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Summary record of the 63rd meeting

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

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opinion on the matter and say that it wished penalties to be prescribed and applied.

154. Mr. el-KHOURY proposed that the discussion should be deferred until the Commission considered the report on the Code of Offences.

155. The CHAIRMAN thought it would be dangerous to give immediate consideration to the question of including penalties in the draft Code, and agreed with Mr. el-Khoury that the matter should be deferred until the report on the Code of Offences was examined.

156. Mr. AMADO did not agree with Mr. ALFARO regarding the legal basis of crimes and penalties. The application of the maxim " *nullum crimen sine lege* " to international political crimes was a question which required fuller consideration. He agreed with the view expressed by the Chairman at the 49th meeting (paras. 47 and 51) that the great criminals of aggressive wars might go unpunished, since in order to achieve their nefarious purpose they used methods which had hitherto been unknown, and consequently were not yet prohibited by international law.

The meeting rose at 1.10 p.m.

63rd MEETING

Friday, 7 July 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, 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).

Regime of the High Seas: Report by Mr. François (item 7 of the agenda) (A/CN.4/17 and A/CN.4/30)

GENERAL DEBATE

1. Mr. FRANÇOIS stated his report was somewhat different in nature from the others. In the first place, it was necessary to select the subjects which the Commission wished to study, and in the second place, since most of the questions were not yet ripe for codification, it was too early to attempt to establish precise texts. He thought that questionnaires would have to be sent to governments to learn their views on the subjects selected by the Commission, and he felt that the Commission's first task should be to draw up those questionnaires.

1 a. He had omitted from his report a number of subjects which were of a purely technical nature and which had already been regulated by international conventions, as well as other subjects which could, of course, be studied by the Commission, but were not sufficiently important.

1 b. He had kept three questions—collision, the right of pursuit and the continental shelf. His report also dealt with pollution of the sea, but information which he had received from the Secretariat (A/CN.4/30) after writing his report made it clear that other United Nations organs were already dealing with that question and that it should not therefore be included among the questions to be studied by the Commission. He had inadvertently omitted piracy, thinking that that was also one of the subjects selected by the Commission for independent codification. The Commission could consider whether the subject was important enough to deserve study within the framework of the report.

1 c. With regard to the special question of territorial waters, he recalled that The Hague Conference for the Codification of International Law in 1930 had almost reached agreement on the regime of territorial waters, but, as differences of opinion still existed as to the breadth of territorial waters, had considered that the question of breadth was so important that if an agreement were not achieved in regard to it, it was not desirable to submit a draft convention on the regime of territorial waters. The previous year, the Commission had considered that there would probably be no more success than in 1930 in reaching an agreement on the question of the breadth of territorial waters, and that it should be dropped provisionally. The regime of territorial waters and the regime of the continental shelf were related questions, and it was possible that, if the principle of the continental shelf were accepted, that might constitute a basis of agreement which would make it possible to fix the breadth of territorial waters at a figure below that desired by certain States.

1 d. The General Assembly had requested the Commission to consider whether the question of territorial waters should not be included in the study of the regime of the high seas. He proposed to leave on one side the question of the regime of territorial waters, as it now presented few controversial points. With regard to the breadth of territorial waters, the Commission could include a question on that subject in the questionnaire sent to governments, study the governments' replies the following year, and determine whether the question of the breadth of territorial waters could be taken up with some chance of success.

1 e. The question of the continental shelf was of interest to the whole world. The Commission should not

confine itself to holding a general discussion on the subject and then referring it to the following year's session. It was essential to learn the points of view of the various governments. The organizations dealing with the question, such as the International Law Association, the Institut de Droit International, and so forth, were doing so from a purely scientific angle or from the viewpoint of the big oil companies. It would be very desirable for governments to give their views on that question before the Commission formulated specific proposals in regard thereto.

1 f. For the progressive development of international law, it was necessary for the Commission to know both the views of governments and the opinion of the scientific world.

1 g. He therefore proposed that the Commission should hold a general discussion first of all on which subjects to select and then on the subjects themselves, so as to determine what questions to put to governments; the General Rapporteur and the Special Rapporteur would then draft the questionnaires which would be inserted in the Commission's general report; after approval by the General Assembly, the questionnaires would be sent to governments with a request for an answer within four or live months; finally, the Special Rapporteur would submit a report on the replies received at the next session.

2. Mr. LIANG (Secretary to the Commission) wished to draw the Commission's attention to the document entitled: " Regime of the High Seas. Questions under Study by Other Organs of the United Nations or by Specialized Agencies " (A/CN.4/30) which had been drawn up by the Secretariat. He hoped that the Commission would take that document into consideration when selecting the questions to be dealt with.

2 a. He noted that Mr. François had mentioned the questionnaires which would be prepared by the General Rapporteur and the Special Rapporteur and then discussed by the Commission and incorporated in the report submitted to the General Assembly. When they had been approved by the Assembly, the questionnaires would be circulated to governments. That procedure, which was not that prescribed by the Statute, would involve delays, since the questionnaires could not be sent out before the end of the year at the earliest, and replies would not be received until May. A general questionnaire had already been sent out in 1949, and the replies of the governments had been incorporated in document A/CN.4/19. That questionnaire had necessarily been very general, and a number of governments had intimated that they could not reply to a request for general information and would like the questionnaires to be more specific. The questionnaire in question had been sent out in virtue of article 19 of the Commission's Statute. There was nothing in that statute to prevent detailed questionnaires being sent to governments through the Secretary-General without the latter having to await the General Assembly's decision. The questionnaires would in any case form part of the report submitted to the General Assembly, which would take note thereof.

2 b. He suggested that the drafting of the questionnaire should be completed in the course of the session. The Secretariat would at once transmit it to governments with a request for a reply before the end of the year.

3. Mr. YEPES said that he admired Mr. François' work, which was an admirable synthesis of almost all the problems relating to the high seas. He had noted that there were no specific conclusions in that report, but there were a number of such conclusions in the statement which Mr. François had just made. The problems proposed for discussion by the Rapporteur were of great interest—particularly those of collision and of the continental shelf—but there were other problems which should also receive the Commission's attention, among them those of the protection of marine resources and the regime of floating islands, the study of which would be of great service to the science of international law and to international politics. The protection of marine resources was necessary because otherwise they would soon be exhausted owing to modern technical advances in fishing and hunting methods. He proposed that those two questions should be added to those suggested for retention by Mr. François.

4. Mr. HUDSON said that he had been going to make the same observation as Mr. Liang. Delays had to be avoided, and the Commission had already consulted the governments. It had only received replies from ten governments, and four of those had confined themselves to making a short statement in a letter. The results obtained from the issue of the questionnaire were disappointing. Of course, the questionnaire was very general. He quoted the reply of the United Kingdom: " While the Government of the United Kingdom will be ready and willing to furnish detailed material which the International Law Commission finds to be necessary in the course of its study in the topics it has chosen, it does not consider that it would be practicable at this stage to supply the material requested in your communication, owing to its quantity and to the fact that the criteria of selection can only be decided by the International Law Commission itself. " (A/CN.4/19, part I, section A) The Government of the French Republic had sent a similar reply. (*ibid.*)

4 a. If a particular topic were taken, useful replies might perhaps be obtained, but too much should not be expected from that method. They should enquire into the practice of States rather than concern themselves with what the various authors had said, since the latter repeated one another and ignored the practice of States.

4 b. Last year, the Commission had considered the question of the regime of territorial waters. It had distinguished between that regime and the regime of the high seas, and had included the latter in the first list of priority questions. Since then, the General Assembly had requested the Commission to include the question of territorial waters in that list also, and the Commission must therefore consider studying that question. The two subjects should be distinguished from

each other and treated separately if the Commission wished to conform with its decision of the previous year. For his part, he would like the Commission to take a decision on the matter, and he thought that the Rapporteur would say the same thing, since the report barely touched upon the question of territorial waters.

5. Mr. AMADO, in general, supported Mr. Hudson's view. He had read the report with the care due to its author, who had been Rapporteur on the question of territorial waters at The Hague Conference twenty years earlier. Caution was the hall-mark of the report: its author only proceeded after careful investigation. He first gave a theoretical dissertation, and then provided the definition of a ship. There seemed to be no reason for this, since the author did not reach any conclusion, merely stating that " It would seem that agreement on the definition of a ship would obviate certain difficulties and the Commission might communicate with governments on this subject." (A/CN.4/17, section 2)

5 a. With regard to the territorial quality of ships, the Rapporteur " considers that this controversy is of an academic nature and that it is unnecessary for the International Law Commission to retain this item." (section 3) The Rapporteur also considered that the questions dealt with in paragraphs 4, 5, 6 and 7 need not be retained. With regard to paragraph 8, " safety of life at sea ", the Rapporteur does not consider that this subject is suitable for codification by the Commission. (section 8)

5 b. He thought that the Commission should concentrate upon the positive conclusions contained in the report, and then see whether it should study all or merely some of them. The Rapporteur proposed the questions of collision, the right of pursuit and the continental shelf. He (Mr. Amado) did not know whether the Commission would be able to deal with the latter question thoroughly, and thought that the Commission should devote its attention to not more than two or three subjects. He had no preference as to those subjects, but thought that the question of the continental shelf could be left until later.

6. Mr. HUDSON thought that four months did not give governments much time to reply. He suggested that the procedure proposed by the Rapporteur should be followed, but added that if the Commission fixed a time-limit, it should not expect it to be complied with.

7. Mr. FRANÇOIS admitted the justice of Mr. Hudson's remarks, but it was precisely for that reason that he had said that the questionnaire should confine itself to main principles. The draft questionnaire at the end of his report contained nine questions relating to those principles. He did not think it impossible for governments to reply to those questions in four or five months. He wished in this way to obtain some guidance for the continuation of the Commission's work since, in regard to collision, for example, there was great uncertainty as to principles. He saw no point in asking questions of detail.

8. Mr. LIANG had referred to the questionnaire transmitted to governments the previous year without the approval of the General Assembly, but that had been a questionnaire which the Commission had sent to governments, in virtue of article 19, paragraph 2 of its statute, requesting them " to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary ". That was something quite different. It concerned existing texts, and was not a request to governments for their views as to which clauses should appear in a convention. The questionnaire they were now discussing was that referred to in article 17, paragraph 2 (b) of the Statute, which provided that the Commission " shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time ". He was not sure that the Commission would be entitled to send out that questionnaire without the assent of the General Assembly. That point had been discussed during the drafting of the Commission's Statute, when many speakers had held that the Commission should not be able to circulate questionnaires to governments without the General Assembly's authorization.

9. The CHAIRMAN thought that, as Mr. Liang and Mr. Kerno had said, the question had been thoroughly discussed the previous year, and that Mr. Koretsky had put forward an argument which the Commission had rejected, deciding that it was independent and could send questionnaires direct to governments.[1] The Sixth Committee of the General Assembly had approved that decision. [2]

10. Mr. FRANÇOIS pointed out that he had not been present at that time. Clearly, if questionnaires were sent to governments direct, it would speed up proceedings.

11. Mr. YEPES asked what the Rapporteur thought of the two questions he had proposed for study.

12. Mr. FRANÇOIS replied that as regards marine resources, the Commission could not study a subject of such wide scope and which differed so much in its various aspects from one part of the world to another that regulations concerning it could not be embodied in a general code; that question should be left for separate conventions dealing, for example, with seals, the large cetaceans, and so forth. A general codification could not include all the provisions which would be necessary.

12 a. With regard to the other question, that of floating islands, if the Commission took the line he had suggested, it would consult the governments. The last page of his report contained the following: " 8. Do works and installations established in the waters in question for working the soil have territorial waters of their own ? If not, may special security zones be claimed for them ? " That did not cover the whole

[1] See 3rd and 4th meetings of the Commission.

[2] *Official Records of the General Assembly, Fourth Session, Sixth Committee,* 158th and following meetings, particularly the 164th meeting.

question of floating islands, but that question was nevertheless dealt with in relation to the continental shelf. It should be noted that that aspect of the subject was of great importance. If the Commission were to take up the question of the continental shelf and item 8 of the questionnaire he proposed, it would have gone a long way in the direction suggested by Mr. Yepes.

13. Mr. HSU said that Mr. François' report, which he had read with admiration, was remarkable for its precision. Mr. François had suggested that questions should be put to governments. That procedure was admissible where the subject dealt with was not ripe for codification; otherwise, the Commission first drafted a text and then submitted it to governments for their views.

13 a. He thought it neither desirable nor practicable to consult governments since the latter would be little inclined to reply. The main point was that by sending a questionnaire of that type to governments, the Commission appeared to imply that the subject was not ripe for codification. The previous year, the Commission had drawn up a list of subjects and had retained three of them on the ground that they could be codified. The Commission had not been set up solely to do research work; the most important part of its task was codification. If a subject did not lend itself to codification, the Commission should leave it alone. If governments were sent that questionnaire, they might reply that the Commission had made a mistake the previous year when it decided that the subjects were ripe for codification.

14. Mr. FRANÇOIS thought that to some extent the Commission's task in this respect related to the progressive development of international law.

15. Mr. ALFARO doubted whether satisfactory results would be obtained by sending a questionnaire to governments. Generally speaking, governments did not reply to questionnaires, or they sent replies which were of little use.

15 a. With regard to the problem of the continental shelf, the questionnaire drawn up by Mr. François was so important that it would be justifiable to circulate it. Nevertheless, he suggested that if it decided to send out the questionnaire, the Commission should indicate that its work would not be interrupted during the time needed for the replies to come in. If the replies were received within a certain time limit, the Commission would take them into account, but if not it would carry on with its work. It was a matter that concerned the progressive development of international law, and the circulation of a questionnaire could be justified on the basis of article 16, paragraph (c).

16. Mr. SPIROPOULOS associated himself what the preceding speakers had said about the importance of Mr. François' work. With regard to the general discussion, the Commission should see clearly what was at issue. He had the impression that on important points there were divergencies between the report and the views held by certain members of the Commission.

16 a. With regard to the questionnaire, Mr. François had said that he had based himself upon an article relating to the progressive development of law. That was most important, as he had thought that codification was involved and, if that were the standpoint adopted, there could bo no questionnaire. As Mr. Liang had said, the Statute referred to questionnaires designed to elicit relevant documents, and those were the only questionnaires which could be circulated to governments. On matters connected with codification, the Commission should—according to the terms of its Statute—consult governments only after it had reached conclusions.

16 b. Of course, there was nothing in the Statute to prevent a questionnaire from being circulated to governments, but was it desirable to do so? Was it not the Commission's task to answer those questions and to submit its replies to governments? To proceed as Mr. François suggested would be to reverse the proper order. In his view, the Commission should avoid sending out a questionnaire. Governments did not like answering a scientific questionnaire; it was their duty to furnish the texts of laws and so forth for which they were asked, but they did not like replying to economic and legal questionnaires. He recalled that the questionnaire circulated in regard to his report had received only four replies and, of those, that of the Netherlands Government alone had been of any use. Governments had considered it useless to reply, or had not known what reply to make.

16 c. The Commission had to codify the legal status of the high seas. He had read his eminent colleague's report with great interest. That report made it clear that what was necessary was a code of the high seas which should contain only the main principles and leave details to be settled by special conventions. Codes of domestic law were drawn up in that way; they did not go into details, which were dealt with in individual laws. The question of fisheries, for example, could be regulated by conventions.

17. Mr. KERNO (Assistant Secretary-General) wished to add a few words to clarify the points relating to the circulation of a questionnaire to governments, and to the Commission's Statute. When the progressive development of international law was involved, a questionnaire should be circulated to governments immediately, in virtue of article 16 (c), but when the codification of international law was concerned, governments should be consulted at a later date in accordance with the provisions of article 21, paragraph 2. It should be noted that although, in the field of codification, the Commission was not required to circulate a questionnaire until the draft had been drawn up article by article, it was nevertheless free to do so. Article 19, paragraph 1, stated: "The Commission shall adopt a plan of work appropriate to each case." The procedure was therefore very flexible. In particular cases, it might appear appropriate to send a questionnaire at the outset.

18. Mr. el-KHOURY said that Mr. Spiropoulos had already expressed what he wished to say. He thought that the Commission did not fully appreciate how much it influenced the views of the various governments. There were very few persons who would venture to

advise the Commission. When the governments with which he was acquainted received a questionnaire from the Commission, they wondered what they were going to reply to those eminent jurists. They were afraid of exposing themselves to criticism by the members of the Commission, aware that the latter knew more than anyone else about the problem. When, on the other hand, governments were asked to state their views on a proposal by the Commission, they were no longer afraid to answer, as they took their own interests into consideration, whereas if they were asked for their views on theoretical questions, they hesitated to give them; in that case, the Great Powers alone perhaps were able to reply. He thought that in practice it would be useless to circulate a questionnaire to governments asking for their opinion before the Commission was able to add its own conclusions to their replies.

18 a. He had noted from the Rapporteur's explanatory statement that he had studied the question thoroughly, but confined himself to postponing questions till later, making no proposals which would allow of concrete results. For his own part, he thought that it would be preferable to deal with the points one by one, discuss them, reach a decision, and circulate a questionnaire relating to those decisions.

19. Mr. SANDSTRÖM said that after listening to what his colleagues had had to say he was not sure whether it was desirable to circulate a questionnaire at that time. He was afraid that such a step might be prejudicial to a solution, and he would prefer it to be postponed until later. He agreed with the Rapporteur on the choice of subjects for consideration. As regards territorial waters, in particular, he thought that it would facilitate the Commission's work if that item were discussed at the same time as the regime of the high seas.

20. Mr. BRIERLY said that he had at first agreed with the Rapporteur, but that he had been shaken by the arguments put forward by Mr. Spiropoulos, Mr. el-Khoury and other members of the Commission. He enquired whether the Rapporteur considered himself justified at this point in modifying his original proposals.

21. Mr. FRANÇOIS had listened carefully to the comments made by his colleagues, but they had not made him change his views about the desirability of consulting governments. It was true that the Commission was composed of scientific jurists, but the question of the continental shelf, for example, was not purely scientific. If the Commission only examined that question from the scientific point of view it would achieve nothing, since the draft would be submitted to governments, which based their decisions on political considerations. To achieve practical results the Commission should begin by obtaining the views of governments. It was difficult to interpret the absence of a reply in view of the proclamations made in recent years. If it were interpreted as signifying approval and if that interpretation did not correspond to reality, there was the danger that the Commission would be wasting its time in preparing a draft.

22. Mr. LIANG (Secretary to the Commission) stated that the Secretariat was preparing a digest of the conventions, laws, proclamations, declarations and so forth concerning certain subjects, including the continental shelf, which would be completed within two or three months. The documents were being compiled with the help of the governments and delegations at United Nations Headquarters. He hoped that that work would fill a need. He agreed that the circulation of a detailed questionnaire drawn up in accordance with the proposal contained in the last page of Mr. François' report was not contrary to article 19 of the Statute. He recalled that the League of Nations Committee of Experts, which met before the 1930 Conference, had drawn up a questionnaire, and that the Council of the League had approved it before it was circulated to governments. He pointed out that the Commission's Statute had been approved by the General Assembly and therefore constituted prior authorization.

22 a. The opinion had been expressed not only by certain members of the Codification Commission of 1947, but also by authors of scientific articles, that too much importance should not be attached to the *ad hoc* replies to questionnaires sent in by governments. Those replies constituted a valuable source of information as to the view of the governments, but many of the latter, knowing that their replies would be taken into consideration for the drafting of a code, tended to send in statements about what they wanted to be adopted rather than about the current international law practice of their countries. As J. B. Moore had said, it should not be forgotten that " mere extracts from State papers or judicial decisions cannot be safely relied on as guides to the law " (J. B. Moore, *Digest of International Law*, Washington, D.C., 1906, preface, page IV). From the scientific point of view, the replies to questionnaires did not have the same value as the extracts from state papers contained in the works by Wharton, Moore and Hackworth on the practice of States.

23. Mr. AMADO thought that many governments had not hitherto had occasion to take up a position on certain present-day questions connected with the regime of the high seas—particularly questions relating to the continental shelf—and many countries had no legislation on the matter. What replies could those governments make to the Commission? He next pointed out the complex nature of the questions on which the report proposed to consult governments. He instanced the nine questions concerning the continental shelf, and pointed out that question 5, for example, " Is a right of sovereignty involved or merely rights of control and jurisdiction? " was already the subject of differences between several governments, and could not be treated as a purely theoretical controversy. He failed to see how a government, in the few months it would have in which to make its reply, could take a decision on the intentions with regard to problems in respect of which governments had not yet disclosed their views or enacted any legislation for their solution. He failed to see how the Commission could, in those circumstances, expect to receive, in a relatively short space of time, replies which would be sufficiently precise and nume-

rous for it to be able to draw internationally valid conclusions. The members of the Commission were aware that governments were showing more and more reluctance to reply to the questionnaires circulated by international organizations.

24. Mr. FRANÇOIS said that a deterioration in the attitude of chancellories could indeed be noted in recent years. He recalled that in 1930, when the draft convention on territorial waters was discussed, specific questions had been put to the various governments, which had sent in very clear and explicit replies. The results obtained on the basis of those replies had not been bad; agreement had been reached on the regime of territorial waters, but not on their extent.

25. The CHAIRMAN said that no one was blind to the fact that it would be difficult to obtain replies from governments. For the moment, however, the Commission was considering what method to adopt; it had to decide whether it wished to consult governments before going on with its work on the question of the high seas, or whether it wished to go ahead immediately subject to asking governments for information which it would use next year. He thought that the Commission was entitled to draft its report without consulting governments.

25 a. He agreed that there had been a deterioration as compared with 1930. He knew that governments hesitated to reply, unless they had competent jurists who urged them to do so. He was also aware that in many cases governments merely replied that they did not have time to study the questions submitted, and that often they did not reply at all. Despite all the possible objections, however, he thought that it would be useful to send the questions to governments, so as to be able to make use of their replies at a later stage in the Commission's work.

26. Mr. AMADO repeated that he did not think that governments were able to state their views on questions which they themselves had not yet studied. The Commission should continue its work, but that in no way prevented it from circulating a list of questions.

27. Mr. YEPES said that he had wide experience of consulting governments; in his capacity as legal adviser to the Minister of Foreign Affairs of Colombia, he had often found himself obliged to reply to questionnaires. When asked to reply to questions of principle, his government always avoided doing so, but on questions relating to law or practice, it willingly furnished precise replies. He thought that it would hardly be possible to obtain replies to question 9, for example. Nevertheless, there would be some advantage in consulting governments, since their replies would furnish the Commission with systematic data which would be useful in drawing up a code. The Commission, however, should expect to receive replies bearing solely on points of fact, and not on points of principle.

28. The CHAIRMAN thought that there was nothing te prevent the Commission from asking governments for information, and it could decide later what to do with the replies received. It was, however, desirable for the Commission to study the questions first, in order to decide which of them could be put to governments. He agreed with Mr Yepes that the Commission could not draw up a code without systematizing the problems and questions.

28 a. He recalled that other United Nations bodies were working on subjects related to those dealt with in Mr. François' report. He thought that the Commission should not for the moment deal with questions which were already in the hands of other agencies, but should merely postpone them. The Commission had the right and the duty to examine them also, since it had a monopoly in the field of codification, and when it did so, it would be able to study what those other bodies had achieved. In the work of codification, however, the Commission should not go into too much detail. He recalled that when the French Civil Code had been drawn up, many questions of detail had been left undecided, the view being held that the judges would be able to decide them on the basis of the general provisions contained in the code. The Commissoin should follow that example, stating exactly which questions it meant to deal with, on the understanding that the Commission's competence was all-embracing.

29. He thought that the most practical procedure would be for the Commission to take up the points it intended to study, leaving aside for the moment the other points referred to in the report. He proposed that the Commission should take up the following questions: (1) collision; (2) right of pursuit; (3) the continental shelf. The Commission would then see whether it wished to consider other points, such as the question of territorial waters. That question could also be placed on the agenda of the present session, but he thought that the Commission would agree with him that it should be given a certain independence and be handled separately, except where the other questions which the Commission was to study were related to it.

30. Mr. FRANÇOIS proposed that when it considered the question of territorial waters, the Commission should confine itself to studying the extent of those waters.

31. Mr. YEPES proposed the addition of a fourth item: floating islands.

32. The CHAIRMAN said that that question could be taken up when the Commission dealt with the problem of the continental shelf.

33. Mr. SPIROPOULOS observed that at the beginning of his report, Mr. François had dealt with the conception of the freedom of the seas, which was one of the fundamental points in connexion with the problems of the high seas, and he wondered whether the Commission intended to define that conception. A general principle was involved, and he thought it desirable that the Commission should formulate that principle at the outset of its study of Mr. François' report.

34. Mr. FRANÇOIS feared that the Commission would only be able to formulate principles either too vague or much too detailed. If it proposed to go into details, the Commission would lose too much time in discussing the highly complicated question of the free-

dom of the seas, and would be unable to complete its study of the special subjects it wished to retain. He thought it better to begin consideration of the report by studying the three specific and practical points referred to by the Chairman. Then, if time remained, there was nothing to prevent the Commission from taking up the general questions.

35. The CHAIRMAN admitted that the consideration of special points would require less time, but nevertheless thought it better to study the question of the freedom of the seas, solely with the object of defining a general principle and without going into detail. By establishing that general principle, the Commission would give the Rapporteur at least one directive which he would find useful in drawing up the reports on the subjects retained.

35 a. Mr. YEPES thought that Mr. Spiropoulos' proposal was a useful one and should be acted on. He noted, however, that the Commission had begun its study of the report on the high seas without having defined the term " high seas ".

36. Mr. SPIROPOULOS said that he had raised the question of considering a general principle for the conception of the freedom of the seas merely in order to draw the Commission's attention to that problem. He thought that the Commission could discuss the three or four points mentioned by the Chairman without first formulating a general principle. But, after examining those points, the Commission would have to establish a connexion between them in order to be able to include them in a draft code.

37. The CHAIRMAN proposed that the Commission should begin by considering the particular points and if general problems arose during the discussion, it could deal with them in passing.

38. Mr. BRIERLY thought that the Commission should confine itself to studying the particular points, or it would never complete its task.

39. The CHAIRMAN called upon the Commission to take up the following questions: (1) collision; (2) right of pursuit; (3) the continental shelf; and (4) breadth of territorial waters, beginning with the first. He asked the Rapporteur whether he wished to make an explanatory statement on that first question.

40. Mr. FRANÇOIS said that he had nothing to add to his report. The case of the *Lotus* had caused considerable anxiety at the time, and he thought that perhaps the Commission should study that case, particularly from the point of view of penal responsibility, which as a matter of fact was bound up with the question of civil responsibility. The systems for the regulation of penal and civil responsibility varied greatly from one country to another, and the Commission would meet with great difficulties if it sought to achieve systematization. It might, however, succeed despite those difficulties, which was why he had just enquired whether the Commission wished to take up the study of questions of competence.

41. Mr. SPIROPOULOS replied that the Commission had just decided not to deal with general questions, and to confine itself to particular questions. Whether the problems were special or particular, the first essential was that the Commission should have before it precise texts for consideration; otherwise, the discussion would remain purely academic and vague.

41 a. He thought that the subject of collision had nothing to do with the regime of the high seas as the Commission should conceive it, but involved questions which belonged to municipal law. He wondered whether, in the case of the *Lotus,* for example, Turkey was entitled to prosecute under Turkish law an officer belonging to that French vessel after its collision with a Turkish vessel on the high seas. Lastly, if the Commission wished to study that problem, it would have to discuss the question of penal responsibility separately from that of civil responsibility.

42. The CHAIRMAN observed that consideration of the question of responsibility at once raised the question of the various competences as enumerated in Mr. François report (section 10): (1) exclusive competence of the courts of each flag State; (2) competence of the State of either the colliding vessel or the vessel collided with; (3) concurrent competence of the courts of both flag States; (4) competence of the courts at the vessel's first port of call or at the port where the crews seek refuge.

43. Mr. FRANÇOIS recalled that he had concluded in his report that in international civil law collision raised in the first place questions of the conflict of laws. Such conflicts arose in many connexions: responsibility for collision, causes of lapse of the action, competence of the courts responsible for taking cognizance of the consequences of the collision, the result being that no agreement has been reached on uniform regulations with regard to competence. Four systems had been proposed for the settlement of conflicts of law: they were linked respectively to what was called " general maritime law ", the *lex fori,* the law of the flag State of the vessel collided with, and the law of the flag State of the colliding vessel. In fact, there was multiple and complex responsibility, and he doubted whether the members of the Commission were sufficiently experienced in maritime questions to be able to pronounce on so difficult and specialized a problem. With all those difficulties in mind, he had thought that questionnaires should be sent to governments to enable the Commission in the light of the replies it received, to reach a decision with a better knowledge of the facts. Nevertheless, he had no objection to the Commission's studying the problem itself so as to reach a conclusion.

44. The CHAIRMAN thought that the Commission should pronounce on the questions of competence without waiting for information from governments.

45. Mr. SANDSTRÖM said that very little information was available to the Commission on all those points at the present time, and he did not think that the Commission was any better informed in that regard than he was himself. In his view, the members of the Commission did not have the knowledge of maritime law essential to enable them to reach conclusions.

46. Mr. FRANÇOIS thought that the chief need for

the moment was for the Commission to select topics. If the Commission retained the question of collision, and wished to be able to pronounce upon it, should it not have before it a much more detailed report than his ? He was perhaps under-estimating the abilities of the members, but he thought that, with the few lines of information available to it in the present report, the Commission could scarcely reach a decision.

47. The CHAIRMAN asked how, if that was so, the Commission could obtain information. Would each member have to collect sufficient documentary material and study it separately ? That would mean postponing consideration of the report until the following year. If Mr. François said that he was not competent, who was there who could make a more detailed report ?

48. Mr. AMADO said that, to be able to deal with the question of collision, the Commission should be familiar with the relevant rules of national and international law. It would never be able to establish a codification if it did not know the rules. Here again there were two possibilities: either there were rules, in which case a knowledge of them was essential for codification, or there were no rules, in which case codification was impossible.

49. The CHAIRMAN replied that if there were no rules the Commission would be asked to draw them up.

50. Mr. AMADO said that the first question that arose was that of the existence of rules of maritime law in general. If such rules existed, and if the Commission were able to reach agreement, it could and should formulate a rule of international scope. The Commission, however, was not required merely te accept the old rules of Roman law or other outworn principles, but should examine the possibility of arriving at a doctrine of maritime law which corresponded to the situation obtaining at the present time. It would not be necessary for the Commission to go into details, but it was essential that it should make a general declaration concerning maritime law.

51. Mr. SPIROPOULOS thought that the Rapporteur's task was to submit precise texts, and he would be glad if such could be available to the Commission. For his part, he had no views as to the method to be adopted, but he thought that in the end the Commission would have to agree upon the formulation of certain general principles—such, for example, as a principle whereby no State had jurisdiction over a vessel belonging to another State, except where that vessel engaged in the white slave traffic or the slave trade, or committed an abuse of the flag; a principle on the right to fish, the right to lay cables, and so forth.

52. The CHAIRMAN reverted to the question of collision, in regard to which certain rules essential in every organized society could be drawn up. Two vessels sailing on a national river or two automobiles proceeding along a national road were subject, in the event of a collision, to the legislation of the country concerned. There were national rules to cover such a case. It was true that those national rules were not applicable in the international field, but there were also certain international rules. There were certain analogies between road traffic and navigation. One of the first rules to be established in regard to maritime matters was on the question of the choice of competent courts. What international courts would be competent to decide cases like those of the *Lotus,* the *Ortigia* or the *West-Hinder* ?

53. Mr. SPIROPOULOS thought that it would be very difficult to base oneself, in international matters, on the competence of national courts. He also thought that the question should be considered from a more general standpoint. The specific task before the Commission was to enunciate the general principles of a code of the high seas. He repeated his view that is was essential for the Commission to have precise texts if it did not wish to discuss at random.

54. Mr. FRANÇOIS said that, in drawing up his report, his task had been to enumerate all the topics covered by the subject-matter. He had been unable to go deeply into those topics or to present a detailed report and hence he had been unable to devote more than one page to the question of collision. He had thought that he would be able to deal with the subject more fully on the basis of the replies of governments to the questionnaire which was to be sent to them. The Commission no longer wished to adopt that system and wanted to examine the various questions without further delay. In those circumstances he asked the Commission to defer consideration of the question of collision until the following year, when he would be able to submit a further special report on that subject. In that way, the Commission would achieve better results, whereas it would achieve no results at all if it began discussion of the question at the present time.

55. Mr. YEPES recalled that there was in existence a body of law formulated by the Permanent Court of International Justice, and that the award given by the Court in the *Lotus* case constituted a complete study of collision.

56. The CHAIRMAN could not share Mr. Yepes' view that the *Lotus* case had established a body of law.

57. Mr. SPIROPOULOS thought that he had found a solution for the question of the method of work. In his view, the Commission should set out on the basis of a general principle. Comparing Mr. François' report with that of Mr. Brierly, he had found a fundamental difference between them. Mr. Brierly's report contained precise texts, whereas Mr. François' report did not. The previous year, the Commission had given the special rapporteurs to understand that it expected working papers, and he had himself thought at first that he would be able to adopt the same method of presentation for his two reports. When he had set to work, however, he had realized that it was necessary to submit more precise reports, and had therefore included more concrete proposals in his reports, as Mr. Brierly had done.

57 a. He readily admitted that Mr. François' report was a most useful document, but it contained no conclusions. It was of the same kind as the report which the Secretary-General had submitted to the Commission at its first session, entitled " Survey of International

Law ".[3] It therefore constituted a report for the first stage of the Commission's discussions, and it was for the Commission to extract what it could therefrom, proceeding in the same manner as in the previous year. When studying the report, the Commission should enquire which questions were relevant to the regulation of the regime of the high seas. Whatever points the Commission retained would have to form the subject of a fresh report which Mr. François would submit the following year, and which would contain more precise rules. He thought that that was the best method for the Commission to adopt.

58. Mr. FRANÇOIS noted that Mr. Spiropoulos' proposal was almost the same as his own.

59. Mr. AMADO thought that if the Commission proceeded in that way it would be able to limit to three or four days the time devoted to study of Mr. François' report. He quite understood Mr. François, point of view, but thought that the Commission should forthwith reach conclusions on a number of principles, since otherwise it would have no precise texts available the following year. Those conclusions would constitute directives for Mr. François' next report.

60. Mr. FRANÇOIS agreed that the question of collision should be postponed in favour of the questions of the right of pursuit and the continental shelf, which were less difficult than that of collision and in regard to which information was available that would enable the Commission to reach certain conclusions.

61. Mr. AMADO pointed out that in Mr. François, report it was stated (point 10) that " in international civil law, collision raises in the first place questions of the conflicts of laws. Such conflicts arise in many connexions: responsibility for collision, causes of lapse of the action, competence of the courts responsible for taking cognizance of the civil consequences of the collision ". That constituted a complicated and difficult question, and if the Commission undertook to study it in all its aspects, it would never complete its work. He accordingly proposed that the Commission should not study the question, but should take the report chapter by chapter, consider each one rapidly, and pronounce an opinion on each point without prolonging the discussion.

62. Mr. FRANÇOIS recalled that to avoid wasting time the Chairman had proposed eliminating all the points dealt with in the report except the three he had mentioned.

63. Mr. AMADO thought that the Rapporteur could not be given the very vague task of seeking the rules existing in regard to collision. He might well be overwhelmed with documents which, despite their number, might still be incomplete, and from which he would be unable to draw really valid conclusions. It was far better to study the principles one by one, and to state that such and such a principle could be retained with a view to the establishment of a code on the law of the high seas.

64. Mr. FRANÇOIS recalled that it was not the general principles which gave rise to difficulties; it was the exceptions to those principles which concerned the Commission, and the scope of which should be studied from the international point of view.

65. Mr. AMADO thought that if the Commission nevertheless wished to study the question of collision, it could ouly do so by considering the four systems which were capable of settling conflicts of law and which constituted four doctrines: general maritime law, the *lex fori,* the law of the flag State of the vessel collided with, and the law of the flag State of the colliding vessel. The Rapporteur had himself drawn attention to those four doctrines, and had noted that others existed (" among which ").

66. Mr. FRANÇOIS again asked that consideration of the whole chapter should be deferred to a later date.

67. The CHAIRMAN, reverting to Mr. Amado's proposal, failed to see what the Commission could gain by reading the chapter " Conception of the Freedom of the Seas ".

68. Mr. SPIROPOULOS thought that in any case they should establish a principle in regard to that point.

69. Mr. CÓRDOVA reiterated that what was important was not the principle, it was the exceptions that the Commission should study.

70. Mr. SANDSTRÖM thought that the best procedure might be to begin by selecting the subjects which the Commission intended to retain, and then go on to discuss those subjects. With a view to that selection, he proposed that the table of contents should be read out, which would not take very long.

71. Mr. SPIROPOULOS said that there were international rules constituting principles of which a study should be made; the essential thing was to codify the existing rules. When that codification had been completed, it would be possible to establish rules wich could be included in a draft code.

72. The CHAIRMAN thought that it was neeessary for the Commission to establish which points were not in dispute, and he proposed to read the report so as to determine its principles.

SECTION 1: CONCEPTION OF THE FREEDOM OF THE SEA

72 a. The CHAIRMAN said that the report opened with the following words:

> " According to the principles of international law, the sea, with the exception of the coastal belt called ' territorial seas ' or 'territorial waters ', can neither be owned by individuals nor be subject to State sovereignty."

72 b. He asked the Commission whether it was agreed on that first principle, which constituted an important point in relation to the question of the continental shelf.

73. Mr. AMADO also had in mind the adjacent zone.

74. The CHAIRMAN agreed, adding that the regime of the continental shelf should not influence the regime

[3] United Nations publication, Sales No.: 1948.V.1 (1).

of the high seas. That principle was supported by many American countries.

75. After Mr. YEPES had asked that the words " or ownership " should be inserted after the word " sovereignty ", the CHAIRMAN said that he thought the same result could be achieved if the words " by individuals " and " State " were deleted, so that the sentence would read merely: " can neither be owned nor be subject to sovereignty ".

75 a. He added that he would have reservations to make on that subject later on. He did not recognize state sovereignty over the "territorial sea ". Like Mr. de La Pradelle, he believed in the indivisibility of the sea. The Rapporteur's definition of that principle was more general than he would have liked, for he considered that the whole sea, including the territorial sea, the adjacent zone, and so forth, was free. There were only " servitudes " with regard to its waters for the benefit of riparian States. He did not understand the distinction made between high seas, territorial sea, continental sea and adjacent zone. As far as he was concerned, there was just the sea, which could neither be owned nor be subject to sovereignty.

76. Mr. SPIROPOULOS recalled that the Commission's task was to establish a code of the high seas and—so as to make this clear—he asked that, in the principle that had just been read, the words " the sea " should be replaced by the words " the high seas ".

77. The CHAIRMAN said that he agreed to that amendment. He then read the next sentence of Mr. François' report:

> " It therefore follows that neither navigation nor fishing on the high seas can be forbidden to anyone."

77 a. He said that this constituted a second principle on which the Commission could express its agreement. He added that the remainder of the chapter on " The Conception of the Freedom of the Sea " contained no other principles requiring notice.

78. Mr. AMADO said that in the antipenultimate paragraph of section (1) of the report there was another principle which the Commission should consider. That principle was worded as follows:

> " According to modern theory, the freedom of the seas is based rather on the idea that the attribution of exclusive sovereignty over the high seas to any State would be contrary to the interests of the international community."

79. The CHAIRMAN asked whether the Commission accepted the passage as a principle.

80. Mr. ALFARO said that the passage did not constitute a rule, but followed from the two principles which the Commission had just adopted.

81. Mr. FRANÇOIS agreed, saying that the passage quoted contained the underlying theory of the two principles already stated.

82. Mr. SPIROPOULOS stated that all that the Commission was doing at the present time was purely provisional. It had just accepted two principles which the Chairman had read, but he thought it necessary to point out that the second principle was not accurately formulated. There were fisheries conventions which prohibited foreign vessels from fishing in certain zones of the high seas. The Commission could not formulate a principle which was contrary to the spirit and the letter of those conventions; the wording should specify that in certain circumstances the State was entitled to prohibit foreign vessels from fishing in certain zones of the high seas. He did not wish to press this point, however, since all the decisions which the Commission was taking were merely provisional.

83. Mr. KERNO (Assistant Secretary-General) wondered whether, in the second principle accepted by the Commission, the word " fishing " was sufficient at the present time. The sea was a source of wealth; without saying anything of petroleum and confining himself to the water itself, he had in mind certain processes being sought by scientists—for example, to use the difference in temperature between the various depths of the sea to produce heat or motive power. The application of those scientific processes would, like fishing—which was a source of wealth—constitute exploitation of marine resources. He therefore thought that the term " fishing " might soon become too narrow.

84. Mr. SPIROPOULOS proposed that the words " nor the exploitation of resources " should be invested in the principle after the words " nor fishing ".

85. The CHAIRMAN thought that it would be better to formulate the principles in positive terms instead of in the negative terms at present used. In his view, the exploitation of marine resources should be permitted to all.

86. Mr. SANDSTRÖM thought that the text was not clear, and that it would be better to change it and make it more precise.

87. Mr. CÓRDOVA said that it should be made clear that the exploitation of marine resources should not be carried on to the detriment of particular countries or of the international community. He recalled that whaling had been regulated, and that there were treaties in force between the United States of America and Mexico for the protection of certain fish in specific zones of the high seas. He thought that more and more of such treaties would be concluded to protect marine resources. Would fishermen who were nationals of States not parties to those conventions be able to disregard them and so destroy marine resources? He thought it essential, therefore, that the Commission should be very cautious in formulating a principle.

88. Mr. BRIERLY replied that States had declared on many occasions that they were not required to observe treaties of that kind concluded by others.

89. The CHAIRMAN thought that the problem could be solved by adding to the principle a few words excepting the special situations which might result from the provisions of certain conventions in force. He proposed that the Rapporteur should be left to draft a text which would take into account the reservations expressed by the Commission.

The meeting rose at 1 p.m.