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320th MEETING

Monday, 27 June 1955, at 3 p.m.

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

** 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, 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 territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (continued)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV)
(continued)

Article 14 [13]: Delimitation of the territorial sea at the mouth of a river (continued)

1. Mr. FRANÇOIS (Special Rapporteur) said in reply to Mr. Salamanca's question at the previous meeting (para. 86) as to what cases paragraph 2 in article 14 (A/CN.4/93) was intended to cover, that the text had been taken from that submitted by Committee II to the 1930 Conference for the Codification of International Law.¹ He himself had had some hesitation about using the word "estuary" but had been reassured that it was

a well-defined geographical concept which required no elucidation. In his turn he would be interested to learn from Mr. Salamanca what specific cases he considered would not be covered by the provision.

2. Mr. SALAMANCA explained that he had in mind certain estuaries in South America, and particularly that of the River Plate. The latter was continuously forming new strips of land and the estuary was barely navigable so that the Argentine Government had been forced to construct an artificial canal to make passage between Buenos Aires and Montevideo possible. Geographically speaking, therefore, article 4, paragraph 2 was inapplicable in that instance.

3. Mr. FRANÇOIS (Special Rapporteur) asked whether the continuously shifting sandbanks were uncovered at low tide.

4. Mr. SALAMANCA answered that they were not wholly submerged. The main characteristic, however, of the River Plate estuary was its limited navigability. The two coastal States had agreed not to attempt any demarcation because of the constantly changing contour of the land.

5. If the Special Rapporteur was unable to indicate the precise estuaries for which his text was designed, perhaps it might be preferable to delete paragraph 2 altogether.

6. Mr. FRANÇOIS (Special Rapporteur) said that he would be unable to answer that question without expert advice.

7. Mr. SANDSTRÖM believed that Mr. Salamanca was, in fact, concerned to know whether the same rules should apply to estuaries where the land formation was continuously changing as to normal ones.

8. Mr. SALAMANCA stressed that the important criterion was navigability. In his opinion the normal rule about estuaries could not be applied where they were not navigable. He was, therefore, convinced that it was better to delete paragraph 2 rather than to retain a provision which could not cover the important exceptions to which he had drawn attention.

9. Mr. ZOUREK reminded the Commission that it had decided to restrict the application of article 7 to bays within the territory of a single State. If the scope of article 14 were to be likewise restricted, perhaps Mr. Salamanca's difficulty would be overcome.

10. Mr. FRANÇOIS (Special Rapporteur) pointed out that navigability had never been taken into account during the Commission's discussion on bays,² many of which were not navigable throughout but only along certain channels. Moreover, the concept was a vague one and had no meaning except in terms of a particular vessel. Mr. Salamanca had, therefore, introduced an entirely new criterion, which had no relevance whatsoever to the question of delimitation. He remained unconvinced that a special provision was necessary to cover the cases Mr. Salamanca had in mind.

¹ League of Nations publication, *V. Legal, 1930, V.16* (document C.351(b).M.145(b).1930.V), p. 220.

² 317th-319th meetings.

11. In view of the Commission's decision about bays he certainly considered that article 14 should also apply solely to estuaries within the territory of a single State.

12. Sir Gerald FITZMAURICE felt that the problem with which Mr. Salamanca was preoccupied was that of the delimitation of an estuary with constantly shifting channels lying between two States. Paragraph 2, which had already figured in the Special Rapporteur's second report (A/CN.4/61),³ together with paragraph 1 was intended to cover estuaries of the normal kind, where the boundary between inland waters and the territorial sea could be drawn along the line of the coast. When the land domain was being continually pushed out to sea by the constant formation of new sandbanks, it was necessary to determine the point from which the low-watermark was to be measured and States might find it necessary to revise the line from time to time. In the case of the River Plate estuary it was impossible to draw a line from headland to headland in order to establish the limit of inland waters and the rule for delimiting the territorial sea must therefore be applied along the whole circumference.

13. Mr. SANDSTRÖM considered that the Commission had not sufficient technical information at its disposal to decide whether special provision was necessary for the exceptional cases mentioned by Mr. Salamanca. He suggested therefore that it should wait for the comments of the States concerned, substantiated if possible by expert evidence.

14. Mr. SALAMANCA said that though he still remained unsatisfied with paragraph 2, the precise implications of which remained obscure, he would not be opposed to the Commission's taking a provisional vote on article 14, drawing the attention of governments to the special case he had mentioned and asking for their observations.

15. Mr. ZOUREK asked that it be made perfectly clear in the comment that article 14 applied solely to estuaries within the territory of one State.

16. Mr. KRYLOV doubted whether it was appropriate to draw an analogy between bays and estuaries: the whole question required further thought.

Pending the receipt of comments by governments, the Commission provisionally approved the Special Rapporteur's text of article 14 (A/CN.4/93) by 11 votes to none, with 1 abstention.

Article 15 [14]: Delimitation of the territorial sea of two States the coasts of which are opposite each other

17. Mr. FRANÇOIS (Special Rapporteur) drew the attention of the Commission to the amendments (A/CN.4/93) he had submitted to article 15, in order to meet the points raised by the Netherlands, Swedish and United Kingdom Governments respectively (A/2934, Annex, Nos. 10, 13 and 16).

Article 15, as amended by the Special Rapporteur, was adopted by 11 votes to none, with 1 abstention.

Article 16 [15]: Delimitation of the territorial sea of two adjacent States

18. Mr. FRANÇOIS (Special Rapporteur) said that he had proposed two changes (A/CN.4/93) following the observations made by the Netherlands and United Kingdom Governments (A/2934, Annex, Nos. 13 and 16). He saw no advantage in substituting for the original text the draft proposed by the Belgian Government (*ibid.*, No. 2).

Article 16, as amended by the Special Rapporteur, was adopted by 11 votes to none, with 1 abstention.

The CHAIRMAN pointed out that the Commission had thereby completed its first reading of the draft articles on the régime of the territorial sea.

Order of business

19. Mr. GARCÍA AMADOR, announcing his intention of submitting a draft resolution to supplement the resolution adopted at the previous session concerning co-operation with inter-American bodies,⁴ asked when that question would be taken up as he wished to circulate the text in time for study by members of the Commission.

20. Mr. FRANÇOIS (Special Rapporteur) said that it would greatly facilitate the completion of the final report if the Commission could finish its work on the régime of the high seas before taking up Mr. García Amador's proposal.

21. Mr. LIANG (Secretary to the Commission), stating that he would make an oral report to the Commission on behalf of the Secretary-General about the steps taken in connexion with the decision regarding co-operation with inter-American bodies, suggested that the matter might be taken up on 30 June provided the work on the régime of the high seas had been wound up by then.

It was so agreed.

Régime of the high seas (item 2 of the agenda) (resumed from the 306th meeting)

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

22. The CHAIRMAN invited the Commission to consider the revised draft articles on the régime of the high seas prepared by the Drafting Committee.

23. Mr. FRANÇOIS (Special Rapporteur) said that in the course of discussion he would indicate those passages where the Committee had gone somewhat beyond mere drafting.

³ *Yearbook of the International Law Commission, 1953, vol. II.*

⁴ "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 77, in *Yearbook of the International Law Commission, 1954, vol. II.*

Article 1 [1]: Definition of the high seas

“The term ‘high seas’ means all parts of the sea which are not included in the territorial sea or inland waters of a State.”

Article 1 was adopted without comment.

Article 2 [2]: Freedom of the high seas

“The high seas being open to all nations, no State may subject them to its jurisdiction. Freedom of the high seas comprises *inter alia*:

- “(1) Freedom of navigation;
- “(2) Freedom to lay submarine cables and pipelines;
- “(3) Freedom of fishing;
- “(4) Freedom to fly over the high seas.”

24. Mr. FRANÇOIS (Special Rapporteur) said that it was not clear from the summary records whether Mr. Zourek's suggestions concerning article 2⁵ had been accepted. At all events, the Drafting Committee had sought to take them into account.

25. Mr. KRYLOV proposed that the order of sub-paragraphs 2 and 3 be reversed.

26. Mr. FRANÇOIS (Special Rapporteur) said that that had been the intention of the Drafting Committee. The present order had not been corrected as the result of an oversight.

27. Mr. ZOUREK observed that the presence of the words “*inter alia*” implied that there might be other freedoms in addition to those listed in article 2, but he was unable to perceive what they might be.

28. He noticed that sub-paragraph 3 referred only to fishing and wondered whether it covered seal hunting, etc.

29. He would be interested to know why his original amendment for the addition of a new sentence to article 2 (A/CN.4/L.52),⁶ had not been taken into account by the Drafting Committee.

30. Mr. FRANÇOIS (Special Rapporteur) explained that the words “*inter alia*” had been inserted in order to show that the enumeration was not necessarily exhaustive.

31. Mr. Zourek's amendment had not been taken into account because it seemed superfluous.

32. The CHAIRMAN considered it self-evident that since the high seas were open to all nations they could not, save in the exceptional cases provided for in the draft, be used for activities prejudicial to the nationals of other States.

33. Mr. KRYLOV considered that the substance of Mr. Zourek's amendment was contained in the first sentence of article 2.

34. Mr. SANDSTRÖM agreed that the principle Mr. Zourek had in mind had been better stated by the Drafting Committee.

35. Mr. ZOUREK maintained that his amendment was necessary so as to emphasize that States did not exercise sovereignty over the high seas. He had also proposed that it be made clear in the article that the high seas should be used by all States on an equal footing — a concept which did not appear in the Drafting Committee's text. However, he would not insist on his amendment being put to the vote, but asked that a clear statement on the same lines be inserted in the comment.

It was so agreed.

36. Mr. SCHELLE considered it important to retain the words “*inter alia*” because there were other freedoms covered by article 2, such as the right to scientific research and to the exploitation of the resources of the sea bed.

37. Mr. HSU said that although he usually considered any enumeration to be fraught with danger the words “*inter alia*” did provide some safeguard. However, it seemed inconsistent to have devoted chapters in the draft to the first three freedoms listed but not to the fourth. Given the nature of the articles and their purpose, he also doubted whether it was suitable to include the word “freedom” in the headings of the three chapters.

38. Sir Gerald FITZMAURICE wondered whether Mr. Hsu's point might be met if the latter part of article 2 were amended to read:

“Freedom of the high seas comprises freedom of navigation, of fishing, to lay submarine cables and pipelines and other freedoms such as, for instance, freedom to fly over the high seas.”

39. With that modification the chapter headings should not give rise to objection.

40. Mr. LIANG (Secretary to the Commission) did not think that Sir Gerald Fitzmaurice's suggestion would effectively dispose of Mr. Hsu's criticism. Since chapters I, II and III all dealt with regulations it seemed hardly appropriate to include the word “freedom” in their titles. The appropriate emphasis had already been given to the freedom of the high seas in article 2 itself.

41. Mr. SANDSTRÖM proposed that the Commission take up Mr. Hsu's point at the end of the discussion on the draft articles, which would be a better time to consider the chapter headings.

It was so agreed.

Article 2 was adopted, subject to sub-paragraphs 2 and 3 being transposed.

Article 3 [4]: Status of ships

“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 regulations, they shall be subject to its exclusive jurisdiction on the high seas.”

Article 3 was adopted without comment.

⁵ 293rd meeting, para. 43.

⁶ See *supra*, 283rd meeting, footnote 13.

Article 4 [5]: Right to a flag

“Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either :

“1. Belong to the State concerned, or

“2. Be more than half owned by :

“(a) Nationals of, or persons legally domiciled in the territory of, the State concerned and actually resident there ;

“(b) A partnership of ‘commandite’ company in which the majority of the partners with personal liability are nationals of, or persons legally domiciled in the territory of the State concerned and actually resident there ; or

“(c) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.”

42. Mr. FRANÇOIS (Special Rapporteur) said that as the Drafting Committee had felt itself to be lacking in the expert knowledge necessary to resolve the problems connected with the types of companies to be mentioned in article 4, Mr. Scelle had been asked to seek the advice of Mr. Arminjon, who had drafted a new text. However, Mr. Arminjon had laid down certain requirements which, during the first reading, had been rejected as too severe.

43. In Mr. Arminjon’s draft the expression *personnes résidant effectivement établies* was used.

44. Mr. SCELLE said that though the two expressions were synonymous he preferred the latter as being more definite.

45. He added that the Commission was not bound to accept Mr. Arminjon’s text.

46. Mr. AMADO said that he knew of no such concept as *personnes établies* in any civil code, and also had doubts about the expression *résidant effectivement*, which seemed somewhat tautological.

47. He found the requirement laid down in sub-paragraph (b) surprising, because it was not the nationality of the majority of the partners which was important but the nationality of those who owned the bulk of the shares.

48. Mr. SANDSTRÖM asked whether there was a distinction in English law between domicile and residence.

49. Sir Gerald FITZMAURICE said that under English law there was a difference between domicile and residence, but in practice they amounted to much the same thing, domicile usually being equivalent to permanent residence, though not always. However, the problem did not arise for the registration of shipping because for a ship to be registered as British it had to be either wholly owned by a British subject or by a company in which the majority of shares were owned by British subjects.

50. He pointed out that, as the text stood, it would be enough if any one of the conditions laid down in article 4 were fulfilled.

51. Mr. SANDSTRÖM said that in Sweden the law drew no distinction between legal domicile and effective residence.

52. Mr. SALAMANCA said that the distinction would cause difficulties in those countries where there was no special legislation concerning residence. There might, moreover, be some contradiction between the first sentence in article 4 and sub-paragraph (a). Where domicile was the only concept recognized by law it must be regarded as equivalent to residence for the purposes of the article.

53. Mr. SCELLE said that the article had been so drafted as to take into account the situation in France where a distinction existed between *de facto* domicile, which was almost equivalent to residence, and *de jure* domicile.

54. Mr. Arminjon had wished to bring within the scope of the article such companies as those composed of members of a single family who, having invested their money, left the entire management to one member. The shares could be transferred from one person to another, and it was impossible to establish the number of shareholders. If such a provision were felt to be too specialized he would have no objection to its deletion, particularly as that would not greatly affect the application of the article. Indeed, the earlier text drawn up by the Institute of International Law would probably have been perfectly adequate.

55. Mr. LIANG (Secretary to the Commission) said that as far as the English text was concerned it was difficult to understand the precise meaning of the words “legally domiciled” since English law knew no such concept as *de facto* domicile.

56. He had some doubts about the word “or” following the words “a partnership” in sub-paragraph (b). If it was intended to establish a distinction between a partnership and a “commandite” company that should be made clear.

57. Mr. AMADO said that notwithstanding Mr. Scelle’s remarks he could not agree to the inclusion of the words *des personnes établies* in sub-paragraph (b) because they did not correspond to any concept in civil law as he knew it.

58. Mr. SCELLE pointed out that for certain purposes a person might be legally domiciled in France without necessarily living there.

59. Sir Gerald FITZMAURICE said that the Secretary’s remarks about English law were correct, but the words “legally domiciled” should not give rise to difficulty. Although he appreciated the reasons for Mr. Amado’s objections, he believed there was a need to refer both to domicile and residence, because in countries such as France the two were not necessarily equivalent.

60. Mr. ZOUREK considered that sub-paragraph (c) should be expanded by the insertion of the words “or any other company” after the words “a joint stock company”. The article would then cover other types of

companies, such as co-operatives. He also believed that some proviso was necessary to allow registration of vessels hired and operated by nationals of the State and not necessarily owned by them. That was particularly important for non-coastal States like Czechoslovakia, and the omission of such a proviso might make article 4 unacceptable.

61. Mr. FRANÇOIS (Special Rapporteur), referring to Mr. Zourek's last point, said that a similar proposal originally made by Mr. Amado had been rejected.

62. The opening words of sub-paragraph (b) might be amended to read, in the French text, *d'une société en commandite simple*.

63. He also proposed that the words *résidant effectivement* be substituted for the word *établies* in sub-paragraph (b) of the French text.

64. Mr. SANDSTRÖM considered that sub-paragraph (c) nullified the effect of the preceding requirements.

65. Sir Gerald FITZMAURICE, referring to the Special Rapporteur's suggestion with regard to sub-paragraph (b), considered that in the English text it would be preferable to maintain the fundamentally important notion of "a partnership" but to delete the words "or 'commandite' company".

Sir Gerald Fitzmaurice's suggestion was adopted.

The Special Rapporteur's proposal for substitution of the words résidant effectivement for the word établies in the French text of sub-paragraph (b) was adopted.

66. Mr. ZOUREK asked for a separate vote on the first sentence of article 4.

The first sentence of article 4 was adopted by 10 votes to none, with 1 abstention.

The remainder of article 4 was adopted by 6 votes to 1, with 3 abstentions.

67. Mr. SANDSTRÖM explained that he had voted against the article because of the requirement laid down in sub-paragraph (c).

68. Mr. FRANÇOIS (Special Rapporteur) said the following letter dated 31 May 1955 had been addressed to Mr. Liang (Secretary to the Commission) by Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations:

"I have been following with interest the discussions of the International Law Commission on the nationality of ships. In this connexion there is a recent incident which concerned the United Nations which may be of interest to the Special Rapporteur and other members of the Commission, and I should be grateful if you would be good enough to communicate it to them informally.

"The United Nations Korean Reconstruction Agency (UNKRA) recently had ten fishing vessels (motor trawlers with a gross tonnage of about 77.5) built in Hong Kong for the purpose of helping to reconstruct the fishing industry of the Republic of

Korea. They were to proceed to Pusan in Korea for delivery there to Korean owners. The question arose of what flag should be flown and what registry used on the voyage from Hong Kong to Pusan. British registry was unavailable under the applicable legislation, by reason of the vessels' ownership. Nor could Korean registry be obtained while the vessels were still owned by UNKRA; it would theoretically have been possible to bring the future Korean owners to Hong Kong and turn over ownership to them there, thus making Korean registry available, but apart from the unreasonable expense involved there were urgent reasons *connected with their course en route to Pusan* why it was necessary that the vessels should be under United Nations rather than Korean ownership during the trip.

"In these circumstances it was still open to us to register the vessels in one of the countries (for instance, Liberia) where no degree of national ownership is required for registration, but we thought this course inappropriate as the vessels had no real connexion with any such country, and registration there would be the barest legal fiction. Consequently, we saw no alternative but to undertake the function of registration ourselves, and to navigate the vessels to Pusan under the United Nations flag. This was in fact done. The vessels, in several groups, left Hong Kong, stopped over in a Japanese port, and proceeded thence to Pusan, all without incident. They have now been turned over to their Korean owners. Some further information about the matter is given in the *United Nations Review* for May 1955 at page 15.

"In view of the possible occurrence of future cases of this kind where it is, practically speaking, impossible for a vessel owned by an inter-governmental organization to obtain national registry, it would seem to me desirable that the Commission's draft should at least not exclude the possibility of such an organization's registering its vessels for itself, and should not imply that the right to register vessels is necessarily confined to States. The Commission might also wish to study, from the standpoint of *lex ferenda*, the questions of the law applicable aboard vessels under international registration and also of the appropriate jurisdiction, in case an international organization should again feel obliged, in very exceptional and compelling circumstances such as those we faced, to register ships.

"Since the last summary records of the Commission which I have received are dated 18 May, I am not sure how the draft now stands, or whether it will be possible to take account of this point. But I think that the case I have described is at least an interesting precedent for the consideration of the Special Rapporteur and the other members of the Commission most concerned."

69. The question raised was an interesting one. Undoubtedly, it was feasible for a ship to fly the United Nations flag and also for that ship to be under the protection of the United Nations. But the national flag

of a ship implied more than protection; there was, for instance, the question of the law to be applied in respect of acts committed on board.

70. Mr. GARCIA AMADOR said that article 4, as voted by the Commission, would appear to imply that legal entities other than States were not entitled to register ships. Such a suggestion was not desirable, as the United Nations and other internationally recognized legal entities or "juridical persons" were fully entitled to own ships and protect them in fulfilling the purposes of the organizations concerned.

71. He proposed that a paragraph be added either to article 4 or to its comment stating that the provisions of that article did not exclude the right which might pertain to the United Nations, and other international organizations endowed with the same legal capacity, to register, and fly their flag on, ships owned by them or used by them in an international service.

72. Mr. KRYLOV said that the matter raised by Mr. Stavropoulos could best be dealt with in a comment.

73. Mr. ZOUREK recalled his proposal (A/CN.4/L.56)⁷ for an article making provision for exceptional cases wherein, for urgent reasons, the government of a State might confer its national flag for a limited period on a ship not yet registered in that State, provided either the owner or the operator of the ship were nationals of the State in question.

74. A provision of that type would solve, in practice, any of the difficulties to which reference had been made in Mr. Stavropoulos' letter.

75. Mr. SANDSTRÖM recalled that during the Second World War the International Committee of the Red Cross had chartered a certain number of ships which sailed under the Red Cross flag. It would be interesting to make enquiries from that body to find out the conditions under which that action had been taken.

76. Mr. SCELLE said that the United Nations and its agencies were recognized in international law as legal entities or juridical persons. They were fully entitled, in order to exercise their functions, to take part in international relations. For the purpose of exercising functions within its competence, an international organization might well engage in certain activities on the high seas and its right to register ships and make them fly its flag must be recognized.

77. He recalled that certain international religious orders and such international commercial organizations as the Hansa had been acknowledged in the past as having the international status of juridical persons and allowed to fly their flags on the high seas.

78. Sir Gerald FITZMAURICE said the United Nations was indeed a juridical person. It was not, however, a State, and did not possess any legislation of its own. That did not raise any difficulty concerning the private-law ownership of the ships in question; there was no

reason why the United Nations should not be acknowledged as the owner of its ships. Other problems, however, were much more complex. All States had elaborate laws concerning ships and seamen; they had criminal legislation which could be enforced on the high seas on board their ships. The United Nations had no legislation of that sort and the matter therefore required more careful study.

79. The CHAIRMAN urged the Commission not to plunge into a new and extremely difficult problem.

80. It was probable that Member States of the United Nations would always recognize the flag of the United Nations. But the full implications of United Nations registration for a ship were something which it would probably require an international convention to determine.

81. Mr. AMADO, referring to the first sentence of the penultimate paragraph of Mr. Stavropoulos' letter, said he could not agree to the final phrase thereof, wherein it was stated that the Commission "should not imply that the right to register vessels is necessarily confined to States".

82. Mr. ZOUREK recalled that a ship's flag implied a nationality. It also implied submission to a particular legal order, to a legislative system which would govern all legal problems connected with the ship on the high seas. The United Nations flag could not possibly have any such implications.

83. Mr. SCELLE said that a legal order was no more than a body of rules accepted by a society. In that sense, the United Nations possessed a legal order, which superimposed itself on that of all States.

84. Mr. LIANG (Secretary to the Commission) said that the situation referred to in Mr. Stavropoulos' letter arose under "compelling and exceptional circumstances" as Mr. Stavropoulos put it. The question raised could also be examined apart from any problem of the nationality of ships. When an international organization had a particular function to perform it must be clothed with all the powers essential or necessary for the accomplishment of the tasks involved. Concerning the case referred to in Mr. Stavropoulos' letter, the registration of a ship in the name of the United Nations under the given circumstances would certainly be considered as the exercise of an essential power.

85. It could not be argued that the articles adopted by the Commission would exclude the possibility of an international organization registering ships which it owned or used for the exercise of its functions and the fulfilment of its purposes.

86. Regarding the question whether the Commission should examine in detail, at the present juncture, the problem as to whether an international organization in normal circumstances should have the capacity of owning and registering ships in the same way as States, he recalled that in connexion with its study of the law of treaties the Commission had, at its second session,

⁷ See *supra*, 294th meeting, footnote 1.

decided to include in that study also agreements to which international organizations were parties.⁸ The then Special Rapporteur on the topic of the law of treaties, Mr. J. Brierly, had proposed that the matter be the subject of detailed provisions. The tentative texts of articles which the Commission had in due course provisionally adopted did not, however, deal with the matter in that manner; the Commission felt that the treaty-making power of certain international organizations would require further consideration before it could adopt any detailed provisions upon it.

87. The matter raised by Mr. Stavropoulos in his letter could, at the present stage, be covered by a reference in the Commission's report to the Commission's intention to study the question at a later date.

88. Mr. GARCÍA AMADOR said that the Commission should go further than just take note of Mr. Stavropoulos' letter. He proposed that it should also state that its draft articles did not exclude the possibility of an international organization registering its own ships and allowing them to fly the United Nations flag.

89. The CHAIRMAN said that if the Commission were to make a statement such as suggested by Mr. García Amador, it would in fact be adopting implicitly a decision that such registration was possible.

90. He proposed that the Commission should, at the present stage, confine itself to stating that it intended to examine the question raised by Mr. Stavropoulos at a later date.

91. Mr. SCALLE said the Commission should not carry prudence too far. It should recognize the fact that the United Nations could have ships under its control and had in fact flown its flag over them.

92. There was no reason why the Commission should assume that only a State could be responsible for ships on the high seas. The State, in its modern form, had not existed prior to the fifteenth century and might disappear in that form by the twenty-first century.

93. Mr. AMADO said that maritime States had behind them a long history of struggle and pioneer work in the field of navigation—a human endeavour of which their flag was a symbol. It was still early for the adoption of Mr. García Amador's proposal. The United Nations was, in essence, an organization constituted by the Member States.

94. Mr. ZOUREK said that, if the Commission were to adopt Mr. García Amador's proposal, it would be implicitly contradicting article 3, under which ships possessed the nationality of the State in which they were registered and were subject to the exclusive jurisdiction of that State on the high seas.

95. He supported the Chairman's proposal that the Commission should take note of Mr. Stavropoulos' letter

and state that it proposed to examine the question therein raised.

96. Mr. GARCÍA AMADOR said that his proposal contained neither an explicit nor an implicit recognition of any particular right on behalf of the United Nations and other international organizations. He merely proposed that the Commission should state that its articles did not exclude the possibility of the United Nations and its agencies registering ships and making them fly the United Nations flag.

97. Article 104 of the Charter clearly stated that the Organization enjoyed in the territory of each of its Members such legal capacity as might be necessary for the exercise of its functions and the fulfilment of its purposes. The legal capacity which it enjoyed in the actual territory of the Member States belonged to it *a fortiori* on the high seas.

98. Article 104 of the Charter gave a blank cheque to the United Nations in respect of such matters as registering ships and allowing them to use its flag. The statutes of the Organization of American States and of the United Nations' specialized agencies all contained similar blank cheques acknowledging to the legal entities in question such legal capacity as might be necessary for the exercise of their functions and the fulfilment of their purposes.

99. If the Commission were merely to take note of Mr. Stavropoulos' letter without at the same time stating that it did not exclude the right that might pertain to international organizations in the matter, it would be casting doubt on a subject which was covered by a very explicit article of the Charter.

100. Faris Bey el-KHOURI enquired what was the position regarding the nationality of United Nations planes used by observers of the armistice agreement in Palestine.

101. Mr. LIANG (Secretary to the Commission) said that, to his mind, the problem was independent of any question of the nationality of either airplanes or ships. It must, however, be possible for ships and airplanes used in connexion with the activities of the United Nations to be registered by the organization running them.

102. Sir Gerald FITZMAURICE said that the United Nations had a flag. Its agencies had not, and Mr. García Amador's reference to "other international organizations" seemed rather vague.

103. Mr. GARCÍA AMADOR pointed out that the Organization of American States had a flag of its own.

Mr. García Amador's proposal was rejected by 4 votes to 3 with 4 abstentions.

104. The CHAIRMAN then put to the vote his own proposal to include in the report a comment to the effect that the Commission, having taken note of Mr. Stavropoulos' letter, proposed to examine the question therein raised at a later date.

⁸ "Report of the International Law Commission covering the work of its second session" (A/1316), para. 162, in *Yearbook of the International Law Commission, 1950*, vol. II.

The Chairman's proposal was adopted by 10 votes to 1 with 1 abstention.

Further discussion of the revised draft articles relating to the régime of the high seas was adjourned.

The meeting rose at 6 p.m.

321st MEETING

Tuesday, 28 June 1955, at 9.30 a.m.

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

** The numbers within brackets indicate the article numbers in the draft contained in Annex to 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, 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) *(continued)*

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the revised draft articles submitted by the Drafting Committee.

Article 5 [6]: Ships sailing under two flags

"A ship which sails under the flags of two or more States may not claim any of the nationalities in question with respect to other States and may be assimilated by them to ships without a nationality."

Article 5 was adopted without comment.

Article 6 [7]: Immunity of warships

"1. Warships on the high seas shall enjoy complete immunity from the jurisdiction of any State other than the flag State.

"2. The term 'warship' means a vessel belonging to the naval forces of a State, under the command of an officer duly commissioned by the government, whose name figures on the list of officers of the military fleet, and the crew of which are under regular naval discipline."

Article 6 was adopted without comment.

Article 7 [8]: Immunity of other State ships

"For all purposes connected with the exercise of powers on the high seas by States other than the flag State, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used only on government service shall be assimilated to warships."

Article 7 was adopted without comment.

Article 8 [9]: Signals and rules for the prevention of collisions

"States shall issue for their ships regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not be inconsistent with those concerning the safety of life at sea internationally accepted for the greater part of the tonnage of sea-going vessels."

*Article 8 was adopted without comment.*¹

Article 9 [10]: Penal jurisdiction in matters of collision

"1. In the event of a collision or any other incident of navigation concerning a ship on the high seas

¹ See, however, paras. 85-92 below.