

Document:-  
**A/CN.4/SR.376**

**Summary record of the 376th meeting**

Topic:  
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68. Mr. PAL considered it essential that the proviso contained in the third sentence of the first paragraph should apply specifically to nuclear weapon tests.

69. The CHAIRMAN said that that limitation was already made explicit in the text.

70. Mr. SANDSTRÖM suggested that Mr. Pal's pre-occupation might be met if the reference to the freedom to undertake scientific research were transposed from the third to the second paragraph.

71. Mr. FRANÇOIS, Rapporteur, had no objection to such an amendment.

72. Mr. PAL said that the modification would not give him entire satisfaction because it would still not be clear that the freedom to conduct scientific research was subject to the general principle enunciated in the third sentence of the first paragraph.

73. Mr. ZOUREK said that the difficulty was due to the position occupied in the text by the principle that States were "bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States". Perhaps that statement could be transferred so as to make clear that it governed the exercise of any of the freedoms of the high seas.

*The Rapporteur was requested to make the modification suggested by Mr. Zourek.*

*The meeting rose at 1.10 p.m.*

## 376th MEETING

*Wednesday, 27 June 1956, at 10 a.m.*

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*Chairman:* Mr. Jaroslav ZOUREK,  
First Vice-Chairman of the Commission;  
*Later:* Mr. F. V. GARCÍA-AMADOR.  
*Rapporteur:* Mr. J. P. A. FRANÇOIS.

#### *Present:*

*Members:* Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS.

*Secretariat:* Mr. LIANG, Secretary to the Commission.

### Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

#### *Chapter II: Law of the Sea*

##### *Part II. The High Seas (A/CN.4/L.68/Add.3) (continued)*

In the absence of the Chairman, Mr. Zourek, first Vice-Chairman, took the chair.

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II, part II, of its draft report.

#### *Article 3: Right of navigation*

2. There were no observations on article 3 or the comment thereto.

#### *Article 4: Nationality of ships*

3. The CHAIRMAN, observing that article 4 had already been approved by the Commission, explained that the Drafting Committee had only made a slight change in paragraph 2. Since, according to paragraph 1, nationality was clearly linked with the right to fly a flag, the Drafting Committee had deemed it enough for paragraph 2 to refer solely to the right to fly a flag, which would be automatic proof of nationality.

4. Sir Gerald FITZMAURICE reaffirmed his view that the correct principle for the recognition of nationality was that of effective control. Consequently he would have preferred the third sentence in paragraph 1 to have read: "Nevertheless, for the national character of the ship to be recognized by other States, the flag State must be in a position to exercise effective control over the ship."

5. Mr. FRANÇOIS, Rapporteur, said that he had sought to meet Sir Gerald Fitzmaurice's point in the last sentence of the third paragraph of the comment.

6. Mr. EDMONDS questioned the use of the word "established" in paragraph 2; a ship's right to fly a flag was established not by documents, but by rules of law. He therefore proposed the substitution of the word "evidenced" for the word "established".

*Mr. Edmonds' amendment was adopted.*

7. Mr. FRANÇOIS, Rapporteur, said that he had sought to explain in the comment the considerable changes introduced by the Commission in the text of the article. He had also inserted, at the Commission's

request, the four conclusions of his report<sup>1</sup> concerning the right of international organizations to sail vessels under their flags. The Commission had not expressed its decision on those conclusions.

8. Faris Bey el-KHOURI said that he would have favoured a provision stating that a ship's documents were open for examination for purposes of establishing its nationality.

9. The CHAIRMAN pointed out that an amendment in that sense could not be discussed unless a motion to reconsider the article, which had already been approved, were carried.

10. Sir Gerald FITZMAURICE wondered whether the fourth paragraph of the comment reading: "The second paragraph has been added in order to enable ships at any time to prove their right to the flag they are flying", conveyed the main purpose of paragraph 2 of the article, which was that the right to fly a flag could be verified from a ship's documents.

11. The CHAIRMAN, speaking as a member of the Commission, said that it would be desirable to indicate that the Commission had discussed the Special Rapporteur's proposals concerning the right of international organizations to sail vessels under their flags. He therefore proposed the insertion of the words "After some discussion" at the beginning of the last paragraph of the comment.

*It was so agreed.*

#### *Article 5: Status of ships*

12. The CHAIRMAN stated that some members of the Drafting Committee had objected to the second sentence of article 5, which read: "A ship may not change its flag during a voyage or while in a port of call", on the ground that it imposed too rigid a prohibition, however, as the Commission had already approved the text, it was felt that discussion could not be reopened on what was a point of substance.

13. Mr. FRANÇOIS, Rapporteur, said that he had experienced some difficulty in explaining the purpose of that sentence. It had been proposed by Mr. Scelle who, for reasons of health, had unfortunately not been able to attend meetings of the Drafting Committee and was again absent for the same reason, so that there had been no opportunity of asking him to elaborate his views further. For his own part he doubted the wisdom of such a provision, the full implications of which were not entirely clear to him.

14. Sir Gerald FITZMAURICE shared the Rapporteur's doubts. He understood the principal reasons underlying Mr. Scelle's proposal, but the second sentence of article 5, as at present worded, would prevent genuine and valid changes of flag, and should therefore either be omitted or amplified by an express statement that fraudulent changes of flag were inadmissible.

15. Mr. FRANÇOIS, Rapporteur, objected to such an addition because it was self-evident.

16. Mr. AMADO said that he was always opposed to undue pessimism and to attributing the worst motives both to individuals and States. He therefore considered that the second sentence of article 5 should be deleted.

17. Mr. LIANG, Secretary to the Commission, agreed with the objections to that sentence and suggested that it might be replaced by the last paragraph in the comment.

18. Sir Gerald FITZMAURICE doubted whether such a substitution would in fact satisfy Mr. Scelle, whose concern was to prevent a ship, on the instructions of its owner, from changing its flag during a voyage or in a port of call for nefarious purposes, without any genuine transfer of ownership—which was perfectly permissible—having taken place. If the solution suggested by the Secretary were adopted, the words "except as a result of a genuine transfer of ownership" should be substituted for the words "in order thereby to evade the law of the flag State on the transfer of ships" in the last paragraph of the comment, but the question was so complex that he would personally support the course advocated by Mr. Amado.

*At the CHAIRMAN's suggestion it was agreed to postpone a decision until Mr. Scelle's return.*

19. Mr. SANDSTRÖM observed that the French text of the Italian Government's comments (A/CN.4/99/Add.8), some of which related to article 5, had just been circulated.

20. Mr. FRANÇOIS, Rapporteur, said that he had not yet had an opportunity of studying the Italian Government's comments and that the English and Spanish translations were not yet available. Furthermore, the observations on article 5 related to the text adopted at the previous session, which had since been very much modified.

21. Mr. KRYLOV did not think that the Commission could at the present juncture re-open discussion on article 5 in order to take into account the Italian Government's views.

22. Mr. FRANÇOIS, Rapporteur, said that although from the procedural point of view he agreed with Mr. Krylov, he would draw the Commission's attention to any new considerations raised by the Italian Government after he had had an opportunity of examining its observations in detail.

23. Sir Gerald FITZMAURICE, referring to the second sentence in the first paragraph of the comment, said that in English it would be preferable to refer to "the flag of some State" rather than to "the flag of a State".

24. Mr. SANDSTRÖM did not find the French text satisfactory and proposed the insertion of the word "seul" after the words "le pavillon d'un".

*Mr. Sandström's amendment was adopted.*

25. Sir Gerald FITZMAURICE considered that the last sentence in the first paragraph of the comment, which read: "Ships without nationality or with forged certificates of registry cannot be placed under the jurisdiction of any State", was misleading because it suggested that such ships would be free from all control. The real point

<sup>1</sup> A/CN.4/103.

was that they could not claim the protection of any State.

26. Mr. PAL believed it was unnecessary to refer to forged certificates because, if they were not genuine, the ship was not in fact registered.

27. Mr. SPIROPOULOS proposed the deletion of the last sentence of the first paragraph of the comment.

28. Mr. FRANÇOIS, Rapporteur, had no objection to that amendment.

*Mr. Spiropoulos' amendment was adopted.*

*Article 6: Ships sailing under two flags*

29. Mr. PAL found the first sentence of the comment unsatisfactory because the word "need" implied something that was genuinely necessary, and so was entirely inappropriate in the context.

30. Sir Gerald FITZMAURICE agreed, and suggested the substitution of the words "its convenience" for the word "need".

31. Mr. LIANG, Secretary to the Commission, considered that the first sentence of the comment failed to make clear that it was the use of more than one nationality that constituted an abuse.

32. Mr. FRANÇOIS, Rapporteur, did not altogether agree with the Secretary because it was conceivable that, without necessarily using them both, a ship might have two nationalities as a result of not giving up the first when acquiring the second.

33. Mr. PAL suggested that the meaning would be rendered more clearly if the words "by a ship using" were substituted for the word "where" in the first sentence of the comment.

*Mr. Pal's amendment was adopted.*

*Article 7: Immunity of warships*

34. There were no observations on the substance of article 7 or the comment thereto.

*Article 8: Immunity of other state ships*

35. Mr. SANDSTRÖM proposed the deletion from the text of article 8 of the words "government yachts . . . supply ships and other" because that enumeration had been rendered redundant by the insertion of the words "whether commercial or non-commercial".

36. Mr. LIANG, Secretary to the Commission, thought that the inclusion of those words might even be dangerous; the ships listed were more or less of the same category, so that the words "other craft" might be interpreted to mean craft of the same type. He therefore believed that Mr. Sandström's amendment would be consistent with the Commission's intention when it had revised the text of Article 8.

37. Sir Gerald FITZMAURICE considered that the list was a useful indication of some of the main types of vessels envisaged and that the phrase "whether commercial or non-commercial" showed that vessels of a

different class were also included. However, though he believed that the text should be maintained, he would not oppose Mr. Sandström's amendment.

38. Mr. EDMONDS said that it was not apparent from the summary record<sup>2</sup> that the Commission had decided to mention commercial State ships in the article, there being some doubt as to whether they could enjoy the same immunity as warships.

39. Mr. KRYLOV did not think it a matter of great moment whether the list, which was purely illustrative, was placed in the article or in the comment, but as he disliked last-minute changes, he would on the whole prefer the text of the article to remain as it stood.

40. Mr. FRANÇOIS, Rapporteur, said that the text approved at the seventh session had been identical with that contained in the draft report except that the words "whether commercial or non-commercial" had not figured in it. Now that those words had been included, he agreed that the enumeration should be omitted, for the reasons indicated by Mr. Sandström and the Secretary.

*Mr. Sandström's amendment to delete the words "government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other" was adopted by 4 votes to 3 with 3 abstentions.*

41. Replying to an observation by Mr. KRYLOV and Mr. PAL, Mr. SANDSTRÖM pointed out that a two-thirds majority was not required for such a vote because the text had only been approved at the present session subject to revision by the Drafting Committee.

42. With regard to the last paragraph of the comment, Sir Gerald FITZMAURICE felt that the text could bring out more clearly the purpose of the paragraph, which was to make it plain that State ships covered by article 8 could not claim immunity from verification of their status unless they bore the external marks referred to.

43. Mr. FRANÇOIS, Rapporteur, agreed that that was the purpose of the paragraph but felt it was essential to indicate, as he had sought to indicate, that the system established by the article in that respect was a new departure which would entail the conclusion of a new international agreement. He would, however, be prepared to modify the paragraph so as to make its purpose clearer, as suggested by Sir Gerald Fitzmaurice.

*It was so agreed.*

*Article 9: Safety of navigation*

44. The CHAIRMAN said that the Drafting Committee had made certain changes in the article designed to render it simpler and more precise.

45. Mr. FRANÇOIS, Rapporteur, said that in the comment he had sought to explain why the Commission had felt it necessary to extend the scope of the article; he had also pointed out that the Commission had now agreed to use a simpler and more general expression than in the 1955 draft to describe the standard to which safety regulations should conform.

<sup>2</sup> A/CN.4/SR.342, paras. 24-54.

46. Mr. KRYLOV asked whether the Rapporteur felt it was really necessary to retain the last sentence but one in the first paragraph of the comment, reading as follows: "The absence of such regulations or of effective control over their observation has strengthened objections to the transfer of ships to another flag". The meaning was far from clear.

47. Mr. SANDSTRÖM agreed that the sentence could well be deleted, since it would have to be considerably expanded in order to make clear precisely what was meant.

48. Mr. FRANÇOIS, Rapporteur, said that although the sentence was not perhaps absolutely necessary, it was in his view useful and an accurate statement of fact. The nature of the objections referred to, and the reasons why the absence of safety regulations had strengthened them, were surely sufficiently well known.

49. Mr. KRYLOV and Mr. SANDSTRÖM said they would not press the point, the former however adding that he hoped the Rapporteur might be prepared to reconsider the matter when he came to read through the comments again.

*Mr. García-Amador resumed the chair.*

*Article 10: Penal jurisdiction in matters of collision*

50. Mr. ZOUREK said that, in the light of various observations made by Mr. Pal and other members of the Commission during its previous consideration of article 10 at the present session,<sup>3</sup> the Drafting Committee had omitted from the text approved at the previous session the words "involved in the collision" and had also replaced the words "the State of which the ship on which they were serving was flying the flag" by "the flag State".

51. Mr. FRANÇOIS, Rapporteur, drew attention to the last sentence of the first paragraph of the comment, which was new. There had been recent cases, one in South Africa and one in Argentina, where the State had withdrawn certificates issued to foreign seamen by another State, and those cases had caused serious concern in maritime circles. The former case had been the subject of an appeal to the Probate, Admiralty and Divorce Division of the United Kingdom High Court which had declared the withdrawal of the certificate invalid; in Argentina, however, the State's action had been upheld by the competent court of appeal. The International Labour Organisation had been asked to give an opinion on whether the practice of the two States in question had been in accordance with established law. Both it and Professor Gidel, whose advice it had sought in the matter, had, as might have been expected, found that the practice was quite unwarranted, the latter pointing out that it was tantamount to unjustifiably prolonging the State's jurisdiction over foreign craft after they had left the area in which it could properly exercise jurisdiction, and that it was moreover contrary to the principle of the mutual independence of States. Since the fully agreed with that point of view, he had thought it only right in the circumstances to insert a sentence to the

effect that the power to withdraw certificates rested solely with the State which had issued them.

52. Sir Gerald FITZMAURICE said that he had no objection to the new sentence in the comment. He merely wished to place on record his view that, even if a State compelled a foreign seaman to surrender a certificate issued to him by another State, the loss of that piece of paper, which merely served to attest to the fact that he was duly certified, in no way affected the fact itself.

*Article 11: Duty to render assistance*

53. Replying to a question by Mr. EDMONDS concerning sub-paragraph (b), Mr. FRANÇOIS, Rapporteur, said that the words "if informed of their need for assistance" and "in so far as action may reasonably be expected of him" were taken from existing conventions.

*Article 12: Slave trade*

There were no observations on article 12 or the comment thereto.

*Articles 13-20: Piracy*

54. Mr. KRYLOV said that although he realized that his observation was being made too late to be taken into account, he would draw the Commission's attention to the fact that, in devoting eight of the thirty-eight articles on the high seas to the question of piracy, it appeared to be attaching undue importance to that subject.

*Article 13*

55. There were no observations on article 13 or the comment thereto.

*Article 14*

56. Mr. ZOUREK said that he maintained his previous reservations<sup>4</sup> with regard to article 14 and the comment thereto.

*Article 15*

There were no observations on article 15 or the comment thereto.

*Article 16*

57. Mr. SANDSTRÖM thought it should be made clear that the first and second sentences of the article referred to different cases: the first, to a ship or aircraft intended for piratic use and the second to a ship or aircraft seized and put to piratic use.

58. After some discussion,

*It was agreed*, on the proposal of Mr. ZOUREK, to emphasize the difference between the two cases in the comment.

59. Mr. SANDSTRÖM said that since the purpose of the article, according to the first sentence of the comment, was to define the terms "pirate ship" and "pirate aircraft", the article should figure earlier in the set of articles on piracy.

<sup>3</sup> A/CN.4/SR.343, paras. 2-9.

<sup>4</sup> A/CN.4/SR.321, para. 4 and A/CN.4/SR.343, paras. 37 and 49.

*It was agreed* to request the Special Rapporteur to place the article at a more appropriate point in the set of articles on piracy.

60. Mr. KRYLOV pointed out that previous versions of the draft were already in the hands of the public. The numbering of the articles should accordingly be changed as little as possible, in order to avoid confusion.

*Article 17*

There were no observations on article 17 or on the comment thereto.

*Article 18*

There were no observations on article 18 or on the comment thereto.

*Article 19*

61. Mr. SANDSTRÖM did not like the order of words in the French text of the beginning of the article and asked that the phrases "sans motif suffisant" and "pour cause de suspicion de piraterie" should be transposed, as they were in the English text, which was better.

*It was so agreed.*

*Article 20*

62. Sir Gerald FITZMAURICE, referring to the first sentence in the second paragraph of the comment, pointed out that though a merchant ship might hand a pirate ship over to a warship or to the authorities after overpowering it, it did not necessarily overpower it with that end in view.

*It was agreed* to amend the comment on the article accordingly.

*Article 21: Right of visit*

63. There were no observations on the article or on the comment thereto.

*Article 22: Right of hot pursuit*

64. Mr. ZOUREK, speaking as Chairman of the Drafting Committee, drew attention to the changes to the article made in pursuance of the Commission's decisions.

65. Mr. KRYLOV, referring to the second sentence of paragraph 4 of the comment, questioned the need to refer to "constructive presence", a term which appeared to be confined to Anglo-Saxon jurists.

After some discussion, *it was agreed* to delete the sentence in question.

66. Mr. AMADO, referring to the paragraph 4 (1) of the comment, recalled that he was one of the members of the Commission who were of the opinion that no pursuit commenced when the ship is already in a contiguous zone can be recognized.

67. Sir Gerald FITZMAURICE, supported by Mr. ZOUREK, proposed that it be made clear in paragraph 4 (3) of the comment that a second ship arresting the ship pursued must have actually joined in its pursuit and not merely intercepted it.

*It was agreed* to add the words "provided that it has

joined in the pursuit and not merely effected an interception" after the words "which began the pursuit" in the first sentence of the paragraph.

*Article 23: Pollution of the high seas*

68. Sir Gerald FITZMAURICE pointed out that the effect of radioactive waste on the suitability of fish for eating was still a matter of controversy.

*It was agreed* to substitute the words "which may be particularly dangerous" for the words "which is particularly dangerous" in the third paragraph of the comment on the article.

*Sub-Section B: Fishing*

*Article 24: Right to fish*

69. Mr. ZOUREK proposed that paragraphs 1 and 2 of the article be made separate articles. Paragraph 1, under the heading "Right to fish" would then constitute article 24, as it had done in the draft adopted by the Commission at its seventh session, while paragraph 2 containing the definition of the expression "conservation of the living resources of the high seas", would form the introduction to the set of articles on fishing.

*It was so agreed.*

70. Mr. SPIROPOULOS, referring to the second paragraph of the comment, said that the explanation of the term "nationals" still did not make it sufficiently clear that the term referred not to physical persons but to ships. Furthermore, as it stood, the sentence did not cover small craft which did not fly a flag.

After some discussion, *it was agreed*, on the proposal of Sir Gerald FITZMAURICE and Mr. SPIROPOULOS, to state that: "the term nationals denotes fishing boats having the nationality of the State concerned, irrespective of the nationality of the members of their crews".

*The meeting rose at 1.05 p.m.*

**377th MEETING**

*Thursday, 28 June 1956, at 9.30 a.m.*

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