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Summary record of the 293rd meeting

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

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35. It was only after an act of piracy had been committed that the vessel became a pirate, and in that respect Mr. Sandström's wording in sub-paragraph (*b*) of article 24 was not satisfactory, since the purpose of seizure of a ship by crew or passengers could not be known until their subsequent action provided evidence.

36. In conclusion, he expressed general agreement with the Special Rapporteur, subject to one point. In view of the last decision taken by the Commission it would be preferable to make it clear that piracy was not confined to acts committed on the ship itself, but that it essentially consisted in acts committed against another ship or persons not on the pirate vessel itself.

37. Mr. FRANÇOIS (Special Rapporteur), expressing the view that a pirate could only be seized by a warship, observed that Mr. Sandström's text extended that power to other State vessels.

38. Mr. SANDSTRÖM explained that he had had in mind the definition of a warship contained in article 12 which had already been approved.

39. Mr. ZOUREK asked whether the seizure could be made by a police boat.

40. Mr. FRANÇOIS (Special Rapporteur) replied that it would be preferable for practical purposes to limit the right of seizure to warships. Any extension of the principle he advocated, which was supported by most authorities, might encourage abuse.

The Commission upheld by 9 votes to 1, with 2 abstentions the Special Rapporteur's view that ships which had committed acts of piracy or were suspected of piracy, could be seized only by a warship.

41. Mr. AMADO observed that in his new text of article 26 the Special Rapporteur had used the expression "public vessels".

42. Mr. FRANÇOIS (Special Rapporteur) stated that there had been a mistake; those words should be replaced by the word "warships".

43. Mr. SCELLE, explaining his vote, said that in the belief that acts of piracy could also take place in the territorial sea or on land, he could not accept the thesis that warships alone could seize vessels guilty of such acts. If police vessels also were empowered to seize pirate ships, the possibility of error might well be reduced.

The meeting rose at 6 p.m.

293rd MEETING

Tuesday, 17 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, 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.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.56) (*continued*)

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

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

1. The CHAIRMAN asked the Special Rapporteur to indicate what further issues beyond those already disposed of at the previous meeting had yet to be considered by the Commission in respect of article 23.

2. Mr. FRANÇOIS (Special Rapporteur) replied that the Commission had to decide, first, whether or not an attack by one aircraft against another should, in certain circumstances, come within the definition of piracy; secondly, whether an attack by an aircraft on a ship came within the definition; and thirdly, whether military aircraft should have the same powers as warships to apprehend vessels suspected of piracy.

3. Though Mr. Edmonds had included in his definition attacks by one aircraft on another, he (the Special Rapporteur) did not think that was necessary in a draft dealing specifically with the high seas.

4. On the other hand, he would be prepared to re-introduce into the definition attacks on vessels on the high

seas delivered from aircraft, as proposed by Mr. Zourek in his amendment. He had omitted that provision from his revised text in the interests of simplification, though, as the Commission would remember, he had originally followed the Harvard draft[1] in order to take modern technological developments into account.

5. With regard to the third issue, he considered that military aircraft should be permitted to take action against pirate vessels in the same way as warships. It was feasible for aircraft sighting a vessel *in flagrante delicto* to launch an attack with bombs, or in the case of a sea-plane or flying-boat to send a party to verify the ship's papers.

6. Mr. EDMONDS explained that he had submitted his amendment after the Special Rapporteur had announced his intention of deleting from his draft article the reference to attacks in or from the air. Perhaps his own text did not clearly bring out that his intention had been to cover attacks by aircraft on ships.

7. The second purpose of amendment had been to re-introduce the proviso concerning the *bona fide* assertion of a claim. However, the Special Rapporteur's revised text would be acceptable to him.

8. Mr. HSU welcomed Mr. Edmonds' explanation, as he had doubted the necessity to speak about superjacent air. An aircraft operating from a pirate vessel would, of course, also be a pirate, and an aircraft making attacks from the land would involve the responsibility of the territorial State. If that State disclaimed responsibility for it, the case would be similar to those involving ships dealt with at the Nyon Conference of 1937. Hence, unless the Commission decided to expand the traditional concept of piracy, he did not think attacks by aircraft need be specially noted.

9. Mr. GARCÍA AMADOR agreed with the Special Rapporteur that, for purposes of the present draft, attacks by aircraft on other aircraft need not be taken into account, but that an attack by an aircraft on a vessel on the high seas must be regarded as an act of piracy since it violated international penal law. Mr. Edmonds' amendment would, therefore, be acceptable if applicable solely to the second case.

10. Mr. ZOUREK expressed doubts about such a restrictive conception of piracy, particularly as it was more easy for persons bent on committing acts of piracy to obtain airdraft than ships. The Commission should take technical progress into account, and, in particular, the consequent possibility of flying-boats committing acts of piracy. Though inclined to support the view that an attack by one aircraft on another in the air could not be an act of piracy, he urged the Commission to consider the numerous other acts committed by an aircraft not in pursuance of official instruction that would constitute genuine acts of piracy. Surely such acts were precisely the same as those committed by ships within the definition under discussion. Sub-paragraph (*e*) in his amendment had been prompted by his conviction that technical progress must not be ignored.

11. In reply to a question by Mr. KRYLOV, Mr. FRANÇOIS (Special Rapporteur) stated that he could not accept Mr. Zourek's view when applied to an attack by one aircraft on another.

12. The CHAIRMAN put to the vote the question of whether an attack by one aircraft on another should fall within the scope of the definition of piracy.

The question was decided in the negative by 8 votes to 3, with 1 abstention.

13. The CHAIRMAN put to the vote the question of whether an attack by an aircraft against a vessel in the high seas should fall within the scope of the definition of piracy.

The question was decided in the affirmative.

14. The CHAIRMAN put to the vote the question of whether provision should be made in the draft allowing military aircraft to take steps against ships committing acts of piracy.

The question was decided in the affirmative.

15. Mr. GARCÍA AMADOR observed that once a definition of piracy had been extended to include attacks by aircraft on ships, there could be no objection to conferring upon military aircraft the same powers as those enjoyed by warships in the suppression of piracy.

16. Mr. FRANÇOIS (Special Rapporteur) said that finally the Commission had to decide whether to restrict piracy to acts committed for private ends, thus excluding acts committed for political motives or by warships.

17. Mr. KRYLOV felt bound to repeat the argument he had adduced at the 290th meeting[2] and, in that connexion, referred to the preamble to the Nyon Arrangement of 1937, where the attacks made by vessels or aircraft in the Mediterranean Sea were described as acts of piracy and contrary to the elementary principles of humanity. Perhaps politicians had short memories, but as a body of jurists the Commission should bear in mind the Nyon Arrangement, which Sir Gerald Fitzmaurice had mistakenly implied to be insignificant. Even if the Arrangement was no longer valid—indeed it might already have been formally denounced by some of its signatories—the Commission must recognize that it was not purely of an ephemeral nature, but contained the seeds of a new principle to which due weight should be given. Modern developments were more germane to the discussion than historical questions associated with the activities of the Barbary corsairs.

8. In conclusion, he stated that the Special Rapporteur's revised text would be acceptable to him provided the word "private", before the word "vessel", were deleted from the second line.

[1] Harvard Law School, *Research in International Law* (Cambridge, 1932), pp. 790–816.

[2] 290th meeting, paras. 64–65.

19. Mr. ZOUREK said that there could be no doubt that formerly piracy had been understood in the sense attributed to it by the Special Rapporteur; but it was equally certain that the concept in modern positive international law had now been extended in the manner indicated by Mr. Krylov. The Special Rapporteur had already admitted, and the Commission had accepted, the thesis that an insurgent vessel committing acts of piracy against a third State was a pirate. Yet, if the proviso "committed for private ends" were retained, international crimes of violence and depredation would be recognized as lawful if it could be shown that they had been committed at the instigation, or on the express instructions, of a public authority. Such a step would constitute recognition of the principle that certain acts were justified because they had been committed on superior orders—a principle which had been rejected outright by the Nürnberg Tribunal, as well as by the Commission in its formulation of the Nürnberg principles and subsequently in its draft Code of Offences against the Peace and Security of Mankind. He would be unable, therefore, to support the present restriction which, in the circumstances, seemed to him inexplicable. Surely not a single member of the Commission would contend that the vessels and aircraft whose actions had provoked the Nyon Conference had been pursuing "private ends". He urged the Commission to abandon the Special Rapporteur's original draft and to codify twentieth-century practice rather than obsolete principles.

20. Sir Gerald FITZMAURICE said that, notwithstanding Mr. Krylov's arguments, he adhered to his original view that the Nyon Arrangement was a special one, although many acts similar to those it envisaged had occurred since. As he had stated at the 290th meeting,[3] the real basis of the agreement reached at Nyon was the assumption that the acts had been unauthorized because no government would admit responsibility; otherwise the normal representations would have been made. Acts of a piratical character committed by warships on superior orders were more than acts of piracy, and might constitute aggression or an act of war engaging the responsibility of the flag State.

21. Mr. HSU had little to add to Sir Gerald's remarks. In his view, it would be absurd to extend the concept of piracy to cover acts of aggression authorized by a government. No government of good faith would disclaim responsibility for such acts committed by its own vessels, and no provision to meet such a contingency was required in the present draft articles.

22. Mr. FRANÇOIS (Special Rapporteur) observed that Sir Gerald Fitzmaurice had already brought out the distinctive features of the Nyon Arrangement. It would be well to remember that that instrument had been signed by only nine States, and that the innovation they had introduced had been severely criticized by international lawyers. In the circumstances, it was impossible to hold that the Commission should be in any way bound by that agreement.

23. Replying to Mr. Zourek, he rejected the suggestion that he was seeking to ensure that certain acts committed by warships should be regarded as lawful; he urged the Commission to reflect most carefully on the consequence of allowing seizure of a warship by a State on suspicion that it had committed acts of piracy. Such a step carried far more serious implications than in the case of seizure of merchantmen.

24. Turning to sub-paragraph (*f*) of Mr. Zourek's amendments, he pointed out that the whole question of civil war aroused complex issues such as the recognition of revolutionaries as belligerents and recognition of governments, which could not be disposed of in the way suggested by Mr. Zourek, who wished to assimilate to acts of piracy all acts against a State not party to the conflict. He was categorically opposed to such a provision, which would increase rather than restrain disorder on the high seas.

25. Mr. AMADO recalled that he had previously referred to the Nyon Arrangement[4] in order to illustrate the way in which the classical concept of piracy had been extended by analogy, but that he had offered no opinion on that development whatsoever. In his view, the first characteristic of an act of piracy was that it had to be committed by individuals, either members of the crew or passengers, on a ship. Sir Gerald Fitzmaurice had at the previous meeting indicated the circumstances in which mutiny could lead to piracy. He would also suggest that the Commission give some thought to the meaning of the words "private vessel", since in almost all countries merchant vessels were, at least to some extent, subsidized by the State.

26. Mr. LIANG (Secretary to the Commission), referring to Mr. Zourek's suggestion that the Commission had already taken some kind of a decision which would bring acts committed by insurgents within the definition of piracy, said that he had no recollection of such a decision and would have to examine the summary records.

27. With regard to whether, in the case of a civil war, it was possible to consider acts by one party as akin to piracy, he pointed out that in the jurisprudence and doctrine of the United States of America at least, a distinction was made between belligerency and insurgency. The latter problem had not been studied to the same extent in European doctrine, and its development as an independent concept was largely the result of decisions reached by the United States Supreme Court and some others.

28. His own study of the work of Professor George Grafton Wilson[5] on the subject of insurgency had led him to conclude that once a state of insurrection had

[3] *Ibid.*, para. 80.

[4] *Ibid.*, para. 62.

[5] "Insurgency and International Maritime Law", *American Journal of International Law*, vol. I (1907), pp. 46–60.

been recognized to exist, the vessels of the insurgents could not be condemned for acts of piracy because it was assumed that they were acting under the orders of a public authority. He agreed with the Special Rapporteur that the problem of piracy in connexion with civil war deserved independent study, and in his opinion Mr. Zourek's amendment could be taken up only in connexion with the draft code of offences against the peace and security of mankind. As indicated by Sir Gerald Fitzmaurice, the present theory was undoubtedly that only private ships were capable of acts of piracy.

29. Mr. KRYLOV, referring to the Nyon Arrangement, pointed out that history often repeated itself, with the result that something which had begun as a special case became general. He had not mentioned the question of the violation of freedom of navigation in the China Seas, because he had carefully read the discussions on the subject in the *Ad hoc* Political Committee at the ninth session of the General Assembly, and had nothing further to add to the concrete facts already adduced on that occasion by the Polish and Soviet Union representatives. In the meantime, the legal situation was as he had described it, and he would therefore insist that the Commission vote on his proposal to delete the word "private" from before the word "vessel". The question of whether the expression "for private ends" should be retained might be referred to the Drafting Committee.

30. Mr. GARCÍA AMADOR pointed out that it was not always easy for even the most distinguished experts to establish the legal distinction between various kinds of acts. In the present instance, he believed that intention could be the only guide, and that, if acts of aggression, which were an entirely separate issue, were to be excluded, piracy must therefore be defined as an act committed for private ends.

31. He agreed with the Special Rapporteur and the Secretary that sub-paragraph (*f*) of Mr. Zourek's amendment would only complicate the issue. It was interesting to note that at a conference held the previous year at Caracas it had been found impossible to agree on provisions concerning piracy for insertion in a protocol to the Convention on duties and rights of States in the event of civil strife, signed at Havana in 1928 by twenty-one States. It was not for the Commission at the present stage to enter into the extremely complicated questions arising out of a civil war, and it should therefore not go beyond the traditional concept of piracy.

32. Mr. ZOUREK pointed out that an act of aggression must involve at least two States, and that there were many different possibilities of a *de facto* authority obtaining possession of a vessel or aircraft in order to commit acts of piracy which could in no sense be regarded as acts or aggression. Despite the Secretary's affirmation, he could cite many authorities who held that the acts of an insurgent against a third party were acts or piracy. He was unable to see how the Commission could overlook, for purely theoretical reasons, the existence of patent cases of piracy committed not for private ends but for political reasons.

33. Mr. HSU observed that a government, whether recognized or not by other States, continued to exist. He feared that if State A did not recognize State B, State B would retaliate by not recognizing State A and if each treated the vessels of the other as pirates the peace of the world would be gravely endangered.

34. The CHAIRMAN put to the vote Mr. Krylov's amendment for the deletion of the word "private" before the word "vessel" in the Special Rapporteur's revised text.

Mr. Krylov's amendment was rejected by 10 votes to 2, with 1 abstention.

35. The CHAIRMAN then put to the vote the retention of the words "for private ends" in the Special Rapporteur's revised text.

It was decided, by 11 votes to 2, that those words should be retained.

36. Mr. AMADO, explaining his vote, said that, so far as the French text was concerned, he preferred Mr. Sandström's wording *pour des buts personnels* to the Special Rapporteur's phrase *a des fins d'ordre personnel.*

37. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee would take Mr. Amado's observation into account.

38. He then suggested that, as the remaining articles on piracy were not controversial, they might be referred forthwith to the drafting committee for consideration in the light of the Commission's discussions and decisions.

It was so agreed.

Article 2 [2]*: Freedom of the high seas*
(resumed from the 284th meeting)

39. The CHAIRMAN invited the Commission to resume its consideration of article 2.

40. Mr. FRANÇOIS (Special Rapporteur) submitted the following revised text to replace articles 2 to 5 in the original draft:

> "This rule does not affect the provisions concerning policing of the high seas, contiguous zones and the continental shelf, forming part of the present rules of maritime law."

41. Mr. SANDSTRÖM considered that it was necessary to state in positive terms the basic principle of the freedom of the high seas. He accordingly proposed that the new article 2 be re-drafted as follows:

> "The high seas shall be open to all nations. No State may subject them to its jurisdiction, or claim for itself or its nationals the right to make any use of them which impedes free navigation or fishing. This rule does not affect the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf, forming part of the present maritime law regulations."

42. The Commission would note that the text contained nothing new.

43. Mr. ZOUREK said that, in view of the paramount importance and fundamental character of the principle of freedom of the high seas, which was universally accepted in practice and theory, he considered an introductory article essential, and proposed that it read:

"The high seas being open for use by all nations, all States and their nationals shall enjoy on an equal footing

"(*a*) Freedom to sail without let or hindrance on the high seas under the exclusive control, save as otherwise agreed, of the State where the vessel is registered;

"(*b*) Freedom to fly over the high seas for peaceful purposes;

"(*c*) Freedom to fish and hunt therein;

"(*d*) Freedom to lay submarine cables and pipe lines therein."

44. Mr. FRANÇOIS (Special Rapporteur) observed that the three texts did not differ greatly. However, he considered that sub-paragraph (*b*) of Mr. Zourek's text might be eliminated from a draft dealing with the high seas, and doubted whether the question of submarine cables was of sufficient importance to warrant inclusion in a general article of that kind. From that point of view, he preferred Mr. Sandström's version, which mentioned only fishing. He also favoured the reference in the latter text to the fact that no State might subject the high seas to its jurisdiction, and felt that mention of the contiguous zones should help to forestall misunderstanding. As he considered Mr. Sandström's text generally acceptable, he wondered whether Mr. Zourek would be prepared to withdraw his own.

45. Mr. SCELLE expressed a preference for Mr. Zourek's text, although it was not fully satisfactory, since it was incomplete and open to misinterpretation in that it failed to stipulate that the seabed and superjacent air were subject to the same régime as the high seas.

46. On the other hand, he agreed with Mr. Zourek's statement of the positive law on the freedom of navigation, which was consistent both with the definition adopted in 1880 by the Institute of International Law and with the practice followed for centuries.

47. He found the third sentence in Mr. Sandström's text defective, because as at present framed it seemed to reverse the relative importance of the general principle and of the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf.

48. The CHAIRMAN, speaking as a member of the Commission, observed that the right to lay submarine cables was expressly recognized in article 16.

49. Mr. ZOUREK noted that the Chairman had raised a drafting point which might be considered by the drafting committee.

50. He could not agree with the Special Rapporteur that sub-paragraph (*b*) should be deleted from his text because he considered that rules for the superjacent air must be included in a draft on the high seas, as had already been done in the case of the territorial sea.

51. Though he would be prepared to borrow from Mr. Sandström's text some such wording as: "No State may subject them to its jurisdiction", which had found favour with the Special Rapporteur, he could not withdraw his own text because Mr. Sandström had failed to make a complete and precise statement of the principle and because, as Mr. Scelle had pointed out, he had in the third sentence subordinated the principle of the freedom of the high seas to the provisions concerning policing.

52. Mr. HSU agreed with Mr. Zourek and Mr. Scelle about the necessity of specifying in article 2 the freedom to fly over the high seas for peaceful purposes. It could be said that ships made use, albeit to a very limited extent, of the air bove the high seas; it was therefore legitimate to ask at how many inches above the surface of the water the high seas came to an end and the superjacent air commenced.

53. Sir Gerald FITZMAURICE agreed with the principle of the freedom of the high seas for all legitimate purposes, as formulated by Mr. Zourek. As a matter of drafting, he preferred the wording of the first two sentences of Mr. Sandström's text.

54. With regard to the final sentence of Mr. Sandström's text—which the Special Rapporteur had endorsed in his proposed second paragraph to article 2—he felt serious doubts. In so far as the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf entailed derogations from the absolute freedom of the high seas, the legitimacy of those derogations would be apparent from the Commission's articles on those topics.

55. Mr. SALAMANCA drew attention to the words "save as otherwise agreed" in paragraph (*a*) of Mr. Zourek's draft, which suggested that only international agreements could justify action on the high seas on the part of a State other than the flag State. The Commission was considering not only the régime of the high seas, but also related questions, such as the contiguous zones and the rights of the coastal State over the continental shelf and superjacent waters.

56. It was necessary for the Commission to take a comprehensive view of all those problems and to devise integrated solutions to them. It was the lack of a coherent system governing the high seas and the closely related problems he had mentioned which had led certain States to adopt unilateral measures which some other States had considered excessive. It was the duty of the Commission to take a broad view of the real situation, and to re-appraise all the problems involved.

57. He recalled the words of Gidel in his lecture entiled "Law and the continental shelf" (*Le Plateau continental devant le droit*), delivered at Valladolid in

1951 under the auspices of the *Instituto Francisco de Vitoria*.[6] Professor Gidel had stated that the concept of the freedom of the high seas had now lost the absolute and tyrannical character which it had derived from its origin as a reaction against claims to sovereignty over the high seas.

58. Mr. AMADO said that in article 2 the whole emphasis must be laid on the principle of the freedom of the high seas. Any derogations from that important general principle must be presented as exceptions to the general rule. He could not therefore approve of the last sentence of Mr. Sandström's text—or of the Special Rapporteur's similar proposal—namely: "This rule does not affect the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf..." That wording suggested that the derogations were the rule rather than the exception.

59. If the Commission felt that a reference to the policing of the high seas, the contiguous zones and the continental shelf was necessary, it could only be worded as follows:

> "The provisions concerning the policing of the high seas, the contiguous zones and the continental shelf, forming part of the present draft articles, do not affect the principle of the freedom of the high seas."

60. The CHAIRMAN said that at that stage of the discussion he would tentatively suggest that Mr. Zourek's and Mr. Sandström's drafts might be combined in the following way: Article 2 would begin with the words "The high seas shall be open to all nations. No State may subject them to its jurisdiction". That formulation would then be followed by the more detailed exposition of the four freedoms in paragraphs (*a*) to (*d*) of Mr. Zourek's proposal.

61. Finally, the Commission would have to decide whether it was necessary to include a final paragraph referring to the policing of the high seas, the contiguous zones and the continental shelf.

62. Mr. SANDSTRÖM said that he would not insist on his own text, and was prepared to agree to the Chairman's suggestion.

63. Mr. FRANÇOIS (Special Rapporteur) agreed to include in article 2 a reference to the freedom to fly over the high seas for peaceful purposes.

64. With regard to the reference to the related questions, he agreed with Mr. Salamanca that an integrated approach was necessary. The Commission was presenting several drafts; on the high seas, on the continental shelf, on fisheries, and on the contiguous zones. It was necessary to make it clear that those several drafts constituted one single system; otherwise serious misconceptions might arise. Should the Commission, at its present session, adopt an article expressing unqualified recognition of the principle of the freedom of the high seas, that decision might erreoneously be construed as implying some attenuation of the decisions taken at the fifth session (A/2456, paragraphs 62, 94 and 105) in the adoption of the draft articles on the continental shelf, on fisheries and on the contiguous zones which derogated from the principle of freedom of the high seas.

65. Mr. SCELLE said that the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf did not constitute exceptions to the principle of the freedom of the high seas. They constituted limitations of or restrictions on the absolute freedom of the high seas. He agreed with Mr. Amado that the general principle must first be laid down, and then the limitations set forth in a subordinate clause.

66. The CHAIRMAN, at the request of the Special Rapporteur, asked the Commission to vote on the principle of including in article 2 a reference to the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf.

67. Sir Gerald FITZMAURICE, intervening on a point of order, said that if a vote were taken on the last sentence of Mr. Sandström's (and the Special Rapporteur's) draft, he would have to vote against it; but if the sentence were amended along the lines suggested by Mr. Amado and Mr. Scelle, he would be able to support its inclusion in article 2.

68. Mr. FRANÇOIS (Special Rapporteur) agreed to the amendment suggested by Mr. Amado and Mr. Scelle.

Article 2 was unanimously adopted subject to re-drafting as proposed by the Chairman, and to re-casting of the final sentence.

Article 8 [4]; Merchant ships on the high seas
(resumed from the 284th meeting)

69. Mr. FRANÇOIS (Special Rapporteur) accepted Mr. Zourek's draft for article 8 (A/CN.4/L.56).[7]

70. Mr. SANDSTRÖM pointed out that in the discussion[8] on article 7, the Commission had amended the text so as not to qualify the jurisdiction of the flag State as exclusive. A similar amendment would be called for in the case of article 8.

Article 8 was approved in principle.

Article 9 [6]: Merchant ships on the high seas
(resumed from the 284th meeting)

71. Mr. SANDSTRÖM proposed that article 9 be replaced by the following text:

"A ship cannot be validly registered in more

[6] *Revista española de derecho internacional* (1951), IV, 1, pp. 187 *et seq.*

[7] Article 8 as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

"Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in the present articles, they shall be subject to its exclusive jurisdiction on the high seas."

[8] 284th meeting, para. 35.

than one State. A new registration shall not be valid until the previous registration is extinguished."

72. Mr. Zourek's proposed article 9 (A/CN.4/L.56)[9] appeared to suggest that it was possible for a ship's nationality to be changed at will. If that were so, the rule laid down in article 7 regarding the jurisdiction of the flag State would become meaningless.

73. Mr. ZOUREK said that Mr. Sandström's objection was met by his proposed article 10, in which it was laid down that "each State is entitled to fix the conditions to which registration and transfer of registration are subject".

74. The first two sentences of his proposed article 9 were inspired by international conventions on the registration of aircraft; the final sentence had been added to prevent a ship having two nationalities or flags.

75. The CHAIRMAN pointed out that the difference between Mr. Zourek's and Mr. Sandström's texts was not a matter of mere drafting. According to Mr. Zourek's draft, a ship flying, say, the British flag, would not require any authority from the British authorities before being re-registered in another country. The new registration would automatically cancel the old one.

76. Mr. ZOUREK explained that his purpose had been to prevent dual nationality of ships. His proposed article 10 enjoined respect for the legislation of both States concerned in the transfer of registration.

77. The CHAIRMAN pointed out that, if that were the construction placed by Mr. Zourek on his proposal, his text would have to be re-drafted.

78. Mr. AMADO pointed out that the term "transfer" was misleading.

79. Sir Gerald FITZMAURICE agreed with Mr. Amado. The case which it was intended to cover was apparently that of a ship taking a new registration. Existing international law made it possible in such a case for that ship to have a double registration. If Mr. Zourek intended the Commission to impose a definite rule that the second registration cancelled the first, that would be a case of *lex ferenda.* There would be great practical difficulties in the way of such an attempt.

80. Mr. Zourek's wording for article 9 seemed to suggest that a ship would be able to evade all its obligations under its old registration by taking out a new one. He hardly thought that such was Mr. Zourek's intention.

81. Mr. Sandström's text, on the other hand, was rather too drastic in the opposite sense. It would enable the authorities of a State to maintain a stranglehold on the ships flying its flag, since they would be able to prevent valid registration elsewhere.

82. Perhaps the Commission could find a *via media* between those two extreme courses.

83. Mr. SANDSTRÖM said that in drafting his proposal he had had in mind the case of the sale of a ship.

84. Mr. AMADO objected to the words in Mr. Zourek's draft: "registration may, however, be transferred from one State to another". A ship was private property, and did not belong to a State, nor was it transferable from one State to another. It could, however, be transferred as property from one person to another by way of sale or inheritance, and such change of ownership might affect its flag; in other words, the ship could come under the protection of a different State as the result of a transfer of property.

85. The CHAIRMAN said that the Commission was concerned with the codification of international law relating to the regime of the high seas, namely, the rights and duties of States in that connexion. The problem of the transfer of ownership of a vessel, including its effects on the flag of that ship, was a matter of maritime law rather than international law.

86. Mr. AMADO said that the first sentence of Mr. Sandström's text, namely, "a ship cannot be validly registered in more than one State", was sufficient to formulate the general principle of international law on the subject.

87. Mr. ZOUREK said there appeared to be divergent interpretations of what was meant by the nationality of a ship; whether the term referred to the ship's flag, to its right to a particular flag, or to the nationality of those owning or operating it. He agreed with Mr. Sandström that, for the purposes of the development of international law, it was sufficient to formulate the principle embodied in the first sentence of his own proposal, which was identical with Mr. Sandström's. It was not necessary to add anything else.

88. Mr. KRYLOV agreed that the first sentence was sufficient for article 9.

89. Mr. Zourek's proposed article 10 was a statement of fact which, though unobjectionable, would not solve the problem of dual nationality.

90. Finally, he proposed that Mr. Zourek's article 10 *bis* should be set aside as dealing with too special a case.

91. Mr. LIANG (Secretary to the Commission) said that, in its present state, international law allowed any State to decide how it would attribute its nationality to a ship and authorize it to use the flag of that State.

92. The Commission had two courses open to it. It could adopt a course of *lex ferenda* and lay down a new principle according to which no ship could validly be registered in more than one State. Alternatively, it could affirm the *lex lata,* and regulate the effects of dual nationality as had been done in article 9 of the draft

[9] Article 9 as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

"A ship cannot be validly registered in more than one State. Its registration may, however, be transferred from one State to another. Transfer of a registration automatically cancels the previous registration."

articles in the Special Rapporteur's sixth report (A/CN.4/79).

93. Strictly speaking, article 10 of the original draft (A/CN.4/79) was not concerned with the problem of the transfer of registration, but with the conditions under which a ship might acquire the nationality of a State or the right to fly its flag.

94. Mr. SANDSTRÖM said that the mere enunciation of the principle that a ship could not be validly registered in more than one State was not sufficient. If the Commission were to stop there, every State would be free to legislate according to its own lights, in order to prevent dual nationality; that would lead to chaos.

95. The Commission should either abandon the whole question of dual nationality or else lay down in what way such dual nationality could be avoided. For his part he had no preference for any particular method of preventing dual nationality.

96. Mr. SCELLE agreed with Mr. Sandström that it did not serve any useful purpose to lay down a principle unless its application was also provided for. If the Commission adopted article 10 of the Special Rapporteur's draft, it would be laying down a uniform international rule in the matter, a rule which would supersede municipal law; the conditions laid down by article 10 would apply to all States, which would no longer be free to legislate on the question.

97. The CHAIRMAN said that the Commission was not concerned with the unification of the rules governing the nationality of ships, but only with international law relating to the regime of the high seas.

98. Sir Gerald FITZMAURICE endorsed Mr. Liang's remarks on the present state of international law and the two courses open to the Commission.

99. The status of vessels was relevant to the regime of the high seas, but it was important in other connexions as well.

100. In view of the fact that the existing law of nations admitted the possibility of dual nationality for a ship, the best course would be for the Commission simply to state the consequences of that fact, rather than to endeavour *de lege ferenda* to eliminate the consequences of dual nationality.

101. Mr. FRANÇOIS (Special Rapporteur) recalled that his original draft article 9 had specified that a ship sailing under the flags of two or more States should be treated as if it were a ship without nationality. In that connexion it was important that the Commission should take a decision on article 10.

102. Mr. Zourek's proposal (A/CN.4/L.56) reduced article 10 to one short sentence and completely changed the meaning. He recalled that his own original draft, setting out the conditions for the recognition of a new registration, had been adopted by the Commission at its third session with only one dissenting vote.[10]

[10] *Yearbook of the International Law Commission, 1951*, vol. I, 121st meeting, para. 56.

103. He accordingly proposed that discussion on article 9 be deferred until the Commission had reached a decision on article 10.[11]

It was so agreed.

The meeting rose at 1 p.m.

[11] See *infra*, 294th meeting, para. 52.

294th MEETING

Wednesday, 18 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, 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.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.56) (*continued*)

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

Article 10 [5]: Merchant ships on the high seas
(resumed from the 285th meeting)

1. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Zourek's proposed articles 10 and 10 *bis* (A/CN.4/L.56)[1] were the very opposite of the text of article 10

[1] Articles 10 and 10 *bis* as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

Article 10:

"Each State is entitled to fix the conditions to which registration and transfer of registration are subject."