Document:-
A/CN.4/SR.121

Summary record of the 121st meeting

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

Extract from the Yearbook of the International Law Commission:-
1951 , **vol. I**

from the coast. Thus Chile was the sole exception.

152. The CHAIRMAN pointed out that the Codification Conference of 1930 had not laid down any uniform rule for territorial waters. If there were any such rule it would clearly be possible to begin the contiguous zone from the limit of territorial waters; but there was no rule. It was obvious that most States were satisfied with the breadth of 12 miles; he proposed fixing that distance and explaining in the comment that States could decide otherwise.

The 12-mile limit for the contiguous zone was adopted.

The meeting rose at 6.15 p.m.

121st MEETING

Tuesday, 10 July 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) *(continued)*

CHAPTER 9: CONTIGUOUS ZONES *(continued)*

1. Mr. HUDSON, referring to the discussion at the previous meeting, proposed the insertion of the words "jurisdiction and" before the word "control" in the second line of the draft text (p. 51, mimeographed English text; para. 123, printed French text). He wished to use the same wording as in the case of the continental shelf. He also proposed that the words "over navigation" be inserted before the word "necessary".

2. The CHAIRMAN asked whether the position was really the same in the case of the high seas contiguous to territorial waters as in that of the continental shelf. In the former case he did not think that there was any question of jurisdiction.

3. Mr. SANDSTRÖM thought that that word would include the right to punish.

4. Mr. KERNO (Assistant Secretary-General) thought that the words "jurisdiction and control" might be wrongly interpreted as meaning that the coastal State was competent to try any offences committed within the contiguous zone, whereas the Commission only desired to give that State the right to take police measures.

5. Mr. FRANÇOIS preferred his own text.

6. Mr. HUDSON withdrew his proposal to add the word "jurisdiction". He asked whether the Commission accepted the addition of the words "over navigation".

7. Mr. SANDSTRÖM was not sure whether the control referred to must necessarily apply to navigation. He cited the example of certain forms of contraband traffic in spirits, occurring in Swedish waters. The smugglers came from the open sea and sank containers in the contiguous zone, while accomplices came from Swedish territory and collected them. The police of the coastal State must be able to seize such containers and the use of the words "over navigation" would appear to deny them that right.

8. Mr. HUDSON withdrew his proposal to add the words "over navigation". He then proposed the deletion of the second sentence of the text, which limited the breadth of the contiguous zone to twelve miles from the coast.

9. The CHAIRMAN pointed out that at the previous meeting the Commission had approved that limit.[1]

CHAPTER 1: NATIONALITY OF SHIPS

10. The CHAIRMAN asked the Commission to take a decision on the principles formulated on that subject by the Rapporteur, which appeared in document A/CN.4/42, (pp. 7, 8, mimeographed English text; para. 18, printed French text). The English text of rule 1 was confusing and would require amendment.

11. Mr. FRANÇOIS said that the Secretariat had placed very voluminous documentation at his disposal, but it was difficult to know whether the regulations supplied were always the latest. With regard to Panama, for instance, Mr. Alfaro had been able to point out that the documentation used in the report was incomplete. He therefore apologized to the Commission in advance, in case the report had not always taken account of the most recent state of the law.

12. The rules he proposed regarding the nationality of ships were based almost entirely on existing regulations. They constituted a codification. The Commission might find objections to them and consider the result rather meagre. It might consider that such conclusions were of little practical importance and that they added nothing new, since most States already conformed to them.

13. In dealing with that subject, as with the continental shelf, the Commission should consider whether it wished to take a step forward in the progressive development of law and adopt certain rules which it would be desirable for States to apply. If the Commission took that course, it should accept the risk of meeting with some opposition

[1] Summary record of the 120th meeting, para. 152.

from States who were not prepared to subject their sovereignty to further limitations.

14. To turn to another aspect of the question, he had taken as the starting point for his report the existence of a general principle, the formulation of which he had borrowed from the Asser-Reay Report and which was reproduced on page 4 of his own report (mimeographed English text; para. 3, printed French text). That principle was as follows: " In order that the law of a State on this matter may be effective . . . it should not depart too far from the principles which have been adopted by the great majority of States and which may therefore be regarded as constituting the basis of international law on the matter ". In other words, there were certain general international directives regarding the nationality of ships, which States were required to observe. That principle had only been formulated by a very few writers. It was rarely stated, because nearly all legal authorities, except Neumeyer and Verdross, recognized States as having complete sovereignty in respect of the nationality of ships. The question might be compared with that of the nationality of persons. It was the Preparatory Committee of The Hague Codification Conference of 1930 which had first stated a similar principle in the following terms: " The legislation of each State must nevertheless take account of the principles generally recognized by States ". In the matter under consideration the idea was the same as that formulated by Asser and Reay in their report. The Commission should therefore consider whether it ought to subscribe to that principle. If so, it was important that the fact should be expressly stated.

15. In reply to a question by the Chairman, he explained that the principle in question was that, in regard to the nationality of ships, States were subject to limitations fixed by the law of nations.

16. Mr. HUDSON said that he would prefer to avoid the use of the word " nationality " in connexion with ships and commercial companies. The concept of nationality implied an idea of allegiance, which was possible for a natural person, but not for an inanimate object. He would prefer to use the words " national character ". The use of the word " nationality " had been criticized by Niboyet and de La Pradelle.[2]

17. He thought that the report did not sufficiently stress the registration of ships, which might be the criterion for national character.

18. In the North Atlantic, a tendency to seek the advantages of Panamanian legislation had been noted. Many ships were registered in Panama and thus came under more favourable laws with regard to seamen's wages and the nationality of members of the crew. He wondered how far the rules formulated in the Rapporteur's draft were in conformity with Panamanian law. He would like to know the advantages of registering a ship in Panama.

19. Mr. ALFARO said that there were several reasons for that practice. To take the commercial aspect first, registration fees, which were proportionate to tonnage, were very low in Panama. Moreover, the fiscal laws of that country were extremely liberal. The tax on profits only applied to activities carried on in Panamanian territory. Thus ships operating outside the territorial waters of Panama were exempt from all fiscal obligations on that score.

20. It was often alleged that the acquisition of Panamanian nationality placed a ship under social legislation that was far less strict; but that was not true. In fact, seamen were protected almost as fully in Panama as they were in most other countries.

21. With regard to the nationality of crews, the latest Panamanian law required that 10 per cent should be Panamanian by birth or origin. Formerly, the law had required 25 per cent of Panamanian nationals, but made no distinction between original and acquired nationality.

22. There was also a political reason for registering ships in Panama. Owing to the close relations between that country and the United States, there was no danger that, in the event of war, ships so registered would not be available for the defence of the Western Hemisphere.

23. Those various reasons explained why the Panamanian mercantile fleet had steadily increased. For instance, an inquiry carried out by the International Labour Organisation at the request of Panama had shown that between 1946 and 1948 the Panamanian fleet had increased from 406 to 654 ships, and from 1,300,000 tons to about 3,900,000 tons.[3]

24. Referring to the conclusions formulated by the Rapporteur, he said that rule 1 was in conformity with Panamanian law and he would vote for its adoption, provided that the word " either " was inserted after the words " owned by ". With regard to rule 2, he would make the necessary comments at the appropriate time.

25. Mr. HUDSON noted that rule 1 fixed the rules for registering ships on the basis of ownership. In his opinion, however, the national character of a ship should be largely dependent on its port of registry.

26. According to rule 1, a ship might be registered by a State when more than one half of it was owned by nationals of that State. The Commission would need to know whether Panamanian law laid down such ownership requirements and whether rule 1 could be applied to that country.

27. Mr. ALFARO read out article 1080 of the Panamanian Commercial Code of 22 August 1916 relating to the conditions which a ship must fulfil in order to be eligible to bear the nationality of that country. The article ran as follows:

> " Merchant vessels belonging in whole or in part to Panamanian citizens or to foreigners domiciled in the Republic and with more than five years of residence therein, or to commercial societies having their headquarters in Panama, shall be held as Panamanian, provided they be registered and enrolled as such and

[2] A. de La Pradelle et J. P. Niboyet, *Répertoire du droit international*, Paris, 1929–1931, vol. X, *Navires de mer*, paras. 14–18, pp. 9–10.

[3] Conditions in Ships flying the Panama Flag (International Labour Office, *Studies and Reports*, New Series, No. 22, Geneva 1950), p. 83.

their owners submit expressly to the legal provisions of the Republic concerning navigation." [4]

28. Replying to an inquiry by Mr. SANDSTRÖM, Mr. FRANÇOIS explained that the conditions listed at the end of the part of his report devoted to the nationality of ships were minimum requirements which any State was at liberty to make more stringent.

29. Mr. SPIROPOULOS remarked that the Commission's task was to determine a rule of international law. The text under examination, however, was just a statement unconnected with any rule.

30. Mr. HUDSON recalled that Mr. François had proposed adopting as an introduction the principle formulated in the Asser-Reay Report and reproduced at the end of the first paragraph on page 4 of his own report (mimeographed English text; para. 3, printed French text).

31. Mr. AMADO considered that, before going any further, it would be desirable for the Commission to be clear in its mind as to whether it was concerned with the nationality of a ship or with its ownership. Although the part of the report by Mr. François with which it was dealing was entitled " Nationality of ships ", the conclusions submitted referred only to ownership. The right to registration and to fly a particular flag followed from the conditions under which such ownership was exercised.

32. The first Report on the High Seas (A/CN.4/17), in 1950, had raised a series of questions which had been left unsolved. The Commission had come to no definite decision either on the nationality of ships, on collisions, on safety of life at sea, on the right of approach, on the exploitation of the resources of the sea, or on sedentary fisheries, and had accordingly requested the rapporteur to submit some positive conclusions at its third session.

33. If, out of that vast range of subjects, in which collective interests were at stake, the Commission chose to concern itself with the ownership of ships, it should say so and give its reasons.

34. Replying to a remark by Mr. SPIROPOULOS, the CHAIRMAN recalled that the Commission was at the moment seeking to establish the conditions in which a State might authorize a ship to fly its flag.

35. Mr. FRANÇOIS, replying to an earlier observation by Mr. AMADO, referred to the instructions given him by the Commission at its second session, as set out in paragraph 185 of its report (A/1316). In pursuance of those instructions, he had studied the manner in which the matter of the nationality of ships was regulated in the various countries and had not confined his researches to the question of ownership. His aim had been to discover what were the rules with which ships must comply in order to be considered as possessing the right to fly the flag of a particular State and to be governed by one or other of the various national legislations. Such an inquiry had inevitably led to the conclusions set forth on pages 7 and 8 of the report.

36. Certain countries had additional rules, such as rules regarding the composition of the crew, but since such rules did not exist in a great many countries, he had thought it best only to include those generally adopted.

[4] *Ibid.*, p. 56.

37. He did not see what more could be asked. The question of the implications of registration might be raised and it might be asked whether registration conferred nationality or not. In point of fact, in the majority of cases it did, but that was merely a question of detail. The Commission had only to come to a decision on the general principles derived from the laws of all the countries of the world.

38. Mr. KERNO (Assistant Secretary-General) considered that the rapporteur had placed the question very clearly before the Commission. The term "nationality of a ship " was a long-established and very convenient one. It was synonymous with the right to fly a flag and was a consequence of registration. As a preliminary step, the Commission should ask itself whether States were absolutely free to fix the rules for the registration of ships as they pleased. If it decided that they were not, it could then establish the minimum requirements to which the right to fly a flag was subject. That was what the rapporteur had done in singling out certain rules which were regarded as customary law and were capable of codification. In other words, if the Commission, rejecting the principle of absolute freedom, considered it possible to establish certain guiding principles, it should consider one by one the conditions set out by Mr. François in his report. In that connexion it should be pointed out that sub-paragraphs (*a*), (*b*) and (*c*) of rule 1 were separate cases and that ships must fulfil one or other of those requirements which were, in any case, very liberal ones.

39. The CHAIRMAN, returning to the preliminary question, asked whether the Commission considered that international law contained certain principles which made the grant of a nationality to ships subject to certain conditions.

40. Mr. HUDSON wondered whether that question was of any importance for the study of the régime of the high seas. With the exception of the " I'm Alone ", he could not recall any case in which negotiations or arbitral awards had brought to light any difficulties between States arising from differences between the provisions of national laws on the conditions of registration of ships.[5]

41. He thought the following text might perhaps meet Mr. François' wishes:

> " A State may confer its nationality (or its national character) on a ship (or vessel), in the sense of permitting the ship to fly its flag only if the ownership of the ship is more than fifty per cent in the hands of . . .".

The text would be followed by Mr. François' three sub-paragraphs (*a*), (*b*) and (*c*).

42. Mr. FRANÇOIS said that the text was to his entire satisfaction. If the Commission adopted it, it would be giving an affirmative answer to the question whether there were certain rules with which the legislation of States relating to the nationality of ships should comply.

[5] See " Claim of the British ship '*I'm Alone*' v. United States," joint interim report of the Commissioners, 30 June 1933, and joint final report of the Commissioners, 5 January 1935, *American Journal of International Law*, vol. 29 (1935), pp. 326–331.

43. The CHAIRMAN remarked that Mr. François, as rapporteur, was perfectly entitled to ask the Commission to decide whether or not certain rules existed before considering what those rules were.

44. Mr. HUDSON said that he was not at all impressed by the wording of the principle quoted from the Asser-Reay report. It was a typical example of a platonic problem.

45. The CHAIRMAN said that the Commission should not confine itself solely to questions of international law giving rise to friction between States.

46. Replying to a question by Mr. HUDSON, Mr. SANDSTRÖM pointed out that the matter in question had given rise to difficulties not in the diplomatic sphere but with trade unions; there had been cases of strikes against ships flying a particular flag. Changing the flag enabled the owner of a ship to avoid meeting certain social requirements.

47. Mr. HUDSON observed that the rules the Commission was proposing to study would not have the effect of reducing the number of such cases of friction.

48. Mr. SPIROPOULOS wondered whether, in existing law, the fact that nationality was granted in violation of the rules thereby deprived ships of the right to fly that flag.

49. Mr. HUDSON declared that a State might refuse to recognize the right of a ship to fly a particular flag when its nationality had been acquired in violation of the rules. He proposed adding to the text under consideration the stipulation that if the necessary conditions were not present, other countries would not be bound to respect the national character of the ship.

50. In the case of the *I'm Alone*, the Canadian nationality of the ship had been regarded as purely fictitious and the Commissioners' refusal to grant compensation had been based on that fact.

51. Mr. ALFARO considered that it was difficult, in an age of international co-operation, to undertake the defence of the principle of absolute sovereignty, nowadays generally supplanted by the concept of the interdependence of States. It was, however, necessary to consider whether the matter under consideration by the Commission should merely be codified or whether it lent itself to progressive development; in other words, whether the Commission should define things as they were, *lex lata*, or things as they should be, *lex ferenda*.

52. It was clear that, as the law stood, the matter was entirely one of national law. There was nothing to show that the international community had concerned itself with it except perhaps in order to affirm, basing itself on the *comitas gentium*, that no country might accept registration of a ship if the country whose flag that ship had formerly flown was opposed to such registration.

53. At the present day, as the report pointed out, only 19 countries required the master to be of the same nationality as the ship. Even taking the most favourable view, then it was merely a question of quite a small minority.

54. The Commission could, however, seek to determine what rules it would be desirable to introduce in order to place the question of the nationality of ships on a sounder basis. Since the main reason behind the choice of nationality was a commercial one, it was possible to maintain that national legislations were free on the question, provided they did not prejudice the interests of other States, particularly in regard to dues and taxes and to industrial legislation.

55. The CHAIRMAN noted that Mr. Alfaro considered the different States absolutely free to fix as they deemed fit the conditions for the granting of their nationality to ships, whereas the rapporteur, on the contrary, considered that certain general rules of international law had to be observed in that connexion.

56. Personally, he considered that the rapporteur was right but it was for the Commission to decide.

It was recognized, by 8 votes to 1 with 2 abstentions, that the grant of nationality to ships was limited by certain principles of international law.

57. Mr. ALFARO stated that, although he had voted against the motion because he considered that the rules governing the nationality of ships were a matter of national law, he nonetheless considered that such rules should respect the interests of other States.

58. Mr. SANDSTRÖM explained that he had abstained because he wished it to be possible to challenge the nationality of a ship when acquired in violation of the rules. However, on the CHAIRMAN observing that the principle recognized by the Commission did, in fact, imply the right of third States to challenge the nationality of a ship acquired in defiance of that principle, he declared his support for the majority view.

59. Mr. HUDSON read out the following text:

> " In general, a State may fix the conditions on which it will permit a ship to be registered in its territory, and to fly its flag; yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognized by other States. These minimum requirements are: . . .".

60. The CHAIRMAN proposed that, pending the distribution of the text in writing to all the members of the Commission, it should proceed to consider the minimum requirements referred to. The first of those requirements related to ownership.

61. Mr. KERNO (Assistant Secretary-General) pointed out that the rules stated in sub-paragraphs (*a*), (*b*) and (*c*) were questions to be settled by national law.

62. Mr. HUDSON proposed wording rule 1 as follows:

> " The ownership of the vessel must, to the extent of 50 per cent be vested in:
>
> " (*a*) Nationals of or persons domiciled in the territory of the State ".

63. With regard to sub-paragraph (*b*), he pointed out that a " commandite company " was unknown in Anglo-Saxon law. After Mr. Sandström had explained in detail the nature of that type of commercial company, Mr. HUDSON said he thought the English word " partnerships " covered it adequately.

64. Mr. FRANÇOIS pointed out that the Institute of International Law, in 1896, had referred to " simple commandite companies " in so many words on its work on the nationality of ships and that he had thought it preferable to do likewise in his report.

65. Replying to Mr. HUDSON, he stated that some legislations required 50 per cent national ownership, others more than 50 per cent. The Institute having decided in favour of " more than 50 per cent ", he had followed suit. In practice, the difference was slight.

66. Mr. KERNO (Assistant Secretary-General) pointed out that sub-paragraph (*b*) referred to commercial companies in which the personal element was dominant and, that being so, required the partners to satisfy the necessary nationality conditions. Sub-paragraph (*c*), on the other hand, related to joint-stock companies in which the significant element was the legal entity of the company itself. In the latter case, the requirements did not bear on the nationality of the directors or shareholders but on that of the company itself. As for the commandite company, a quite common form of commercial organization in Europe, it was half-way between a private company and a joint-stock company.

67. The CHAIRMAN thought it would be better to study the various sub-paragraphs of rule 1 in turn.

68. Mr. HUDSON read out his proposal for sub-paragraph (*a*) again.

Mr. Hudson's text for sub-paragraph (a) *was adopted.*

69. Mr. HUDSON read out his proposal for sub-paragraph (*b*):

> " A partnership in which more than half the partners are nationals or persons domiciled in the territory of the State ".

70. Mr. FRANÇOIS inquired whether Mr. Hudson would accept the addition of the words " with personal liability ".

71. Mr. HUDSON thought that that would be going into details which States might interpret as they wished.

72. Mr. SANDSTRÖM said he preferred Mr. François' text containing the expression " commandite company ".

73. Mr. HUDSON pointed out that in English there was a danger of the words " commandite company " not being understood. However, following an observation of Mr. ALFARO, he agreed to add to his text the words " or commandite company " and the phrase " with personal liability ", to be found in the text of the rapporteur.

Mr. Hudson's text for sub-paragraph (b) *was adopted as thus amended.*

74. Mr. KERNO (Assistant Secretary-General), referring to sub-paragraph (*c*), remarked that the inclusion of word " national " was essential.

75. Mr. YEPES supported that view.

76. Mr. HUDSON proposed saying " organized in and having its head office in . . .".

77. Mr. AMADO expressed the view, subsequently corroborated by Mr. KERNO (Assistant Secretary-General), that it was possible for such a company not to be a national one.

78. Mr. LIANG (Secretary to the Commission) pointed out that in English the words " national company " would have no meaning. They could even be interpreted as implying " operating under State control ". He thought the only way to render the idea of " société nationale " in English was to say " incorporated and established in the territory of the State ".

79. Mr. FRANÇOIS thought that the foregoing remark was not valid for certain other countries. A number of countries regarded joint-stock companies as vested with a nationality.

80. Mr. HUDSON, to avoid the difficulty, suggested using the words " having national character ".

81. Mr. SANDSTRÖM suggested using the term " organized under the laws of . . .", adding that, according to Swedish law, a Swedish company could be the owner of a ship only if its shareholders were Swedish.

82. Mr. FRANÇOIS mentioned that a large number of countries did not require the directors of the company owning half a ship to be their own nationals. The Commission was free to lay down more stringent rules, although, in the case in point, it was simply a question of formulating existing law.

83. The CHAIRMAN remarked that the rules proposed by Mr. François would, in their existing form, have enabled the *I'm Alone* legally to fly the Canadian flag, whereas the Arbitration Commission had not recognized as valid her claim to that nationality. It seemed to him that if the Commission adopted sub-paragraph (*c*) of the report, it would be departing from the award in that case.

84. Mr. SANDSTRÖM noted that a State would be bound by those rules to consider as foreign a ship fulfilling those conditions.

85. Mr. FRANÇOIS recalled that, at Venice in 1896, the Institute of International Law had gone further and had stipulated that, in order to acquire the right to fly the flag of a State, more than half of a ship must be owned by " 1. Nationals, or 2. a partnership or commandite company in which more than half the partners with personal liability are nationals, or 3. a national joint stock company in which not less than two-thirds of the members of the Board of Directors are nationals. The enterprise must have its head office in the State whose flag the ship is to fly or in which it is to be registered ". (A/CN.4/42, p. 5, mimeographed English text; para. 5, printed French text).

86. Mr. CORDOVA would prefer the nationality of the shareholders to be taken into account.

87. Mr. FRANÇOIS pointed out that their nationality was not known.

88. Mr. CORDOVA replied that it would be sufficient to make it compulsory for all shares to be registered shares.

89. Mr. ALFARO said that any company was entitled to issue bearer shares. The Commission was getting more and more involved in questions of domestic law.

90. Mr. KERNO (Assistant Secretary-General) noted that the Commission was once again confronted with a case which threw into relief the differences in conception between the various legal systems. Principles accepted on the Continent of Europe seemed hardly intelligible to minds trained in Anglo-Saxon traditions. In joint-stock companies, under Continental law, the shareholders yielded in importance to the concept of the company. The nationality of the shareholders was thus a secondary factor, but the State which authorized the formation of the company and regarded it, so to speak, as one of its nationals, always fixed certain conditions; very often it insisted that the head office of the company be established in its territory and that two-thirds or half the directors be of its nationality. Such questions should be left to national legislation.

91. Mr. HUDSON said that that meant that such companies should be organized under the laws of the country whose nationality they bore and should have their head office in that country.

92. Mr. SANDSTRÖM thought that that was a very formalist attitude. Certain countries maintained that the nationality of the shareholders was the principal factor in determining the nationality of the company. Simply to stipulate that the company should be constituted according to the laws of a country and should have its head office in that country was a very liberal provision which would give companies every facility to choose whatever nationality they wished. He noted that other States would be bound to consider a ship as possessing a particular nationality if those requirements were fulfilled by the company to which it belonged.

93. Mr. HUDSON remarked that it was only a minimum requirement. He referred to the following passage from a text which he had proposed on the subject of the nationality of ships:

> " Yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognized by other States ".

94. The CHAIRMAN appreciated Mr. Sandström's difficulty. For instance, other States would have had to acknowledge the Canadian character of a ship such as the *I'm Alone*.

95. Mr. SANDSTRÖM added that some States were more exacting.

96. Mr. FRANÇOIS emphasized, in reply to Mr. Sandström, that it was a question of minimum requirements. The State which gave a ship the right to fly its flag must satisfy itself that the ship fulfilled the requirements in question. Each State was, however, free to go further and lay down stricter requirements without any other State having the right to object. In that case, the other States would not have the right to recognize a ship as having the nationality of the State in question if all those requirements had not been fulfilled.

97. Mr. CORDOVA explained that a case might occur in which nationals of one State founded a company in another State, with its head office too in the other State, and then utilized the nationality of the ship to institute proceedings against their own country. That was what had happened in the case of the *I'm Alone*, the American owners of which had had difficulties with the United States and claimed the protection of the Canadian flag.

98. Mr. ALFARO recalled that, in the case of the *I'm Alone*[6] no attempt had been made to define the right of a State to permit a company to be formed in its territory and in accordance with its laws. If persons took advantage of the laws of a country to form a company which engaged in illegal activities, damage might be caused internationally. The owners of the *I'm Alone* had claimed damages on the grounds of interference by the United States with the activities of the ship, which in fact was engaged in smuggling. The reply to their claim had been that they were not entitled to damages because, though United States nationals, they had made use of the Canadian laws just in order to give their ship Canadian nationality. However, nothing could limit Canada's right to decide how a Canadian company might be set up, provided there was no fraudulent intent.

99. Mr. HUDSON pointed out that the only reference to the *I'm Alone* case in the report was a quotation from Schwarzenberger (pages 4–5).

100. In point of fact, the ship had been recognized as Canadian and, on that ground, the case had been regarded as an international one. Furthermore, the court had awarded more than 100,000 dollars compensation for loss of life among the crew and the United States had paid that sum. It was to be noted, however, that it had awarded no compensation for loss of cargo or for the ship, since, in that case, the damages would have gone to the American owners and that was something the United States Government could not accept. The rule formulated by Mr. François did not conflict with the award in the *I'm Alone* case.

101. He preferred the following formula, which he considered adequate:

> " A joint-stock company organized under the laws of the State and having its head office in its territory ".

102. Mr. FRANÇOIS accepted that wording.

Mr. Hudson's text for sub-paragraph (c) *was adopted.*

After a short intermission, the meeting was resumed at 11.45 a.m.

103. The CHAIRMAN asked the Commission to pass on to the second of the rules formulated by the rapporteur, namely:

> " 2. The Captain should possess the nationality of the State to whom the flag belongs."

104. Mr. HUDSON found it very difficult to decide that a rule regarding the nationality of the master should be included in the articles. A Committee of Enquiry of the International Labour Office had investigated 30 Panamanian ships, a very small proportion considering how many ships had that nationality, and had found that out of those 30 ships, 12 had previously flown the British flag, 2 the French, 2 the Greek, etc., and that of the 30 masters of those ships, 17 were Greeks, 7 Italian, 3 British, 1 Swedish, 1 Estonian, 1 Mexican but not one

[6] *Ibid.*

Panamanian.[7] He did not know whether that sample was representative of the situation in the Panamanian fleet as a whole, but in view of the large number of ships which had recently become Panamanian, he very much doubted whether many of them had a Panamanian master. The situation in the merchant fleets of other countries was similar. If that principle were laid down as a minimum requirement, there would be a complete upset in shipping throughout the world, since a very large number of ships were commanded by foreign masters.

105. Mr. KERNO (Assistant Secretary-General) thought that the underlying idea was that the registration of ships should be a serious formality and not simply a device to obtain the protection of a flag.

106. On page 7 of the mimeographed English text of the report (para. 13, printed French text) was a list of the nineteen States, including the United States and the United Kingdom, which had adopted the principle that the master must possess the nationality of the State under whose flag the ship sailed. Seeing that there were seventy or more countries in the world, that was clearly a minority, but if the merchant tonnage of those nineteen countries were considered in relation to the world total, the percentage was impressive. The practice was therefore widespread.

107. Although Norway, Germany and France did not figure in that list of nineteen countries, both Norway and Germany required that ship's masters should hold national certificates, which led in practice to the same result. France went even further: it required that all ship's officers, including the master, should be French.

108. Mr. FRANÇOIS regarded the nationality of the master as a very important question, since the ship was subject to the laws of the State whose flag it flew and the master was therefore bound to apply those laws in his ship. If he were not of the same nationality as the ship he would not be very familiar with the regulations.

109. With regard to Panamanian ships, Mr. Alfaro had said that they were all subject to Panamanian law and regulations. If, however, those ships had not a Panamanian master and furthermore, as often happened, never entered Panamanian waters, how could the master be expected to apply laws of which he was ignorant? Mr. Hudson had referred to the large number of Panamanian ships. The objection to the number of Panamanian ships was based precisely on the fact that there was only a very frail link between them and Panamanian law, especially where the master was not of Panamanian nationality.

110. Mr. Kerno had drawn attention to the fact that the great maritime powers required the master to possess the same nationality as his ship, and had cited in that context the United States of America and the United Kingdom. He himself could add the Netherlands, which had recently adopted the same rule after a number of unfortunate experiences with masters not of the same nationality as their ship. Moreover, in time of war, the fact that a ship was not under the command of a national might give rise to serious difficulties. Other States had no doubt had the same experience, which was probably why they had adopted the system in question. The case of Panama should not be used as an argument.

111. Mr. YEPES declared himself in favour of the view that the master must possess the nationality of his ship. He thought that that was the law as it existed. It could be seen from the list of countries which had adopted that rule that the greatest maritime powers in the world were included. If it were intended to treat the nationality of ships as a matter of importance, then the Commission should require that the master at least, if not a proportion of the crew, should possess the nationality of the State whose flag the ship flew.

112. Mr. ALFARO was in agreement with Mr. Hudson as regarded rule 2. It would completely upset shipping practice if the rule were suddenly adopted that a master must have the same nationality as his ship.

113. The reason why, in the majority of the Latin-American republics, ships were commanded by masters of various nationalities was that those countries had not had time to train a sufficient number of masters from among their own nationals. He did not consider it would be desirable to adopt a rule on that point which would retard the development of those nations. He recalled the time when the United States had had to employ Swedish and Norwegian masters and ships to carry bananas. That was not so very long ago — in fact only thirty years back. Nowadays, all the ships and all the masters were American. There was no doubt that the list given by Mr. François was an impressive one. Among the nineteen countries were to be found those with the largest merchant fleets in the world but there were still only nineteen countries. Mr. Kerno had pointed out that there were sixty Member States of the United Nations and about seventy States in the world. Nineteen States therefore was less than a third of the total number.

114. It was not a question of international practice but of domestic jurisdiction. The nationality of the master had nothing to do with international relations between States. The fact of a British master being in command of a Panamanian ship was completely irrelevant to the maintenance of good relations between States.

115. It had been maintained by Mr. François that a foreign master could not be familiar with the laws of the flag State. That assertion did not seem to be correct. An Italian master, for example, was required to make himself familiar with Panamanian law and to get in touch with the Panamanian Consul at every port he visited.

116. Reasons were being advanced which were completely unconnected with relations between States. The Commission was considering a question which was a matter of domestic jurisdiction. Only the country of the flag could legislate in such matters. If there were any damage to another State the matter became an international one but that did not arise from the fact that the master of the ship did not possess the nationality of the flag it flew.

117. There was a very important passage in Mr. François' report, which ran as follows:

[7] "Conditions in Ships flying the Panama Flag," *op. cit.*, pp. 74-75.

> "The nationality of the captain and crew should not, according to the Institute, be a condition for acquiring the right to fly a flag." (p. 5, mimeographed English text; para. 5, printed French text).

The members of the Institute of International Law must have had very good grounds in international law for coming to that conclusion.

118. For those reasons, he considered the Commission should not adopt the rule, whether *de lege lata* or *de lege ferenda*.

119. Mr. EL KHOURY reminded the Commission that it was a question of establishing minimum requirements and that, if the latter were not observed, all countries would be bound to refuse to recognize the flag. In particular, if the rule were adopted, when a ship was commanded by a master of a nationality other than that of its flag, the nationality of that ship would not be recognized and that would lead to complications. It would simplify matters if rule 2 were deleted.

120. It was not for the Commission to concern itself with the nationality of the master and it should not compel States to refuse to recognize the nationality of the ship because of the nationality of the master. That would be running counter to a practice followed by many States.

121. Mr. HSU also thought that the rule was too severe. Obviously it was desirable that the master should possess the nationality of the flag and no doubt, one day, all States would have laws to that effect. It was, however, a different matter to lay down such a requirement at that stage. As Mr. Alfaro had pointed out, several countries had merchant fleets but not enough masters for all their ships. At bottom, the nationality of the master did not create difficulties under international law. Another principle should be established.

122. Mr. SPIROPOULOS shared the views of those who had spoken just before him. The important thing was that there should be an economic link between the ship and the country whose flag it flew. It would be going too far to require that the master must be of the same nationality as the ship. That was, after all, a secondary matter. It must not be forgotten that some countries had not sufficient trained staff. The Commission was dealing with minimum rules. States were free to prescribe any further rules they wished.

123. Mr. AMADO was also in favour of deleting the rule. The principle was clearly one recognized by numerous States. The nationality of the master was bound up with the interests of the country. He hesitated however to prevent countries having foreign masters to command their ships. The historical reasons which had led certain States to ensure that the masters of their ships were their own nationals were well known. He would like the principle to be universally recognized but the Commission would be going too far if, at that stage, it laid it down as a minimum requirement.

124. Mr. SANDSTRÖM was hesitant for reasons of logic. The condition was independent of the question of the nationality of the ship, but it was desired to prescribe it because the same result could not be obtained by any other condition. He supported Mr. Hudson's view.

125. Mr. FRANÇOIS observed that there was scant support for the provision. He wished, though without any great hope of success, to stress the importance of the rule and could not agree that, from the logical point of view, it had no place in the code. Its reason for being there was that it was felt that there should be a close link between the nationality of the ship and the law of the State.

126. According to Mr. Spiropoulos, it was the economic link that was important. He himself did not think that it was only the economic link. It was very important that whoever commanded the ship should be familiar with the law of the State whose flag it flew and one could not expect a foreign master to apply properly the law to which his ship was subject. He therefore considered that the nationality of the master was very important and that it would be of great value to mention as a minimum requirement, in the rules under consideration, that the master should possess the nationality of the flag State.

127. There was of course the argument that certain States could not recruit masters of their own nationality. He wondered whether there were any good reasons for going out of their way to help such States whose merchant fleets had grown to abnormal proportions for very special reasons.

It was decided by 8 votes to 3 to delete rule 2.

CHAPTER 2: PENAL JURISDICTION IN MATTERS OF COLLISION

128. Mr. FRANÇOIS said that he had very few general remarks to offer. The question was, however, one which deserved some attention. If the Commission adopted the proposal he submitted (p. 16, mimeographed English text; para. 31, printed French text), it would be departing from the view taken by the Permanent Court of International Justice.[8] Admittedly it had done that before, but in different circumstances. In the case in point, a decision opposed to the judgment of the Court was justified by the very small majority by which that judgment had been reached, by the time which had since elapsed, and, finally, by the criticisms which that judgment had aroused. The Commission should nevertheless consider whether it wished to go against a judgment of the Court.

129. Mr. KERNO (Assistant Secretary-General) appreciated the gravity of the situation. He was sure that all the organs of the United Nations and all jurists would always do everything in their power to enhance the prestige of The Hague Court and it was certain that the Commission would not lightheartedly arrive at any solution other than that of the Court in the *Lotus* case.

130. Mr. AMADO said he was convinced that the Court would not give the same judgment at the present day.

131. Mr. HUDSON thought that the Court's decision in the *Lotus* case had been reached as a result of the President's casting vote but one of the judges, Judge

[8] Judgment in the *Lotus* case, 7 September 1927. Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 10.

J. B. Moore, who had expressed a dissenting opinion, had agreed with the Court's judgment on the main point at issue. Out of twelve judges, therefore, seven had voted in favour of the judgment and five against.

132. Mr. FRANÇOIS recalled that, the previous year,[9] the Commission had decided to study the problems of international law raised by collisions. It had considered it important to determine which court was competent to give judgment on criminal liability arising out of collision.

133. Mr. SPIROPOULOS said that since the Commission had, the previous year, requested the rapporteur to study the matter, the latter had been right in submitting his conclusions. He made no secret of the fact that he himself did not at all approve of the idea of including the question in the code of the high seas. It had nothing to do with codification of the régime of the high seas but was a matter of domestic jurisdiction. The act having been committed on the high seas, the question was whether it came within the criminal jurisdiction of a State. If such an act had been committed on land, they would not be dealing with it. If it had not been for the *Lotus* case, the matter would never have been discussed.

134. The judgment in the *Lotus* case had provoked criticism and it had been felt that a principle must be adopted on the question. Personally, he thought that the question whether the judgment in the case had been good or bad was a separate one. He would repeat, the text should not be included in the code of the high seas, since what was involved was a question of the extension of the criminal jurisdiction of a State. The problem could be examined in connexion with something else.

135. He was not sure that the judgment of the Court had in fact been at fault. Originally States enjoyed full jurisdiction and the latter had only been limited by the progress of international law. It had not been possible to prove the existence of any rule of international law limiting the jurisdiction of States. The Turkish court had, therefore, in the absence of any provisions limiting its competence, been right in punishing the author of the damage.

136. He did not believe that the rule proposed by the rapporteur existed. Furthermore, the Commission was not bound by that rule, even if it did exist. The Commission was codifying and if it judged a rule to be bad, whether recognized by the Court or not, it could set it aside.

137. Mr. HUDSON said that, if a provision similar to the text proposed by Mr. François were adopted, the Commission would be placing an obstacle in the way of the application of the penal codes of a number of countries. He believed the Austrian Penal Code was the first to include a provision on the lines of that of the Turkish Code. It had been followed by the Italian Penal Code of 1930, by the Turkish Penal Code and by the penal codes of a number of other countries. The Italian Penal Code enacted that Italian courts were competent to judge any person who had committed, in any part of the world, an act prejudicial to an Italian. It was a sweeping provision. He did not know, however, of any principle of international law which was violated by such provisions in penal codes.

138. He readily understood that a maritime body solely interested in maritime law, such as the International Maritime Committee, should study the question without concerning itself with penal codes. The Commission could not do so. It must realize that, if it adopted the text, it would be placing an obstacle in the way of the application of those penal codes. He was not sure whether, in that particular situation, the establishment of such an obstacle was called for.

139. The majority of the States of northern Europe had received the Court's judgement in the *Lotus* case with consternation. If the Commission adopted a provision such as that proposed by the rapporteur, it should add a comment noting the criticism of the judgment in the countries of northern Europe, and indicating, at the same time, that the provision was adopted for the future. He would not like it to be said that the majority of the Court had been mistaken. It was not for the Commission to say so and it would be bad for the prestige of the Court if it did. The comment should indicate that the Commission was not in a position to criticize what the Court had decided in 1927. It would thus lay down a principle for the future.

140. The CHAIRMAN recalled that Judge Moore had expressed a dissenting opinion.

141. Mr. HUDSON confirmed that Judge Moore disagreed strongly with the decision because of the Cutting case,[10] in which he had supported the Mexican argument.

142. Mr. LIANG (Secretary to the Commission) noted that some members of the Commission had expressed the fear that the latter might take a decision criticizing, by implication, the judgment in the *Lotus* case. Such fears seemed to him to be somewhat exaggerated. The judgment in question had been criticized both in maritime circles and by lawyers.

143. The *Lotus* case, had, in his opinion, been settled by Professor Basdevant, for the French, who had endeavoured to prove the existence of a principle of international law prohibiting the application of the Turkish Penal Code. The Court had not accepted that view but, on the other hand, it had made no attempt to find the law applicable to the question. Charles de Visscher had written in that connexion:

> "The case brought before the Court offered it a chance to give some guidance towards the solution of conflicts of criminal jurisdiction by basing its decision on precedents which in our opinion were clear enough. The Court missed that chance." (A/CN.4/42, p. 15, mimeographed English text; para. 30, printed French text).

144. Any formulation by the Commission based on international law would seem to be justified by that quotation from C. de Visscher. The Commission might

[9] See summary record of the 64th meeting, paras. 104–113.

[10] See "Cutting Case", "Mexico, Bravos District Court of Chihuahua, 1886", in M. O. Hudson, *Cases and other Materials on International Law*, 2nd ed., St. Paul, Min, 1936, pp. 575–580).

also formulate the principle and say that it was not sure whether any rule of international law existed but that it wished to submit that rule. It was clear that, whatever the Commission did, it might appear to be criticizing the Court, but that fear was perhaps exaggerated.

145. Mr. SANDSTRÖM said that the reasons given in the report against the judgment in the *Lotus* case were weak. On page 9 of the mimeographed English text of the report (para. 21, printed French text), it was stated that:

> "This decision makes ships' officers liable to prosecution in a great variety of countries. Furthermore, if the captain is arrested, the ship itself is arrested for the purposes of local enquiry, and if he is imprisoned the ship is immobilized till arrangements have been made to replace him. Thus, quite apart from inconsistencies of judgment, the security of navigation and international trade is prejudiced."

The passage stressed the fact the ship might be immobilized but if damages could be claimed, it would not only be the imprisonment of the master which would entail the immobilization of the ship, the latter itself might be arrested.

146. The CHAIRMAN noted that Mr. Spiropoulos was alone in proposing to go back on the decision taken the year before. He inquired whether the Commission wished to deal with the question of penal jurisdiction in matters of collision.

It was decided by 10 votes to 1 to deal with the question

147. The CHAIRMAN declared that it was quite clear that if the Commission adopted the rule proposed by Mr. François it would not necessarily be saying that the Court was wrong. It would be suggesting that, in future, it would be preferable to adopt such a rule. It was a question of the progressive development of law. Numerous criticisms had been made of the judgment in the *Lotus* case and particular importance should be attached to the opinion of the seafaring community.

148. Mr. HUDSON doubted very much whether it was desirable to refer in the rule to any "other accident of navigation". He did not know what that term could imply. The case the Commission had in mind was that of collision on the high seas between ships flying different flags. He wondered what sort of accident the International Maritime Committee had in mind when it had used the words: "or other accident of navigation."

149. Mr. CORDOVA, Mr. FRANÇOIS and Mr. KERNO, (Assistant-Secretary General) suggested, in turn, collision with an iceberg, running aground and deliberate stranding.

150. Mr. HUDSON did not want to concern himself with such accidents. He could conceive of an accident of navigation due to failure to observe international rules compelling another ship to carry out some manoeuvre and damage its engines thereby. He thought it better for the Commission to confine itself to collisions between ships flying different flags.

151. Mr. FRANÇOIS thought that was too limited a view. The Commission should also envisage cases of loss of life arising out of an accident attributable to the master of a ship, without any collision having taken place.

The meeting rose at 1 p.m.

122nd MEETING

Wednesday, 11 July 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) *(continued)*

CHAPTER 2: PENAL JURISDICTION IN MATTERS OF COLLISION *(continued)*

1. Mr. HUDSON was not convinced that the changes proposed in Mr. François' text to what he felt to be the law were either necessary or desirable. Personally he shared the view of those judges of the Permanent Court of International Justice who had voted for the judgment in the *Lotus* case.[1] He was aware that that judgment had been criticized by certain writers, but he suspected that they had merely been repeating what Mr. Brierly and Mr. Charles de Visscher had written. Among writers in English, the great prestige surrounding the name of Lord Finlay had played a decisive part.

2. The amount of criticism which had come from shipping circles was certainly impressive, but the case touched on a broader issue, namely State jurisdiction in criminal matters, and shipping circles did not take that into consideration. He himself saw no reason to find fault with the general provisions to be found in, for example, the Italian, Greek or Swedish codes.

3. If the Commission accepted Mr. François' way of thinking, it would state that the present instance constituted an exception to the general rule in regard to juris-

[1] Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 10.