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REGIME OF THE HIGH SEAS

Observations of the Government of the Polish  
People's Republic, concerning freedom of  
navigation on the high seas.

Transmitted by the Government's official  
observer to the seventh session of the  
International Law Commission - Mr. Jan Balicki.

Freedom of navigation, being the most essential element of the principle of freedom of the seas, is one of the basic principles of modern international law. This has been confirmed in numerous judgments of both municipal and international courts, in works of authorities in law and in international documents like the Barcelona Declaration, the Washington Declaration of 1921 and the Atlantic Charter of 1941.

The indisputable nature of this principle and its general recognition derive from the significance it has in international relations as a whole. Seas and oceans constituting over 70 per cent of the surface of the globe and being a natural link between continents are predestined to play an essential part in the development of international relations. This significance is reflected, above all, in the field of commercial communication, cultural, technical and other exchange. It would not be erroneous to state that the victory of the principle of freedom of navigation has contributed in a fundamental way to the development of international intercourse and exchange in the course of the last centuries.

From this first-rate importance of unhampered navigation in seas and oceans for the life of all nations follows the necessity to safeguard its accessibility to all nations in equal measure, so that one state or a group of states does not extend its jurisdiction over it. Freedom of navigation must be based on the principle of equal rights of all states.

From the basic principles of freedom of the seas and freedom of navigation follows the equal right for all states to have their own ships at sea and to participate in maritime exchange. From the principle of freedom of the seas it follows that only the state to which a given ship belongs has the right to extend its jurisdiction over it on the high seas. This concerns merchantmen and men-of-war alike. A merchant ship sailing under the flag of the country she belongs to cannot be stopped by other than warships of her own state. This principle admits very few fairly strictly defined exceptions when a merchant ship on the high seas can be stopped by a man-of-war of another state: a/ in case she commits an international crime - piracy, b/ in the case when a ship which has committed a crime on the territory of another state attempts to escape - the right of pursuit, c/ in cases provided for in international agreements, e.g. suspected smuggling or prohibited liquor trade.

In all these exceptional situations action undertaken by men-of-war against foreign merchantmen aims at the protection of the freedom of the seas against criminal activities or against activities recognized by multilateral agreements as harmful and expresses the concern of various states for the safety and freedom of maritime navigation and trade. They cannot, however, be in any case a justification for any arbitrary action.

The exercise of the right of pursuit is confined to the state in whose port or on whose territory a foreign merchantman has committed a crime. Men-of-war or signatory states are entitled to interference in the case of an infringement of a convention and, only in the case of piracy which is a heavy common crime, men-of-war of all states have the right of pursuit.

The entire development of international maritime law aims at strengthening the safety of sea navigation in all its aspects.

For some time, however, we have been witnessing the most brutal violation of age-old principles by those who direct hostile activities against vessels of many states. In the China seas the stopping of merchantmen, the seizure of their cargoes, the detention of the crews - are organized on a wide scale. According to statements by Lloyds 70 vessels under various flags were subject to these illegal acts between August 23, 1949 and December 16, 1953. This figure is not complete as other vessels were detained at a later time inter alia, the Soviet tanker "Tuapse". Among the seized vessels there were two Polish merchant ships:

"Praca" detained and captured in October 1953, and "Prezydent Gottwald" - in May 1954.

The above acts are sufficient proof of the violation in an unprecedented way of the freedom of navigation in the China seas. It is characteristic that these acts cannot be justified by any legal arguments. They are simply an expression of force applied by the use of modern technical means. Foreign men-of-war assisted by airplanes forced to stop Polish ships maintaining peaceful commercial communication with the Chinese People's Republic. Faced with the threat of the use of force and with a possible sinking of the ships, the Polish masters were compelled to submit to orders aimed at bringing the ship together with their cargoes and crews to Taiwan. These orders were not justified by anything. None of the Polish ships committed a crime on Chinese territorial waters or any acts which might be regarded as piratical. None of the Polish ships violated any provisions of international conventions which entitle foreign men-of-war to apply means of compulsion. Thus the application of such means was an act of utter lawlessness. As follows from the above, the very act of stopping the ships by the use of force was illegal and has no justification whatsoever. In this way the right of the flag, which follows from the principle of state sovereignty, was violated.

It should also be pointed out that the stopping of ships on the high seas violates the freedom of navigation. Merchantmen carrying cargoes in trade exchange between countries are seriously endangered and their possibility of unhampered sailing on sea routes is thus restricted.

The acts committed in the China seas constitute a most serious crime, namely, piracy.

The circumstances of the seizure of both Polish ships clearly show that violence was used against them. On the high seas two Polish merchant ships were stopped by warships and brought to the island of Taiwan. This was committed under the threat of the use of weapons involving a constant danger to the lives of the members of the crews. This is thus the main evidence that the act committed against the Polish vessels has marks of piracy.

In these concrete cases there also was "animus furandi", i.e. the intent to plunder for gain confirmed by many lawyers as an element of piracy.

The seizure of Polish ships which finds no justification in international law is qualified as piracy, as *delictum jure gentium* and it should be treated accordingly. All authorities in international law agree that a crime thus committed on the high seas open to all states must be prosecuted by all states, as freedom of navigation is not an abstract notion but involves certain rights and duties. It involves not only the duty for a state not to hamper by its activities the free use of navigation routes by ships of other states, but also the duty of adopting an active attitude by the state with regard to the observance of that principle.

In view of the principles enunciated above, some of the formulations contained in the sixth report on the regime of the high seas cannot but give rise to doubts. Articles 22 and 23 of the draft articles relating to the regime of the high seas are particular cases in point.

It seems advisable in article 22 to stress the importance of the general repression of piracy - the first two sentences of the article to read as follows:

"All States are required to cooperate for the more effective repression of piracy and of the slave trade on the high seas. They shall adopt efficient measures to prevent and punish piracy and to prevent the transport of slaves on vessels authorized to fly their colours and the unlawful use of their flag."

The formulation of article 23 of the draft is in conflict with established views on piracy. It should be clear that the words "bona fide purpose of asserting a claim of right" cannot be used in connection with such actions as robbery, rape, wounding, enslavement and killing. It should be clear, for instance, that robbery or enslavement, being by their nature illegal and criminal, could not be committed with a "bona fide" purpose. Similarly the words "for private ends" should be omitted, since no ends, even when described by the perpetrators as not being "private" (i.e. "public") can justify acts of piracy. The present wording of article 23, if accepted and embodied in an international convention, could be used by pirates to justify any action by maintaining that their action had the "bona fide purpose of asserting a claim of right" and that they were not acting "for private ends".

Finally it should be stated that the draft articles do not appear to contain a clear and unambiguous formulation of the acknowledged principle of freedom of navigation on the high seas.