

Document:-
A/CN.4/SR.344

Summary record of the 344th meeting

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

Extract from the Yearbook of the International Law Commission:-
1956, vol. I

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fiable, the State of the vessel pursued could seek damages. He therefore reaffirmed his support for Sir Gerald Fitzmaurice's amendment.

90. Sir Gerald FITZMAURICE said, with apologies to Mr. Scelle, that he must withdraw his amendment because it now seemed to have wider implications than he had at first realized. He would accordingly support the Special Rapporteur's amendment.

91. Mr. SPIROPOULOS considered that the clause should be retained and that it was impossible to take other considerations, of the kind described by Mr. Scelle, into account: hot pursuit could only be justified if a foreign vessel had violated the laws of the coastal State.

92. The issue raised by the Brazilian Government was a delicate one, and he wondered whether it might not be preferable to leave the text as it stood.

Further discussion of article 22 was adjourned until the next meeting.

The meeting rose at 1.10 p.m.

344th MEETING

Friday, 11 May 1956, at 10 a.m.

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Chairman: 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. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-6) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 22 (A/2934).

Article 22: Right of pursuit (continued)

2. Mr. PAL, reiterating his conviction that it was necessary to deal separately with the condition on which the right of hot pursuit could be exercised and the pursuit itself, proposed that the first sentence of paragraph 1 be replaced by the following text:

1. The pursuit of a foreign vessel may be undertaken when the coastal State has good reason to believe that an infringement of its laws and regulations has been made. Such pursuit may commence when the foreign vessel is within the internal waters or the territorial sea of the pursuing State and may be continued outside the territorial sea provided that the pursuit has not been interrupted.

That text which, members would note, involved no change of substance, incorporated the Brazilian Government's proposal (A/CN.4/97/Add.1).

3. Mr. FRANÇOIS, Special Rapporteur, had no objection to Mr. Pal's text.

4. Sir Gerald FITZMAURICE found Mr. Pal's proposal acceptable.

Mr. Pal's proposal was adopted.

5. Mr. FRANÇOIS, Special Rapporteur, passing on to the next comment on article 22, said that he failed to understand the Indian Government's observation. As he had pointed out in paragraph 152 of the addendum to his report (A/CN.4/97/Add.1), the right of pursuit in the contiguous zone was recognized in the last sentence of article 22, paragraph 1.

6. In that connexion he would remind members of Sir Gerald Fitzmaurice's argument at the previous session that, because of the essential difference between the territorial sea and the contiguous zone, the obligation on a foreign vessel to comply with an order to stop given in the territorial sea did not hold in the contiguous zone.¹ That view had also been put forward by the United Kingdom Government in its comment, but he found it unacceptable and therefore proposed that the Commission retain the last sentence of paragraph 1 as adopted at the previous session.

7. Sir Gerald FITZMAURICE wished to make clear at the outset that at the previous session he had expounded a personal view based on certain technical considerations. Perhaps members might find useful some passages in an article of his published in the *British Year Book of International Law, 1954*,² in which he had analysed the effects on maritime law of the judgment in the Anglo-Norwegian Fisheries Case.³

8. Neither he nor the United Kingdom Government had been convinced by the Commission's decision, and remained firmly of the opinion that in codifying maritime law a sharp distinction must be maintained between the territorial sea and the contiguous zone.

9. To stipulate that the powers of the coastal State in the contiguous zone should be limited to the exercise of certain special rights did not suffice to bring out clearly the fundamental difference between the status of the two belts. It was generally agreed that the contiguous

¹ A/CN.4/SR.291, paras. 41 and 48.

² Pp. 371-429. (The Law and Procedure of the International Court of Justice, 1951-1954: Point of Substantive Law I; Maritime Law (Territorial Waters, Internal Waters. The Norwegian Fisheries Case)).

³ I.C.J. Report 1951, p. 116.

zone was part of the high seas, and that there the coastal State had not the sovereignty and exclusive jurisdiction it possessed in the territorial sea. In the latter, foreign ships and nationals were subject to the immediate and direct authority of the coastal State and were under an obligation to comply with any lawful order or request from the authorities of that State: not to do so would be a failure in due submission to local jurisdiction. That was the main ground for recognizing the right of hot pursuit.

10. If the foreign vessel were in the contiguous zone, the position was radically different, because the zone was not under the jurisdiction of the coastal State and the vessel had no obligation to comply with an order to stop. The position was simply that, if the coastal State was in a position to enforce its order, it could do so.

11. Another difference was that a foreign vessel could commit an infringement of the laws and regulations of a coastal State only when within its territorial sea, and that, according to Mr. Pal's text, was a pre-requisite for the exercise of the right of hot pursuit; but in the contiguous zone, where the laws of the coastal State did not apply, the vessel could only prepare to commit an offence eventually—for example, to violate the customs, fiscal or sanitary regulations.

12. For all those reasons he considered that the Commission, while recognizing the right to begin hot pursuit in the territorial sea, should decline to recognize that it could be exercised in the contiguous zone; otherwise the powers of the coastal State would be considerably extended in a manner that went far beyond what was necessary for the protection of its laws and regulations. He accordingly proposed the deletion of the last sentence in paragraph 1.

13. He also proposed that the title of the article be amended to read: "Right of hot pursuit".

Sir Gerald Fitzmaurice's proposal to amend the title of the article to read "Right of hot pursuit" was adopted.

14. Mr. SPIROPOULOS said that in conferring on the coastal State certain rights in the contiguous zone, the Commission had recognized that the coastal State was entitled to promulgate certain regulations relating to the high seas, which meant that if foreign vessels in the contiguous zone infringed the laws of the coastal State, they would be liable to punishment. Notwithstanding, he was inclined to support Sir Gerald's conclusion that the Commission should not recognize the right to begin hot pursuit in the contiguous zone, because it was vitally important not to restrict freedom of navigation unless absolutely necessary, and clearly the interests of the coastal State did not require the same kind of protection in the contiguous zone as in the territorial sea itself.

15. Mr. PAL said that, in spite of the arguments adduced by Sir Gerald Fitzmaurice and Mr. Spiropoulos, he still favoured the provision in the last sentence in paragraph 1, because it was a logical and necessary consequence of the article concerning the contiguous zone,

adopted at the fifth session.⁴ The provision was quite innocuous and would not extend the rights of the coastal State, but would simply give it some remedy in cases of trespass against its rights, for the protection of which the contiguous zone had been created. The Commission had already, by its earlier decision, conferred certain positive rights on the coastal State in the contiguous zone, and the present provision did not constitute any further encroachment on the freedom of the high seas.

16. Turning to another question, he felt that there was some inconsistency in the Special Rapporteur's having accepted the Yugoslav amendment inserting the words "or contiguous zone" after the words "territorial sea" in paragraphs 1 and 2, after rejecting the Indian Government's observation on the ground that it had already been met in the text.

17. Mr. AMADO said that although he understood the reasons which had prompted the Commission to grant the coastal State certain rights for protecting its interests in the contiguous zone and appreciated that there must be some means of enforcing them, he was strongly opposed to the contiguous zone's being treated on the same footing as the territorial sea, at the limit of which the sovereignty of the coastal State ceased. Consequently, he still could not accept the proposition that hot pursuit could start in the contiguous zone, though he agreed that it could continue there provided it had started in the territorial sea. In his opinion, the interests which the coastal State was concerned to protect in the contiguous zone were not important enough to justify such a major and dangerous extension of its rights.

18. He had been particularly struck by the United Kingdom Government's point that in the contiguous zone there was no question of the coastal State's imposing penalties on foreign vessels, but only of preventing trespass against certain rights.

19. Mr. KRYLOV said that he adhered to the view adopted by the Commission at its previous session.

20. Mr. PADILLA-NERVO considered that the last sentence of paragraph 1 should be retained for the reasons given by the Special Rapporteur, which the Commission had found valid at the previous session.

21. Mr. FRANÇOIS, Special Rapporteur, replying to Mr. Spiropoulos, said that the provision in the last sentence of paragraph 1 would, indeed, restrict the freedom of the high seas to some extent, but that that was a logical consequence of a deliberate decision concerning the contiguous zone, taken by the Commission in an effort to combat the dangerous and increasing tendency on the part of States to claim wider belts of territorial sea. The Commission could not now stop half-way, but must face the consequences of that concession by giving the coastal State all the necessary rights for effective control in the contiguous zone. He therefore considered that the last sentence should stand.

22. Sir Gerald FITZMAURICE could not agree with the Special Rapporteur that the provision was the logical

⁴ *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), para. 105.*

consequence of the article on the contiguous zone, because the rights conferred upon the coastal State in that zone were different not only in extent but also in nature from those it enjoyed in its territorial sea. In the contiguous zone the coastal State was only entitled to take precautionary measures to prevent the infringement of certain regulations. In the territorial sea, it exercised sovereign rights. The logic of the case therefore lay in precisely the other direction, namely, that rights of enforcement in the contiguous zone were of a limited kind and must be so because they were an exception to the general rule that the coastal State had no authority on the high seas.

23. Mr. SPIROPOULOS agreed and drew the attention of members to the wording of the article concerning the contiguous zone,⁵ from which it was clear that the rights exercised therein by the coastal State were only rights of control to be exercised in order to prevent the infringement in the territorial sea of certain regulations issued by the State. He again emphasized that the interests at stake were not such as to justify a derogation from the freedom of the high seas.

24. Mr. AMADO asked whether hot pursuit could be continued once the vessel had entered the contiguous zone of a third State.

25. Sir Gerald FITZMAURICE said that the very pertinent question raised by Mr. Amado helped to demonstrate the logic of the United Kingdom Government's case. Pursuit need not cease in the contiguous zone of another State, because that zone remained part of the high seas and was not under the jurisdiction of that State. Only when the vessel reached waters actually under the sovereignty of another State must pursuit stop. Conversely, therefore, why should pursuit be allowed to start in the contiguous zone of the coastal State when that zone was not subject to the sovereignty of that State?

26. Mr. AMADO suggested that there was some underlying confusion in the argument that the Commission had adopted the article on the contiguous zone in order to forestall further claims to a wider territorial sea. Those claims had originated in the concern of certain States over the need to conserve the living resources of the sea rather than in concern to ensure observance of customs, immigration, fiscal or sanitary regulations.

27. The CHAIRMAN, speaking as a member of the Commission, said that the point at issue could only be settled in the light of the Commission's final decision concerning the article on the contiguous zone, and the two texts must be brought into line.

28. Members should bear in mind that legal opinion and legislation on the subject of the rights to be exercised in the contiguous zone was not unanimous. Some authorities, such as Gidel, believed that the coastal State's penal and other powers should be extended to apply in the contiguous zone, and would presumably take the view that the Commission had not gone far

enough in the text adopted at its fifth session. In their eyes, Sir Gerald Fitzmaurice's amendment would be unacceptable.

29. Mr. PADILLA-NERVO agreed with the Chairman.

30. Mr. SALAMANCA, also agreeing with the Chairman, observed that Sir Gerald Fitzmaurice's amendment might conflict with the article on the contiguous zone.

31. Mr. SCALLE confirmed the Chairman's remarks about Gidel's view. The doctrine, of which de Lapradelle was also an exponent, that the classical concept of sovereignty over the territorial sea should be replaced by the concept of special rights for the protection of particular interests such as defence, health, customs, etc., had been gaining ground in France for a long time.

32. He could not agree with the view taken by the United Kingdom Government, and still supported the text of paragraph 1 as adopted at the previous session. He agreed, however, that, in order to ensure consistency, it must be examined in the light of the article on the contiguous zone.

33. Mr. SANDSTRÖM said that paragraph 1 was a necessary consequence of the article on the contiguous zone. He believed there were sound reasons for retaining both that article and paragraph 1 of article 22.

34. The CHAIRMAN proposed that a decision on paragraph 1 be deferred until the Commission had considered the article on the contiguous zone.

It was so agreed.

35. Mr. FRANÇOIS, Special Rapporteur, said that the important question of the exercise of the right of pursuit by aircraft had been raised by the governments of Norway, Iceland and the United Kingdom. Sir Gerald Fitzmaurice had proposed the addition to paragraph 3 of a sentence reading: "The pursuing vessel must establish the position of the vessel pursued at the moment when the pursuit commences, and must, whenever possible, mark this position by physical means—e.g., by the dropping of a buoy"; he had also proposed additional paragraphs 5 to 7 reading:

5. Subject to the following rules, pursuit may legitimately be affected by means of aircraft. The provisions of paragraphs 1-4 of the present article shall apply *mutatis mutandis* to any such pursuit.

6. It being essential to the proper exercise of the right of pursuit that the vessel pursued should, while still within the territorial sea, have been made aware that it is required to stop, an aircraft, acting by itself, must be capable of issuing a visible and comprehensible order to that effect, and must do so while the vessel is still in the territorial sea.

7. Since pursuit, to be legitimate, must follow immediately on the order to stop, and must be continuous, the aircraft giving the order must itself actively pursue the vessel until one of the coastal State's national vessels, summoned by the aircraft, arrives to take over the pursuit. It does not suffice to justify an arrest on the high seas that the vessel was merely sighted by the aircraft as an offender, or suspected offender, when within the territorial sea, if it was not both ordered to stop and pursued by the aircraft itself.

⁵ Official Records of the General Assembly, Eighth Session, Supplement No. 9, (A/2456), p. 19.

36. He regretted that the proposed new paragraphs were not acceptable to him.

37. Sir Gerald FITZMAURICE said that, although neither he nor the United Kingdom Government was advocating the extension of the right of hot pursuit to aircraft, the fact had to be recognized that aircraft were being used by States in the protection of their rights within the territorial sea, and cases had occurred where aircraft had participated in the exercise of the right of hot pursuit. Since it was unlikely that States would forgo such a convenient method of protecting their interests, such use of aircraft was likely to increase. That being so, the Commission should recognize the right and make some attempt to regulate it.

38. His proposals were designed to make impossible the illegitimate use of aircraft in cases similar to some which had already occurred. What he had in mind was the sighting by an aircraft of the coastal State of a foreign vessel fishing within the territorial sea. Without making any contact whatever with the vessel, the aircraft would report it to the shore authorities, who would then order a government vessel to proceed to arrest the offender. In the meantime, however, the foreign vessel would have moved and would only be ordered to stop by the pursuing vessel when the foreign vessel was on the high seas some distance outside the limit. That practice was illegitimate because neither the aircraft, which might well have been at a high altitude, nor the surface ship would have ordered the foreign vessel to stop when within the limit of the territorial sea.

39. Mr. FRANÇOIS, Special Rapporteur, said that, even within the limits proposed by Sir Gerald Fitzmaurice, he could not see that there were sufficient grounds for extending the right of hot pursuit to aircraft. In the case of surface craft, the order to stop must be given at such a distance that the signal was clearly comprehensible by the foreign vessel, the use of W/T signals being excluded. If the offender refused to obey the order and made off, the difference in speed between the two vessels might lead to the foreign vessel's being some distance outside the territorial sea before the arrest could be made.

40. In the case of aircraft, the situation was quite different. As Sir Gerald Fitzmaurice had stated, the aircraft must issue a visible and comprehensible order to stop and, in order to do so, it must be fairly near the foreign vessel, at a distance, say, not greater than 10 cables. Given the speed of the aircraft, it was obvious that the offender could be arrested while still within the territorial sea, so that there was no need to extend the right of hot pursuit to the pursuing aircraft.

41. The case where the foreign vessel was such a short distance inside the limit as to be able to reach the high seas before being overhauled by the aircraft was so hypothetical as to be of academic interest only. Once it was accepted that the aircraft must give a clear order to stop, the question of the right of hot pursuit no longer arose. The extension of that right to aircraft would lead to abuse.

42. Sir Gerald FITZMAURICE said that the situation was by no means as simple as the Special Rapporteur

had suggested. Cases of foreign vessels fishing just within the limit of the territorial sea were far from exceptional; on the contrary, most cases of fishing within the territorial sea were, either by accident or, naturally enough, by design, borderline cases. Even accepting the Special Rapporteur's premises, therefore, the offender might well have left the territorial sea before the coastal State aircraft could reach it.

43. Moreover, in practice it was not at all easy for an aircraft to arrest a surface craft without perhaps having to take extreme and distasteful measures. Where aircraft were used for fishery protection purposes, they were not normally employed to undertake the whole operation culminating in the arrest, their duties being more in the nature of spotting and reporting the presence of the foreign vessel. It was precisely that system of air and sea co-operation that had led to abuse and consequently, required regulation. It might meet the Special Rapporteur's point if the first sentence of his proposed new paragraph 5 were to run: "Subject to the following rules, aircraft may legitimately *participate* in the pursuit."

44. Since it was clear that States would not forgo the use of aircraft as aids to hot pursuit, he could see no possible objection to adopting provisions to regulate the practice.

45. Mr. PAL, concurring, said that in view of the existing situation of fact, the Commission must take a decision on the extension of the right of hot pursuit to aircraft. The alternative of withholding recognition of a practice that had grown up among States was hardly practicable. Subject to possible minor drafting changes, Sir Gerald Fitzmaurice's proposals were acceptable.

46. Mr. SANDSTRÖM, supporting Sir Gerald Fitzmaurice's view, said that he failed to see the force of the Special Rapporteur's argument, which in view of the limited manoeuvrability of aircraft, seemed somewhat exaggerated. It was essential to prevent abuse of the right of hot pursuit by aircraft and the practice should therefore be regulated.

47. Mr. FRANÇOIS, Special Rapporteur, maintained that since by the very provisions of Sir Gerald Fitzmaurice's proposed new paragraph 6 the aircraft must be very near the foreign vessel—which must itself be within the territorial sea—the interval between giving the order and making the arrest was bound to be so short that the aircraft would not need to continue the pursuit on the high seas.

48. Mr. KRYLOV said that the Commission's task was to codify maritime law. The question whether aircraft would be used in the circumstances described—and he was sure that they would—could be left to experts in aviation; in any case, it was no concern of the Commission. The question could be referred to, however, in the comment.

49. Sir Gerald FITZMAURICE agreed with Mr. Krylov that States would certainly use aircraft to protect their rights within the territorial sea. Regulation of the process was therefore necessary in order to avoid abuse. Cases had occurred of vessels being arrested on the high seas

without having received any order to stop while they were within the limits of the territorial sea.

50. In the case adduced by the Special Rapporteur, he would ask what was the aircraft to do if the foreign vessel ignored the order to stop and made off?

51. His own proposal ensured the giving of a genuine order and continuous hot pursuit, although not by the same craft throughout. There was not necessarily anything unreasonable in permitting the coastal State aircraft to call in a surface craft in order to make the arrest, provided the situation were regulated. But if it were not, the existing practices would continue, whereby the foreign vessel would not have been made aware that it was required to stop, there would have been no pursuit by the reporting aircraft, and the subsequent arrest of the foreign vessel on the high seas would be illegitimate.

52. Mr. SPIROPOULOS said that, without giving a firm opinion on a question that called for further study, he wished to draw attention to the fact that the article as drafted assumed that the vessel giving the order to stop was also the pursuing vessel. In Sir Gerald Fitzmaurice's case, however, one craft, airborne, would begin the pursuit, while another craft, seaborne, would take over.

53. Mr. PADILLA-NERVO wished to make two comments. The motive in granting a coastal State the right of hot pursuit was the protection of its rights within internal waters or the territorial sea. The means of exercising that right would naturally be influenced by technical progress; that, however, was a secondary question. The right to carry out pursuit was granted to the State as such, and not to the ship. That was the main point.

54. As Sir Gerald Fitzmaurice had pointed out, the use of aircraft in exercising the right of hot pursuit was a fact that could not be disregarded, especially as the practice was growing, particularly among small States. Mr. Pal was right in his contention that the Commission could not ignore the situation, which must be regulated.

55. He would support Sir Gerald Fitzmaurice's additional paragraphs 5-7. He proposed an amendment, however, which he considered important: Paragraph 7 could be improved by adding at the end of the first sentence the words, "unless the aircraft is itself able to seize the vessel or to escort it to a harbour of the coastal State." That addition would allow the aircraft not only to participate, or rather to collaborate with the State ships, in the seizure, but also to effect the seizure itself. Experiences of the last war, and others, showed that in certain cases an aircraft could carry out seizure. That applied especially to seaplanes, as they could come alongside a vessel and arrest the crew, which amounted to virtual seizure of the vessel. It was also possible for an aircraft, by means of its own resources, to force an offending vessel to put into a port of the coastal State.

56. Mr. SPIROPOULOS said that it must be realized that acceptance of Sir Gerald Fitzmaurice's proposal would involve the abandonment of the classic principle that the coastal State vessel, after beginning pursuit within the territorial sea, should continue it on the high seas. The collaboration of two instruments of pursuit,

aircraft and surface craft introduced an entirely new element.

57. Mr. AMADO said that maritime States were legitimately interested in the existing situation, in which aircraft were used by States for the purpose of protecting their rights in the territorial sea. That did not mean, however, that the right of hot pursuit should necessarily be extended to the aircraft of a coastal State. In the exercise of hot pursuit there was an established link between the two vessels concerned that was lacking in the case of use of aircraft, which hardly came within the institution of the right of hot pursuit as he understood it. He could not support Sir Gerald Fitzmaurice's proposal.

58. Mr. EDMONDS said that the Commission should not lose sight of fundamental principles. It was accepted that the right of hot pursuit could be exercised if a vessel of the coastal State knew, or had reason to believe, that the laws of that State had been or were being violated. In such circumstances, the right of hot pursuit could be exercised from the moment of giving the order to stop. In view of the increasing use of aircraft as part of coastal States' policing forces, there was no reason why the order to stop should not be given by one kind of vessel—or an aircraft—and the pursuit continued by another kind of vessel. The important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which that right was exercised.

59. Mr. SANDSTRÖM, supported by Mr. SCELLE, saw no objection to the pursuit being started by one vessel and subsequently taken over by another.

60. Mr. PADILLA-NERVO, concurring, said that it was not provided in paragraph 1 that the pursuing vessel must be the same as the vessel giving the order to stop. The right of hot pursuit was granted to the State and not to the instrument used in the exercise of that right.

61. Sir Gerald FITZMAURICE said that it was not infrequent in such cases for one vessel to initiate the pursuit and for another subsequently to take it over. It had never been argued that such a practice was necessarily illegitimate, provided there was no break in continuity of pursuit.

Further consideration of article 22 was adjourned.

The meeting rose at 1.10 p.m.

345th MEETING

Monday, 14 May 1956, at 3 p.m.

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