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Summary record of the 122nd meeting

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

Extract from the Yearbook of the International Law Commission:-
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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.

diction. To demonstrate that it was necessary and desirable, Mr. François had shown that ships' officers were liable to be brought before the criminal courts in many countries. He himself did not know whether in practice that happened frequently. He hesitated to state that a new principle of law should be formulated creating an exception to the general rule in regard to jurisdiction. He would be glad to have Mr. Brierly's opinion.

4. The CHAIRMAN disagreed entirely with Mr. Hudson. It would be most unfortunate if the Commission were to encourage the extravagant claims to universal jurisdiction made by certain codes. He did not feel either that the Commission was called upon to answer yes or no to the question, or that the rule formulated by the Rapporteur established an exception to a rule of international law. It was feasible to tackle the subject without declaring that the Permanent Court of International Justice had been in the wrong. The Commission might state that, whatever the law in force at present it considered that the law in the future should be as formulated by it. He attached great importance to the views of shipping organizations, whose members had realized the danger with which they were threatened as a result of the judgment in the *Lotus* case, if the rule laid down by the Court were to become the general rule. He would be content for the Commission to adopt a text on the lines of that of Mr. François.

5. Mr. HUDSON recalled that a majority of the Court had decided that no rule of international law had been violated. He did not maintain that the codes in question represented international law, but no international law provision forbade countries to declare their courts competent in the matter, as Turkey had done.

6. The CHAIRMAN argued that there certainly was a rule of international law which forbade action such as that taken by the States which had issued those codes.

7. Mr. HUDSON made a distinction between a code claiming universal jurisdiction and one which provided for the jurisdiction of the State where the interests of that State were impaired by an act committed outside its territory.

8. The CHAIRMAN said that the Italian code went further than that. It covered every Italian national to whom injury was done abroad. The United Kingdom would never recognize any such jurisdiction.

9. Mr. SPIROPOULOS said he would like to add to what he had said the day before,[2] that he was prepared to accept the Commission's decision; but he did not agree with the Chairman's view. The penal codes in question did not go too far. In the eyes of continental jurists, the provision seemed quite natural. There were of course differences in that respect between the continental countries and the Anglo-Saxon countries. The latter extradited their nationals, on the grounds that only the court in the place where a criminal act had been committed had jurisdiction. The continental countries did not. If a Greek was injured abroad and the person responsible for the injury entered Greece, it was quite normal that he should be arrested and tried by a Greek court.

10. He did not consider that the relevant provisions of a number of national codes were at variance with international law, which did not contain any principle preventing a State from extending its jurisdiction in that direction. For shipping circles the rule might be awkward. In the event of collision, the ship's master would wish to continue the voyage, but he could not avoid being held responsible. Moreover, his ship could be seized. It was certainly unpleasant for a master to be arrested, but the rule was based on historical precedent; why should it be changed for the benefit of a handful of people?

11. If the Commission decided that it was desirable to establish a new rule, he was prepared to examine it and possibly he would change his mind.

12. Mr. FRANÇOIS said he had found Mr. Hudson's remark of the previous day very much to the point, namely, that the task in hand was not to criticize the Court's decision, but to establish a rule applicable in the future.[3] That was the job the Commission must tackle. Its terms of reference were not merely codification, but also the progressive development of the law.

13. Most of the parties concerned, and most jurists as well, considered that the rule in regard to jurisdiction recognized by the Court was not applicable to collisions on the high seas. There was no call for considering whether the principle of international protection of nationals should be applied in a general way. What the Commission had to do was to consider the feasibility of drawing up, within the framework of the progressive development of the law relating to the high seas, the rule he had proposed and which had been advocated by shipping circles. Incidentally the Court's decision had greatly worried the shipping people.

14. Mr. AMADO observed that the Chairman had been one of the writers who had contested the judgment in the *Lotus* case. He had been very surprised to hear the Chairman's lucid criticisms referred to as slight. Admittedly a considerable body of qualified opinion had supported The Hague Court judgment too.

15. Mr. Hudson was always anxious to hear the views of specialists on every subject, but not in the present case, where specialization could not be improvised. Why should the opinion of the experts be rejected now when it had been invoked in other matters?

16. Mr. François' text was a sound one, and he would vote in favour of it.

17. Mr. EL KHOURY said that, on re-reading Mr. François' report, he noticed that the criticisms of the Court's award were based mainly on the opinion of the International Maritime Committee, whose members were experts on shipping affairs, but not legal experts. It was natural enough that ship's masters should be reluctant to be tried in foreign countries for any mistakes they might have made in navigation. But that was not a valid argument. Shipping circles recommended that a ship's master should be judged by a court in his own country; and in so doing they were defending their own interests.

[2] Summary record of the 121st meeting, paras. 133–136.

[3] *Ibid.*, para. 139.

18. The place where a crime had been committed was, of course, the proper place for the trial of the accused party. In the present instance, where a crime had been committed on the high seas, the usual principle could not be applied. Hence the best plan would be to have the accused tried by a court in the country of the victim. He was not in favour of the course advocated by Mr. François.

19. Mr. CORDOVA considered that the courts in the country where the criminal was apprehended had jurisdiction. He saw no reason why sailors should be brought before courts in their own countries. It was going back to the days of the special courts established to try special crimes and to the capitulations system. Shipping circles wanted to carry the jurisdiction of their own countries round the world with them.

20. Mr. FRANÇOIS, referring to Mr. el Khoury's implication that only circles which had an axe to grind had been opposed to the Court's decision, pointed out that the publicists had also criticized it. Names like those of Gilbert Gidel, Albert de La Pradelle and Charles de Visscher, etc. could be mentioned — writers who had not been influenced by shipping interests, and who had criticized the Court's award on general principles. The impression must not be given that it was only those with something to gain who had advocated that persons responsible for collisions at sea should be judged by the courts of the country whose flag their ship wore.

21. The Commission should not under-estimate the interests of shipping on the grounds that legal principles must come first. International shipping was a matter of vital importance, and to hamper it would be doing a disservice to mankind.

22. Mr. SPIROPOULOS noted that, in Mr. François' opinion, international trade might be hampered in that way. But after all, trade went on in spite of the principles of criminal jurisdiction laid down in certain codes.

23. At Mr. Hudson's request, Mr. SPIROPOULOS read out the following paragraph from the report (A/CN.4/42, p. 14, mimeographed English text; para. 29, printed French text):

> "As far as the Rapporteur is aware, the Court's decision in the *Lotus* case has not encouraged other States to prosecute in respect of collisions on the high seas officers or members of the crews of ships sailing under a foreign flag."

24. In the event of a collision on the high seas, the person solely concerned was the master or officer in charge, and the question was whether the officer in question was to break off his course and make for a port in the country of which a national had been killed, or whether he should return to his own country to stand trial. As stated in the report, no complication had arisen. If there were sound reasons for so doing, the interested State would try the accused parties.

25. Mr. YEPES supported Mr. François' conclusions. All the pros and cons had already been advanced. The views of those who were against Mr. François' proposal appeared to have been influenced by the judgment of the Permanent Court of International Justice, which should not be accepted unreservedly. In the first place it had been given only by the President's casting vote, and anyway, the authority of the Court was no argument for adopting a course contrary to that proposed by Mr. François. All the leading authorities on international law had come out against the Court's award. The French Government representative, Mr. Basdevant, who was now President of the International Court of Justice, had contested the majority argument and almost won the day with purely scientific reasoning. Another judge of the International Court of Justice, Mr. de Visscher, had expressed an opinion which differed considerably from that of the Permanent Court of International Justice, when he wrote as follows:

> "It would perhaps be hard to find in all the annals of international arbitration a judgment betraying such profound disagreement between the judges. The Court's ruling leads to consequences that show the weakness of its system and entail unfortunate practical results." (A/CN.4/42, p. 15, mimeographed English text; para. 30, printed French text).

26. The reason why the Court had decided against the principle now upheld by Mr. François was simply and solely because — as was explained by Judge Moore — it had been unable to find any such principle in international law current at the time. Subsequently, a principle of law had been established on the authority of all the most eminent writers on international law, who had denounced the Court's award, and of all shipping circles, who were after all the people best qualified to assess the problem. He would vote in favour of Mr. François' proposal.

27. Mr. FRANÇOIS said it would be well to consider exactly what the problem was. It was not a question of murder or manslaughter. Collision was a result of negligence, and it was invariably very difficult to decide whether the master of a ship involved in a collision had committed a punishable offence. Hence there was no strong reason against leaving the matter to the judges in the country of which the master was a national rather than to those of the country of the ship rammed or of the victim of the accident. Hitherto the question had not given rise to any difficulty, precisely because the *Lotus* case had aroused so much criticism that States had been reluctant to legislate in conformity with the Court's award. If, in the face of that, the Commission declared that the award in the *Lotus* case was entirely in harmony with international law, there was the danger that States might review their normal practice in such matters.

28. Mr. SPIROPOULOS said he had never maintained that the Commission should adopt a course different from that recommended by the Rapporteur. What he had said was that it should leave the question aside as being a matter for specialists in maritime law. Generally speaking, works on international law did not deal with the question of the criminal jurisdiction of States; the award of the Permanent Court of International Justice had, however, provided writers with an opportunity of giving their views. But the Commission's field was the codification of the law relating to the high seas, and it

had very cogent reasons for leaving aside a problem of criminal responsibility.

29. The CHAIRMAN reminded Mr. Spiropoulos that at its previous meeting the Commission had decided to examine the problem.[4]

30. Mr. SCELLE was afraid that at the present stage of international relations the question could not be settled by mere logic. The very reason for the present lively discussion in the Commission was that there was a feeling of mutual suspicion between the country whose jurisdiction would ordinarily be involved and the country which might intervene. There appeared to be no solution to that particular problem. Obviously the crime, being committed on the public international ocean highway, might be regarded as an international crime, and the punishment for it placed in the hands of an international jurisdiction. But such a procedure was impracticable as the law stood at present, and it seemed hardly likely that the situation would be more favourable in the near future. Hence the best course was to choose the lesser evil.

31. The rule of law in force prior to the award in the *Lotus* case derived from the fact that shipping on the high seas had been carried on by the States best able to carry it on. It was very much in the interest of those countries to see that shipping proceeded efficiently; hence it was reasonable for them to claim that a privilege should be maintained in their favour. It was after all a privilege. He could well appreciate the anxiety to have that privilege maintained, and he thought it was in the interest of the international community to take a sympathetic view.

32. There was of course something to be said for the opposite view, which was based on the general principle of equality amongst States; but the criticisms levelled against the award arose from the fact that their authors considered that there was no such equality in fact. Collision involved an offence, and most of the critics started out from the principle that such offences would be better judged by certain States which had greater competence than others in shipping matters. From the point of view of the absolute, theoretical equality of States, it would amount to privilege. He was in favour of maintaining that privilege until such time as the international community had evolved, and recourse could be had to a tribunal which was both international and had unquestioned jurisdiction. The Rapporteur's recommendation should be accepted, even though logically it hardly seemed satisfactory.

33. He supported Mr. Basdevant, not because the latter had been the French Government's representative, but because he had argued that custom could evolve from the absence of action. There was no doubt that at the time when the issue came before the Court, the majority of States had recognized the tendency of local jurisdictions to hold aloof in such cases. That was a perfectly tenable view and it strengthened Mr. François' conclusions.

34. Mr. SANDSTRÖM thought Mr. Scelle had put the problem admirably, but he doubted whether any such privilege existed. The judgment in the *Lotus* case denied any such privilege.

35. Mr. SCELLE replied that the judgment had been mistaken in denying it. Moreover, it had been almost a victory for the losing side, as the voting had been six for and six against.

36. Replying to a remark by Mr. HUDSON that the result of the voting had actually been 7 to 5, Judge Moore being in agreement with the Court on the principle involved, he said that that did not greatly alter the situation.

37. Mr. SANDSTRÖM said that the problem had been solved by giving the accused party the benefit of the doubt. But the interest of the community generally must be taken into consideration too; and that demanded the punishment of the person responsible for the accident. He was not sure that the accused person should be shown favour.

38. Mr. HSU said that Mr. Scelle's argument struck him as the most acceptable. The type of crime in question should be brought before an international court. Until such a court existed, there were two distinct principles to be considered. It must be decided which course was preferable. So far as he was concerned, the rule recommended by Mr. François was easily preferable, and he would vote in favour of it.

39. The CHAIRMAN put to the vote the question whether the Commission wished to reject or to adopt the principle laid down by Mr. François (A/CN.4/42, p. 16, mimeographed English text; para. 31, printed French text).

There were 6 votes for and 6 against. Mr. François' principle was therefore not adopted.

40. Mr. HUDSON said that the issue was whether the Commission wished to lay down a new rule of international law. In the *Lotus* case, the Court had decided that at that particular moment there was no provision in international law to prevent Turkey from claiming jurisdiction.

41. Mr. EL KHOURY also pointed out that the Court's decision was a negative one. He was convinced that there was no new rule of law. One might very well feel disposed to establish one, but the Commission had just concluded that it was not competent to do so. He supported Mr. Spiropoulos in asking the Commission to put the question aside and postpone it until the next session.

42. Mr. HUDSON could not get a clear picture of the best way of voting to ensure that there should be no more split votes. He did not want his vote to tie the Commission to pursuing the discussion of the issue.

43. He could not accept the arguments put forward by Mr. Scelle, whose conception of the problem was different from his own. In a number of countries there were laws governing criminal jurisdiction which had not given grounds for protest by other States. They existed, and it could not be said that they were bad. The fact that such laws existed in the world did not justify the argument that international law was evolving in the direction of Mr. François' proposal. At the same time, he was prepared to consider whether it was desirable to proceed

[4] *Ibid.*, para. 146.

in that direction, and he was willing to be convinced, if sufficiently good grounds were forthcoming, that the master of a ship colliding with another should be treated differently from the way the predominant trend in criminal jurisdiction suggested. It was not the equality of States or general criminal jurisdiction that was at issue, but the special case of collision on the high seas. Mr. Scelle's argument, based on the way certain States had sent out navigators to the four corners of the earth, was certainly very persuasive, but the interests of States whose nationals were victims of collisions must not be forgotten.

44. He was anxious that his vote should not help to divide the Commission. If it were felt that a new rule should be established, he would vote in favour of that decision.

45. He drew attention to the following passage in the report (p. 13, mimeographed English text; para. 28, printed French text):

> "The International Maritime Committee in 1937 requested the Belgian Government to convene a diplomatic conference in order to have the principle advocated in the resolution adopted by way of convention. For reasons having nothing to do with the merits of the proposal, the Belgian Government has not yet complied with this request."

Possibly the diplomatic conference referred to would be in a better position to draft such a rule. He would be glad to have his colleagues' views on that. Possibly the Commission's terms of reference entitled it to anticipate the decision of such a diplomatic conference. Fourteen years had elapsed since that decision was taken by the International Maritime Committee, whose authority he fully recognized. It was a question which had given much food for thought. It might perhaps be a good thing to recommend that the diplomatic conference in question be convened to deal with the Commission's proposal.

46. Mr. SCELLE thought there was much to be said for Mr. Hudson's observations. There was no doubt that the question whether any custom existed merited discussion. He, personally, thought it did exist, but it was no more than a personal conviction. He was inclined to favour Mr. François' proposal. If the Commission merely turned down that proposal, it would be getting nowhere.

47. He did not believe in the equality of States. For him, a State's importance was a matter of relative status in the various spheres, historical, cultural, etc. The notion of absolute equality among States led to chaos and nothing more. The matter under discussion was a case in point. States would decide to act as they thought fit, just as Turkey had done. To solve the problem by bringing the party responsible for a collision before an international tribunal was impracticable; but the procedure recommended by Mr. Hudson was feasible — a diplomatic conference could be convened. He feared, however, that such a conference would produce no results, as had been the case with the Codification Conference held at The Hague in 1930. The Commission might make a request to that effect in the report, but he did not think the request would achieve any positive result.

48. The best thing to do would be to continue to follow the practice established over the years by the States with most experience in shipping matters. That was the best plan — or perhaps the least unsatisfactory.

49. Mr. CORDOVA; referring to Mr. Scelle's disbelief in the equality of States, said that the Commission had already taken a decision on that point in the declaration on the rights and duties of States. The equality of States from the legal standpoint was a fundamental principle. True, the present issue was a very special one, and shipping was hampered by the fact that crews might be subject to a variety of laws of which they were ignorant; but he did not feel that it was fair to establish a capitulations system in respect of sailors, which constituted an exception to the general rules of jurisdiction.

50. He would throw in his lot with Mr. Hudson. The best solution was to state that the Commission proposed to wait until the Belgian Government convened the diplomatic conference.

51. Mr. ALFARO explained his reason for voting against Mr. François' proposal. The decision taken by the Commission was bound to be regarded as either an expression of customary law, or as progressive development of international law. In regard to customary law, obviously there was no decided opinion either way throughout the world. As to the progressive development of international law, Mr. François' text did not seem to him sufficiently acceptable to warrant its being adopted, and he had therefore voted against it. The only possible procedure was to set up an international tribunal. It must be borne in mind too that collision was nothing more than a matter of negligence, and indeed was often unavoidable so that the utmost that could be alleged was that the captain had not taken due care.

52. The Commission might express a wish for an international jurisdiction to be set up, and he would support any such decision. But he certainly could not accept a proposal which was not obviously and fully satisfactory, either as a statement of what was the customary law or as a measure for the progressive development of international law.

53. Mr. FRANÇOIS said that he had inquired why the Belgian Government had not convened the conference advocated in 1937. He had been given the answer that it had been decided to wait until other subjects were ripe for discussion. Actually, at the present moment the conference would only be able to deal with the question of collision. When a diplomatic conference was convened, there would still be the same difficulties in the way of a convention. States would, in all probability, decline to sign the convention, and in the circumstances that might create a dangerous situation. The States unwilling to sign would be those which did not possess large merchant navies; and it was precisely those States which constituted the major peril to shipping as lacking experience of navigation, and which would wish to punish those responsible should any of their nationals be killed owing to an error in navigation. The countries with large merchant navies were in a better position to judge such

cases than States lacking experience of the problems involved. He was by no means sure that, from the point of view of justice, it was preferable to allow an accused party to be judged by the latter than by States possessing such experience.

54. He drew the Commission's attention to what Professor Gidel had written:

> " In fact the *Lotus* case shows the advisability of governing competence in the matter of collision by definite rules (conventions or codification) and, perhaps better still, of giving jurisdiction in this matter to special courts," (A/CN.4/42, p. 14, mimeographed English text; para. 30, printed French text).

Thus Professor Gidel had had in mind an international tribunal — the ideal solution. The Commission might decide that the question should be studied with a view to the possibility of recommending the creation of an international jurisdiction. Pending the establishment of such a jurisdiction, he still favoured the solution he himself had proposed.

55. Mr. SANDSTRÖM thought that the importance of the problem had been overstated. There had been no case since the *Lotus* affair, which was some 25 years old; and Mr. Hudson had rightly drawn attention to the passage in which the Rapporteur stated that the court's decision had not encouraged other States to prosecute in similar instances. Hence, following the vote just taken, the question might be left where it stood.

56. Mr. HUDSON said he had been looking carefully at the list (p. 13, mimeographed English text, para. 26, printed French text, of the report) of organizations which had concurred with Mr. François' own opinion. He noticed that in the case of Italy, the organization was the Corporation of Shipping and Aviation Personnel. He would be interested to know, in the event of the recommendation being approved, what the repercussions would be on the responsibility of aviators, and also whether the International Civil Aviation Organization had any legislation in mind to cover aviators. He did not think the Commission could deal with the question until it knew what the position of aircraft pilots would be. Suppose, for example, that a pilot landing at Cointrin (Geneva) were charged with negligence while flying over Italy en route from Damascus. The Civil Aviation Convention contained no provision covering such an eventuality. He was under the impression that the Legal Committee of the International Civil Aviation Organization had studied the question, but he did not know what the exact position was, and he wondered whether the Commission agreed with him that the responsibility of aviators should be borne in mind.

57. Mr. FRANÇOIS fully appreciated the significance of Mr. Hudson's remarks, and in that connexion reminded the Commission that what it was engaged upon was nothing more than a first reading. He suggested that it might leave on its agenda for the next session the question of penal jurisdiction in matters of collision, instructing him, as Rapporteur, to go rather more deeply into the question in connexion with parallel questions affecting civil aviation. Discrepancies between the relevant regulations governing navigation by sea and by air respectively must be avoided.

58. Mr. SPIROPOULOS was not in favour of Mr. François' suggestion that the question of penal competence in matters of collision be left in abeyance for the time being. The Commission had covered a good deal of ground in its discussions; and he suggested that its report should mention that the question had been examined, that various members had expressed doubts, and that on the whole the Commission had been of the opinion that an *ad hoc* conference of shipping experts and jurists should be convened with a view to preparing a convention. A recommendation on those lines to the General Assembly would surely have a favourable reception. The Assembly would take whatever action it thought fit on the recommendation.

59. Mr. AMADO pointed out that collisions on the high seas were frequent. Prior to the *Lotus* case, collision cases were settled in accordance with a traditional practice existing from time immemorial. The award in the *Lotus* case had deviated from that practice, and had consequently aroused public opinion. It had given rise to heated discussion, but since 1927, when the award was made, no further case appeared to have been settled by the same procedure as in the *Lotus* case.

60. Mr. CORDOVA was prepared to support Mr. Hudson's proposal. He wondered what sort of conference the Belgian Government proposed to convene. It should surely include representatives of every country, not merely those with shipping interests.

61. Mr. SPIROPOULOS agreed with Mr. Amado that collisions had always been a common occurrence, but more often than not there was no way of ascertaining how the question of criminal responsibility was dealt with. Since the *Lotus* affair, was the master of the ship which caused the collision arrested? Did the States which had advocated international regulation apply that principle? The only reason why the problems had been brought to public notice in the *Lotus* case was because France had taken the case to the Permanent Court of International Justice.

62. The CHAIRMAN, answering Mr. Spiropoulos' questions, said that it was rare for cases of collision to give rise to criminal proceedings.

63. Mr. HUDSON drew attention to article 8 of the Treaty on International Penal Law signed at Montevideo on 19 March 1940,[5] the preparatory work for which went back to the conference held at Montevideo in 1902. The treaty had been signed by a number of Latin-American States. The article in question stipulated that " crimes committed on the high seas, whether on board airplanes or on men-of-war, or on merchant ships, must be tried and punished according to the law of the State whose flag the vessel flies ". Pilots of aircraft had been placed on the same footing as the captains of merchant vessels. Hence, the Commission could not disregard the effect its decisions were bound to have on the development

[5] See M. O. Hudson, *International Legislation*, vol. VIII, pp. 482 *et seq.*

of aviation law, nor could it disregard any such development in connexion with its own studies.

64. Everyone was aware of the complications which arose from the use in ships of equipment which infringed a patent, when the ships put into port in the country where the patent had been taken out. Those complications had led to measures for the protection of industrial property being taken in respect of nautical equipment,[6] and the measures had been applied to aviation law in the Convention on Civil Aviation signed at Chicago on 7 December 1944.[7] That example, to which others could be added, should be sufficient demonstration that maritime law and aviation law were closely bound up.

65. It seemed likely that the Legal Committee of the International Civil Aviation Organization had gone into the question of criminal responsibility of aircraft pilots.

66. Mr. LIANG (Secretary of the Commission) did not think the general rule relating to crimes committed on board ships, as laid down in the Treaty on International Penal Law just mentioned, had any connexion with the question of collisions. As to aircraft collisions, they seldom involved the trial of pilots on criminal charges. He was inclined to think that aviation law was derived from different principles and followed a different procedure from maritime law.

67. Mr. CORDOVA wondered whether the Commission should not consider the advisability of merely recommending that a diplomatic conference be convened. A decision in favour of that course would automatically exclude the possibility of solving the problem of substance.

68. The CHAIRMAN and Mr. HUDSON pointed out that that would not necessarily be the case. Any decision on the substance of the issue taken by the Commission would be valuable for future reference and could be used as a basis for the new report to be examined in 1952.

69. Mr. HUDSON further argued that the object of the Commission's deliberations was to provide the Rapporteur with a series of directives. He was in favour of the Commission voting again on the principle laid down by Mr. François in his report. He was prepared to abstain so as not to stand in the way of a vote by six members of the Commission in favour of continuing the examination of the problem.

70. Mr. SPIROPOULOS said that he would do the same.

71. The CHAIRMAN again put to the vote the principle embodied in the Rapporteur's recommendation (A/CN.4/42, p. 16, mimeographed English text; para. 31, printed French text).

Mr. François' principle was adopted by 6 votes to 4, with 2 abstentions.

72. The CHAIRMAN remarked that the second vote had been taken at the request of members who had voted against the principle the first time. It was an unusual vote, but he noted that none of the members of the Commission challenged it.

73. The CHAIRMAN put before the Commission a text submitted by Mr. Hudson to replace that of Mr. François. It read as follows:

> " In the event of a collision on the high seas between vessels flying different flags, the master or any other person in the service of either vessel may be prosecuted in penal or disciplinary proceedings only before the courts of the State whose flag that vessel was flying at the time; the arrest or detention of the vessel may not be ordered as a penal sanction by the authorities of any State other than that of the vessel's flag."

74. The main alteration which the new proposal made to the Rapporteur's text was the deletion of any reference to accidents of navigation.

75. Mr. HUDSON pointed out further that in his text he had cut out the expression " wholly or partly responsible ", first of all because it was not clear from the French text whether the words " *qui est*" referred to both the master and any other person, or only to that other person, and secondly because the use of the expression appeared to dispose of the question of responsibility in advance, before any inquiry or prosecution had taken place. He had replaced the words " at the time of the collision or other accident of navigation " by the words " at the time ".

76. He had no strong objections if the Commission felt that the words " or other accident of navigation " should be kept.

77. He had inserted the words " between vessels flying different flags" so that collisions between two vessels flying the flag of one and the same country would not come under the rule.

78. Mr. EL KHOURY argued that neither Mr. Hudson's nor Mr. François' draft covered possible conflicts of jurisdiction between the courts of various countries. Since the conduct of the masters of the two vessels would be subject to the jurisdiction of different countries, it might well happen that two courts would regard one and the same case differently and make contradictory awards. It seemed essential that there should be an international body to settle any conflicts of jurisdiction. In such instances, the procedure laid down in article 7 of the convention prepared by the commission appointed by the Oslo Conference of the International Maritime Committee in 1933 (see A/CN.4/42, p. 11, mimeographed English text; para. 22, printed French text) might be followed. That article stipulated that: " In the event of a conflict of jurisdiction between the courts of various States, each of the States . . . shall be at liberty to submit the conflict to the Permanent Court of International Justice . . ."

79. He drew the Rapporteur's attention to the shortcoming, and suggested that he remedy it when drafting his new text.

80. Mr. HUDSON said he did not agree with Lord Finlay's opinion in the " Lotus " case (A/CN.4/42, p. 15, mimeographed English text; para. 30, printed French text) that " Criminal jurisdiction for negligence causing collision is in the courts of the country of the flag, provided that, if the offender is of a nationality different

[6] See Article 5 (3) of the Convention for the Protection of Industrial Property, revised at The Hague on 6 November 1925, in Hudson, *International Legislation*, vol. III, pp. 1761 *et seq.*

[7] See Article 27, *ibid.* vol. IX, pp. 168 *et seq.*

from that of his ship, the prosecution may alternatively be in the courts of his own country." Incidentally, that view was also to be found in article 1 of the draft produced by the commission appointed by the Oslo Conference in 1933. It read:

> "In the event of a collision on the high seas the master, as well as any other person in the service of the ship, can only be prosecuted under penal or disciplinary proceedings in respect of such collision, before the courts of the State of which he is a citizen or of which the ship was flying the flag at the time of the collision."

81. The final draft adopted at the Paris Conference had dropped the mention of the nationality of the person prosecuted (A/CN.4/42, p. 13, mimeographed English text; para. 27, printed French text) and Mr. François had quite rightly also omitted it.

82. With regard to Mr. el Khoury's point, at the present time there could be no question of a conflict of jurisdictions, since the only jurisdiction recognized was that of the courts of the State whose flag the vessel was flying.

83. Following an exchange of views in which the CHAIRMAN and Mr. HUDSON took part, Mr. EL KHOURY reminded the Commission of the complications which might arise for third parties victims of a collision, from verdicts pronounced by two different courts in respect of two ships' masters, if both verdicts acquitted both the persons concerned.

84. Mr. AMADO pointed out that the responsibility of a master whose ship collided with another was in the first instance towards the shipowner whose interests he had neglected, since his negligence would have considerable economic consequences. Similar considerations justified the courts in the State of the vessel's flag in holding the ship's master responsible. The penal responsibility of the master must not be put on the same footing as that of a common malefactor. He would be obliged to return to port and there the case would be tried and where necessary he would be punished. The same would apply to the master of the other vessel. That was a simple, logical statement of the position, and in making it he could not help feeling that there was a certain amount of confusion in the Commission's deliberations.

85. Mr. KERNO (Assistant Secretary-General) could not make out why Mr. Hudson had included in his draft the words " between vessels flying different flags".

86. Mr. HUDSON explained that he had inserted the expression so as to make it quite clear that the Commission was concerned exclusively with collisions of an international character, i.e., collisions between vessels of different nationalities.

87. Mr. KERNO (Assistant Secretary-General) supported by Mr. HSU, could not see why, if for example an Italian were the victim of a collision between two French ships, the jurisdiction of the Italian courts should not be ruled out in the same way as if there were a collision between two ships of different nationalities. The reasons against giving jurisdiction to the courts of the country of which the victim was a national were equally valid in both cases.

88. Mr. CORDOVA said he would like to second Mr. el Khoury's argument. According to the text under consideration, the masters of two ships involved in a collision would be brought before two different courts. The two courts might separately acquit both ships' masters, and third parties suffering damage as a result of the collision would obtain no redress whatever. It was essential therefore that jurisdiction should be in the hands of one court only.

89. Mr. HUDSON said that the implication in Mr. Córdova's remarks was that, in the event of a collision, someone must always be punished.

90. Mr. CORDOVA explained that all he was asking was that competence should be given to an international jurisdiction which would judge the entire case, so that any responsibility would be brought out.

91. Mr. AMADO noted that some members of the Commission appeared to assume that, in the event of collision, the shipowner and the State would naturally tend to champion the ship's master and to take sides against the other State and the other vessel. That was an astonishing state of affairs.

92. Mr. ALFARO said that Mr. Hudson's text demonstrated how difficult it was to deal with the question satisfactorily.

93. The Commission must admit that collision was not a premeditated crime, but an accident arising either out of negligence on the part of one or both ships' masters or without any negligence, out of circumstances beyond human control.

94. Clearly the restriction made by Mr. Hudson in using the expression " between vessels flying different flags " fully justified Mr. Kerno's comment.

95. Moreover, Mr. el Khoury had rightly demonstrated that it might be essential for the whole of a case to be tried by a single judge. The strength of national sentiment must not be disregarded, and some means must be found of counteracting it. To take the example of a collision on the high seas between an American vessel and a Norwegian vessel, in which each master blamed the collision on the other, and supposing each master were tried in his own country; in either case the judges might be influenced by national prejudice, or it might be impossible for them to obtain all the evidence, since the passengers in the Norwegian ship would testify before the Norwegian court, while the American court would hear only the passengers from the American vessel. Hence the Norwegian court might establish the responsibility of the American master, and the American court that of the Norwegian master. Surely it could not be argued in such circumstances that justice had not been done to the parties concerned. Penal responsibility for collision was practically impossible to determine if the proceedings were entrusted to a court in the State of which either of the vessels carried the flag. Clearly then, it was desirable to recognize an international jurisdiction as competent in the matter.

96. The CHAIRMAN thought the Commission would be more or less bound to agree that such a prospect was still far off. It was not in its power to establish an

international jurisdiction of the kind. It must take the law as it found it, however imperfect and temporary it might be. Until such time as the law developed to the point of perfection, it had decided to accept the principle drafted by Mr. François. All that remained was to delimit the principle, and Mr. Hudson had proposed stating it in a different form.

97. Mr. EL KHOURY said that he had proposed that any possible conflict of jurisdiction should be solved by the method laid down in article 7 of the draft convention prepared by the commission set up by the Oslo Conference of the International Maritime Committee, namely, to make the International Court of Justice competent in such matters.

98. The CHAIRMAN pointed out that the International Court of Justice had no jurisdiction in criminal matters.

99. Mr. LIANG (Secretary of the Commission) said that the expression " conflict of jurisdictions " was out of place if applied to the instance referred to by Mr. Alfaro. In the example given, both the courts were trying different persons and applying their own particular law. Hence there was no conflict of jurisdictions in the technical sense of the term.

100. Mr. CORDOVA agreed that the expression was inappropriate in the case in point; but the fact remained that difficulties might arise from judicial decisions taken concurrently. The system advocated by Mr. el Khoury should be taken into consideration.

101. The CHAIRMAN admitted that unfortunate consequences might arise from the effect of decisions taken by two separate tribunals. But as the law stood at present, such consequences were inevitable.

102. Mr. SANDSTRÖM pointed out to Mr. el Khoury that article 1 of the draft convention he had quoted laid it down that two jurisdictions would be competent simultaneously, namely, that of the State of which the ship's master was a national, and that of the State of which the ship was flying the flag. It might well happen therefore that the courts of two different countries would regard themselves as competent to try one particular master. In that case, there would be a real conflict of jurisdictions, and article 7 had provided a method of settling such conflicts. On the other hand, in the circumstances with which the Commission was concerned, the conflict involved was not a conflict of jurisdictions, but rather a conflict of evidence.

103. Mr. SCELLE said that the Commission was inclined to disregard the fact that it was concerned exclusively with cases in which the responsibility for collisions was not provided for in a convention, and in which there was no provision for the jurisdiction of an international tribunal. He suggested that wording to that effect should be inserted at the beginning of the text, which would then start off: " In the absence of . . .". It was impossible to overcome the difficulties pointed out by Mr. el Khoury except within the framework of a convention or by appeal to an international court.

104. Mr. CORDOVA, supported by Mr. SCELLE, thought that the Commission might state in its commentary that it recommended the establishment of an international tribunal or the preparation of a convention.

105. The CHAIRMAN said that both those courses were favoured by all the members; and they also represented the wishes of the Belgian Government.

106. Unlike Mr. FRANÇOIS, who saw no objection to that procedure, Mr. HUDSON thought that his proposed text would be too drastically changed if the wording suggested by Mr. Scelle were inserted at the beginning.

107. Mr. FRANÇOIS, summarizing the discussion, said that the Commission had adopted the principle on which the conclusions contained in his report were based, and Mr. Hudson had put forward a new version of the text. In the draft he proposed to submit to the Commission in 1952, he would bear in mind the discussions which had just taken place. He thought, therefore, that the Commission might leave aside the finer points of drafting, since the whole issue would come up for discussion again a year hence. No report would be made at present.

108. The CHAIRMAN considered that to be the best solution. The Commission would ask the Rapporteur to produce a more carefully studied draft on the basis of the two existing versions.

109. Replying to a question by Mr. CORDOVA, Mr. FRANÇOIS said that, in its general report, the Commission would merely inform the General Assembly that it had given a first reading to this or that subject, which it proposed to re-examine at its next session. The only report and commentaries would be those refering to the problem of the continental shelf and closely related subjects. On the other subjects — nationality of ships, penal competence in matters of collision, and safety of life at sea, there would be no detailed report.

It was so decided.

Chapter 3: Safety of life at sea

110. The CHAIRMAN asked the Commission to consider the draft principle on the subject of safety of life at sea suggested by the Rapporteur and appearing on page 19 of his report (mimeographed English text; para. 37, printed French text).

111. Mr. FRANÇOIS pointed out that the Commission was likely to find itself in difficulties. At the second session, he had been asked to study the question and to try to deduce from the rules contained in annex B to the Final Act of the London Conference of 1948 principles which the Commission might examine.[8] In compliance with his instructions, he had tried to formulate a general principle. If the Commission wished to examine it, it would need to have before it the complete text of the Final Act of the London Conference. That was essential if it wished to satisfy itself that the draft principle he had produced was a faithful and comprehensive summary of the rules in question. The same was true of the questions of the right of approach and the slave trade.

112. The CHAIRMAN wondered whether it would not be advisable to report to the General Assembly that

[8] See summary record of the 66th meeting, paras. 2–5.

the question of the safety of life at sea was a technical point which had been thoroughly examined by the London Conference, and that the Commission was not called upon to deal with it.

113. He agreed with Mr. FRANÇOIS, who observed that if the Commission adopted that course it would be going back on the decision it had taken at its second session.

114. Mr. HUDSON said that the Rapporteur had reviewed the international regulations concerning navigation and the relevant texts, which did not constitute a convention. If they wished to bind themselves on the strength of those texts, States would have to enact a uniform national law on the subject. That being so, there was no occasion to deduce a principle from annex B to the London Final Act, even though that document laid down a number of important rules on equipment and signals, which the Rapporteur had carefully reproduced on page 18 (mimeographed English text; para. 34, printed French text), of his report. Turning to the Brussels Convention of 1910, from which he quoted extracts on page 19, (*ibid*, para. 35, printed French text), the Rapporteur had deduced a principle which he had submitted to the Commission.

115. If the Rapporteur concluded that there was no general principle to be deduced from annex B to the London Final Act, he personally would support that view, but a satisfactory formula could be extracted from the Brussels Convention, even though there had been only a small number of ratifications; and the text submitted by the Rapporteur would be useful in drafting that formula.

116. Mr. FRANÇOIS wondered whether Mr. Hudson had fully understood his previous remarks, the main point of which was that the Commission would be hampered in its study of the relevant section of the report by not having the complete text of the Final Act of 1948 before it.

117. Mr. HUDSON said he was quite willing that examination of the question should be postponed until the following session; but he saw no reason why the Commission should not try there and then to discover the principle behind the Brussels Convention. The rules on navigation contained in the Washington Convention of 1889, and the London rules of 1929 and 1948, could not be subjected to the same scrutiny, but that did not apply to the Brussels Conference. He hoped, therefore, that the members of the Commission would make known their views on the principle which the Rapporteur had deduced from that instrument.

118. Mr. KERNO (Assistant Secretary-General) said that as Mr. François' report had been available for several months, all members who had read it could have obtained the complete text of the London Final Act. If asked to do so, the Secretary could perfectly easily provide members with the text. That was no good reason for postponing until the following session the study of the question of safety of life at sea.

119. Mr. FRANÇOIS said that the Commission would find itself hampered for want of time. He did not think members could possibly carry out the necessary checking of the text by the end of the session, either on the topic under discussion or on the other two topics. Hence, he suggested that the Commission take a cursory glance at the topic, reserving the possibility of studying the texts in question between sessions.

120. Mr. SPIROPOULOS pointed out that, at the beginning of the section devoted to the safety of life at sea, the Rapporteur had quoted a paragraph from the Commission's report on its second session to the effect that " the Commission ascribed great importance to the international regulations for preventing collisions at sea, which constituted Annex B to the Final Act of the London Conference of 1948 ". Was that question actually one which lent itself to codification? It was a purely technical matter, unrelated to the international régime of the high seas. While it was important that a question of that kind, relating to national laws, should be unified, the unification should surely be left to legislators. A code of international law should contain only general principles. An international convention could perhaps be drawn up for the purposes of standardizing the rules relating to the safety of life at sea; but such rules had nothing in common with the other topics dealt with by the Commission, and hence had no place in the code.

The meeting rose at 1 p.m.

123rd MEETING

Thursday, 12 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.