopted in 1953 was the final article—article 8—which read :

> "Any dispute which may arise between States concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties." (A/2456, *op. cit.,* para. 62.)

89. The Commission now seemed to be faced by a choice between adopting Mr. Scelle's proposed article 35, or using article 8 of the draft articles on the continental shelf. The main difference between the two texts was that article 8 of the 1953 draft was of a general character, whereas in his proposed article 35, Mr. Scelle made specific references to the 1907 Hague Convention for the Pacific Settlement of Disputes,[11] following which the Permanent Court of Arbitration had been established, as well as to the Commission's draft on arbitral procedure adopted at its fifth session (A/2456, *op cit.,* para. 57). The two texts could not very well be placed on the same footing. The 1907 Convention was a multilateral treaty, whereas the Commission's rules on arbitral procedure were merely a draft.[12]

The meeting rose at 1 p.m.

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[11] J. B. Scott, *The Reports of the Hague Conferences of 1899 and 1907* (Oxford, 1917), p. 292.

[12] Discussion of proposed article 35 was resumed at the 295th meeting.

292nd MEETING

Monday, 16 May 1955, at 4 p.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, Faris Bey el-KHOURI, 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.

Filling of casual vacancies in the Commission (item 1 of the agenda)

(*resumed from the 288th meeting*)

1. After a short discussion, *it was decided by 9 votes to 1, with 2 abstentions, to hold a private meeting on the question of the filling of the casual vacancy caused by Mr. Córdova's resignation.*

2. On the resumption, the CHAIRMAN announced that Mr. Luis Padilla Nervo had been elected to fill the casual vacancy caused by Mr. Córdova's resignation.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79) (*resumed from the 291st meeting*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*resumed from the 291st meeting*)

Articles 23 [14] (resumed from the 291th meeting) and *24-28 [16-20]: Policing of the high seas*[1]

3. The CHAIRMAN announced that there were a number of proposals before the Commission concerning articles 23 to 28.

4. The first proposal was that of the Special Rapporteur: it was a simplified version of the draft in the Special Rapporteur's sixth report (A/CN.4/79), and read as follows:

"*Article 23*

"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.

"*Article 24*

"A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing acts described in article 23."

Article 25

No change.

"*Article 26*

"Every State may seize by its public vessels, in a place not within the territorial jurisdiction of another State, ships committing acts of piracy, and things or persons on board. The State may exercise jurisdiction over them."

5. There was no change to article 27, and article 28 had been dropped.

6. The second proposal was by Mr. Sandström, and con-

[1] Articles 24 to 28 read as follows:

Article 24:

"A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of article 23, paragraph 1, or to the purpose of committing any similar act within the territory of a State by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the State to which the ship belongs."

Article 25:

"A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the State from which it was derived."

Article 26:

"In a place not within the territorial jurisdiction of another State, a State may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board."

Article 27:

"A ship seized on suspicion of piracy outside the territorial jurisdiction of the State making the seizure is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the State making the seizure shall be liable to the State to which the ship belongs for any damage caused by the seizure."

Article 28:

"A seizure because of piracy may be made only on behalf of a State, and only by a person who has been authorized to act on its behalf."