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64th MEETING

Monday, 10 July 1950, at 3 p.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 CORDOVA, 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) (continued)

2. Mr. AMADO announced that he had had the opportunity of studying afresh the question before the Commission, and had endeavoured to draw up a few principles relating to the high seas to serve as a basis for discussion. He had intended to communicate the results of his work to Mr. François, but had been unable to do so. He then read out the document.¹

¹ Doc. A/CN.4/R.4, which read as follows:

PRINCIPLES PROPOSED BY MR. AMADO

1. The high seas can neither be owned by individuals nor subject to State sovereignty.
2. Ships on the high seas are under the exclusive jurisdiction of the State whose flag they fly.
 - (a) Every sovereign State shall be entitled to decide to whom it will give the right to fly its flag and to establish the regulations governing the granting of that right.
 - (b) Every ship shall have the right to ascertain the nationality of vessels of doubtful nationality, (right of approach) and to exercise the right of visit and search in the case of ships without nationality. In the event of international conflict, warships shall also have the right of visit and search in respect of ships of enemy nationality in order to ascertain whether the rules concerning contraband and blockade are being observed.

SECTION 1: CONCEPTION OF THE FREEDOM OF THE SEA (continued)

3. Mr. HUDSON said that, having been obliged to absent himself from the end of the previous meeting, he would like to state that, in section (I) of the report, entitled "Conception of the freedom of the sea", he saw no reason for referring to right of ownership. The points of interest were freedom of navigation and freedom of fishing, and he thought it superfluous to do any more than re-affirm those two freedoms. The latter, in fact, were not derived from the absence of State sovereignty. Once those rights were recognized, the high seas could be subject to a right of sovereignty. In the treaty signed by the United Kingdom of Great Britain

(c) The ships of a riparian State shall have the right to continue, on the high seas, a pursuit commenced in territorial waters of a foreign vessel which has committed an offence within those waters. In case of the capture of such ship, the flag should be notified without delay to the State under whose flag it sails. Pursuit may not be continued in the territorial waters of another State and cannot be resumed after the ship has entered the port of another State.

(d) In the case of collision on the high seas, the courts of the two flag States shall be competent.

3. All States shall have the right to lay submarine telegraph or telephone cables on the high seas. As the provision of the Convention of 14 March 1884 have never given rise to criticism, I feel that the Commission might well adopt them for regulating the right to lay submarine cables. Below is an extract from the main provisions of the Convention, as quoted by Oppenheim (7th edition, page 573):

Intentional or culpably negligent breaking or damaging of a cable in the open sea is to be punished by all the signatory Powers, except in the case of such damage having been caused in the effort of self preservation.

Ships within sight of buoys indicating cables which are being laid, or which are damaged, must keep at least a quarter of a nautical mile distant.

For dealing with infractions of the interdictions and injunctions of the treaty the courts of the flag State of the infringing vessel are exclusively competent.

Men-of-war of all signatory Powers have a right to stop and verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty.

All stipulations are made for the time of peace only, and in no wise restrict the action of belligerents during time of war.

4. Vessels of all nationalities shall be free to engage in fishing on the high seas, subject to their observance of the police regulations in force in the fishing areas, as established by Convention, and of the principles embodied in the treaties for the protection of the products of the sea and especially the protection of seals and the large cetaceans.

5. A sovereign State may exercise specific administrative powers beyond the limit of its territorial waters in order to protect its fiscal or customs interests. The zone in which it may exercise these powers may not exceed twice the breadth of the territorial waters.

6. Where fishing has been carried out over a prolonged period at the same points by ships flying the flag of a particular State, all other States shall be required to respect such peaceable fishing operations.

7. The subsoil of the high seas is a *res nullius* which may be freely exploited by the riparian States, provided such exploitation produces no marked effect on the bed of the high seas.

and Northern Ireland and Venezuela in 1942,² the signatories had shared out the high seas between them, declaring at the same time that freedom of navigation and freedom of fishing continued unimpaired. As far as he knew, no State had raised any objections to the treaty.

4. Mr. FRANÇOIS considered that the situation in point was a special one, and that no generalizations could be drawn from the solution adopted in that case. He could not accept the contention that the only rights protected by international law were the freedom of navigation and freedom of fishing, or that it was possible to claim a right of sovereignty over the high seas.

5. Mr. ALFARO declared that the principle was that the high seas could not be subject to State sovereignty, and it was from that principle that freedom of navigation and freedom of fishing were derived. He thought that the Rapporteur was right in beginning with that paragraph.

6. Mr. HUDSON expressed approval of the sentiment expressed in the first sentence on page 4 of the mimeograph text (A/CN.4/17, para. 9, printed text in Vol. II) of the report. It was indeed pointless to determine whether the high seas should be called *res nullius* or *res communis*. On the other hand, he did not approve of the tenor of the sentence quoted from Fauchille at the end of section 1.

7. Mr. SPIROPOULOS recalled that the last part of the previous meeting had been given up to an entirely general discussion on the report. Some texts had been adopted provisionally. Mr. François would submit texts to the Commission the following year for its consideration. He agreed with Mr. Hudson that the texts were not satisfactory, but it was not until the following year that the Commission would be able to discuss the texts proposed.

8. The CHAIRMAN observed that the belief had hitherto been that freedom of navigation and of fishing were consequences of the principle of the absence of sovereignty over the high seas. Mr. Hudson proposed to take as a principle what had been regarded as a consequence.

9. Mr. SPIROPOULOS considered that it was not necessary to say that freedom of navigation was the consequence of non-sovereignty. The question was a theoretical one, and he thought that any discussion on the point would be premature. The Commission could first lay down general principles and draw the conclusions from them later.

10. The CHAIRMAN thought that the Commission would have to draw a number of other conclusions from general principles. The question was to discover whether there was freedom of navigation and fishing or absence of sovereignty. It struck him as extraordinary that there should be a desire to pass that question over.

11. Mr. AMADO pointed that Mr. Spiropoulos had proposed enunciating general principles.

12. Mr. SPIROPOULOS asked that the Commission

lay down the principles of non-sovereignty and of the freedom of navigation and fishing.

13. Mr. YEPES recalled that, at the previous meeting, he had proposed reserving the question of floating islands. He would like to know whether the principle that the high seas could not be subject to a right of sovereignty was opposed to the principle of floating islands.

14. The CHAIRMAN replied that that question would be considered when the Commission came to it, together with the question of the right to exploit the continental shelf. The Commission would then have to decide whether a State should refrain from exploiting the continental shelf when such exploitation would involve exercising a right of sovereignty over the high seas. A similar question would arise with regard to floating islands. The exceptions would be discussed when the general principles had been laid down.

15. Mr. YEPES pointed out that the question of floating islands was independent of that of the continental shelf, since floating islands would be situated on the high seas. He enquired whether there was any incompatibility between the establishment of a floating island and the principle of non-sovereignty over the high seas.

16. The CHAIRMAN thought that there was definitely a clear relation between the two questions, but it was not the business of the Commission, at that moment, to concern itself with floating islands. He proposed to leave it to the Rapporteur to mention in his report the point raised by Mr. Hudson.

SECTION 2: DEFINITION OF A SHIP

17. Mr. HUDSON asked the Rapporteur whether it was necessary to deal with that question. He would prefer not to discuss it if Mr. François would agree.

18. Mr. FRANÇOIS explained that he had endeavoured to clear the ground, and had sought to establish what subjects the Commission might consider. He agreed with Mr. Hudson that the question in point was not a very urgent one. It was no longer necessary to keep it since the Commission had decided to confine itself to the three main points he had indicated at the last meeting. The continental shelf, collision and the right of pursuit would probably be sufficient for the programme of the next session of the Commission.

19. Mr. AMADO read out the last sentence of section 2: "It would seem that an agreement on the definition of a ship would obviate certain difficulties and the Commission might communicate with governments on this subject." In spite of that remark, he did not consider it necessary to dwell on the point.

The Commission decided provisionally to leave out the question of the definition of a ship.

SECTION 3: TERRITORIAL QUALITY OF SHIPS

20. The CHAIRMAN proposed leaving on one side that question, the subject of a controversy, which the Rapporteur described as "of an academic nature",

² Treaty relating to the submarine areas of the Gulf of Paria, signed at Caracas, 26 February 1942.

adding that "it was unnecessary for the International Law Commission to retain the item".

21. Mr. HUDSON considered, on the contrary, that it was very important for the principle. He did not think, however, that it was correct to speak of the territorial quality of ships. What should be said was: "Every State has the right to exercise its authority over ships flying its flag." He noted that the report stated that the theory of the territorial quality of ships "has been upheld by the Government of the United States." Would the Rapporteur tell him what authority he could quote in support of his affirmation, apart from Gidel I, p. 241?

22. Mr. FRANÇOIS replied that the Government of the United States had upheld the theory of the territorial quality of merchant ships. Professor Gidel (vol. I, p. 241) related that in 1842 Webster had written the following to Lord Ashburton: "Every merchant vessel on the seas is rightfully considered as a part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, is an act of force and is *prima facie* a wrong, a trespass which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations."

23. Mr. ALFORA thought that the principle contained in the sentence: "Every State has the right to exercise its authority over ships flying its flag" should figure in the code.

24. Mr. AMADO read out from the document he had submitted a formulation of the principle almost identical with the first sentence of the paragraph under study in the report of Mr. François.

25. The CHAIRMAN said that the Commission could request the Rapporteur-General to include the principle in his report.

The Commission adopted the principle.

SECTION 4: NATIONALITY OF SHIPS

26. Mr. Hudson said that he had for a long time been the follower of various French authors who claimed that one should not speak of the nationality of a ship but of the national characters of a ship. He recalled the convincing arguments of Niboyet³ on the subject. He felt that the last sentence of section 4 should find a place in the principle which the Commission was to formulate. He thought he was right in saying that the majority of countries kept a register of the ships flying their flag and that the right to fly that flag was conditional on such registration. He could find no mention of that fact in the paragraph.

27. Mr. AMADO was anxious for the document he had submitted to the Commission to be taken into consideration and would wait until it was published before taking part in the discussion.

28. The CHAIRMAN pointed out that it so happened that the report of Mr. François and the document submitted by Mr. Amado were in agreement. The texts in

question were section 4 of the report and sub-paragraph (a) of paragraph 2 in Mr. Amado's document.

29. Mr. FRANÇOIS remarked that Mr. Hudson seemed to consider that the Commission should endeavour to unify the various national laws.

30. Mr. HUDSON replied that that was not what he had in mind. To be more exact, he thought that the laws of States should be studied in order to see on what conditions they conferred their nationality on ships and perhaps in order to derive some general rules therefrom.

31. Mr. FRANÇOIS could not see the utility of considering that subject. There were no doubt certain rules which were the same in different countries, but since the attainment of a uniform system was almost out of the question, he wondered if it was worth while considering the subject dealt with in section 4 of his report.

32. Mr. YEPES thought that the question might be the subject of a recommendation by the Committee expressing the hope that "All States would unify the conditions under which they conferred their nationality on ships."⁴

⁴ Mr. Yepes submitted the following principles as a basis of discussion (A/CN.4/R.5):

1. Each State determines the conditions under which it confers its nationality on various ships, grants them the right to fly its flag and accords them its protection.
2. States having no seaboard have the right to possess their own fleet and flag, but such a right is only recognised in the case of States accepting the general principles of international law.
3. The nationality of a ship is proven by its ship's papers. The captain of a ship is bound to produce such papers whenever lawfully required to do so.
4. It is for the various maritime Powers to determine the conditions under which they recognise the nationality of foreign ships in their own territorial waters. Those conditions should not, however, be such as to render navigation and seaborne trade impossible or too difficult for a foreign nation.
5. It is not forbidden for a State, in time of peace, to confer its nationality on foreign ships by provisionally granting them the right to fly its flag and by according them the protection associated with the latter, but such right may not be exercised for fraudulent purposes or when prejudicial to already existing rights.
6. It is forbidden to fly the flag of a foreign State without the latter's authorization.
7. Ships in distress and their crews must be given all necessary assistance and be allowed free use of installation and equipment for rescue and salvage.
8. No one may seize the persons or property of shipwrecked persons. The right of flotsam and jetsam is abolished.
9. No State may, in time of peace, give orders to foreign ships on the high seas. The ship is covered by its flag.
10. No State has the right, in time of peace, to detain ships on the high seas, to send its officials on board, to demand the production of the ship's papers, or to carry out a search of the ship.
11. When the crew of a ship has committed crimes or offences on the territory or within the territorial waters of another State and is the object of pursuit by the authorities of that State, pursuit may be continued outside the territorial waters of the State and on the high seas. When, however, the ship has escaped pursuit, it may no longer be attacked on the high seas by the ships of the injured State.
12. Pirates are not tolerated and have no right to respect of

³ A. de la Pradelle et J. P. Niboyet, *Répertoire de droit international* (Paris, 1931), vol. X, "Navires de mer", by J. P. Niboyet, chapter II, paras. 15 and 18.

33. Mr. ALFARO pointed out that only treaties could change the practice followed. All that the Commission could do, apart from formulating a recommendation, would be to outline the principles as they existed at the moment. The report was quite clear on that point, since it stated that "Generally speaking, it is for every sovereign State to decide to whom it will give the right to fly its flag and to establish the regulations governing the granting of the right."

34. Mr. YEPES proposed deleting the word "sovereign", and saying merely "every State".

35. The CHAIRMAN asked whether the Commission was in favour of the principle that each State be free to grant the right to fly its flag, or whether it was in favour of considering the possibility of unifying the various national laws on that point. The Commission could confine itself to expressing the principle and reject the idea of seeking for unification.

36. Mr. CORDOVA thought that the situation was not quite as presented. Mr. Hudson had not suggested attempting to bring about uniformity of law but rather discovering whether any common rules existed which were followed by all States. The Chairman had proposed rejecting that suggestion. The fact that the Commission accepted the principle was no reason for rejecting the idea of attempting to find common rules.

37. Mr. HUDSON thought that the Commission could not unify laws but should study how the question of the nationality of ships was dealt with in the law of States.

38. The CHAIRMAN invited the Commission to indicate a means of arriving at some directives for the Rapporteur-General.

39. Mr. YEPES quoted the following sentence of Mr. François' report: "That is why it would be desirable, as Mr. T. M. C. Asser and Lord Reay stated in their report to the Institute of International Law at Venice in 1896, 'if not to bring about the adoption of absolutely uniform regulations with regard to the nationality of ships—this might be extremely difficult to bring about—at least to achieve a greater degree of similarity between the laws of the various States on the fundamental principles involved'."

The Commission decided by 9 votes to 2 that it was desirable to endeavour to determine the general prin-

their flag. They may be attacked at all times and be captured on the high seas.

Those ships which seek to seize persons or booty or to destroy for criminal ends the property of others shall be considered as pirates.

13. When there are grave reasons for suspecting that a ship is guilty of piracy, any ship of war of whatever State has the right to detain the suspect ship and to board it.

14. When a ship, without renouncing its nationality and without breaking its ties with a particular State, commits acts of pillage, brigandage or other offences at sea, the international regulations and jurisdiction admitted in cases of piracy may not be applied to it, and only the tribunals of the State to which the ship is amenable are competent to deal with it.

Note. — These principles have been taken from Bluntschli's text, and adapted to modern conditions.

ciples which might permit the achievement of a certain degree of uniformity in the matter.

40. The CHAIRMAN requested the Commission to take a decision on the principle contained in the last sentence of section 4 of the report of Mr. François: "The right to a maritime flag of States without a sea-board seems to have been recognized adequately by the Declaration of Barcelona of 20 April 1921."

41. Mr. ALFARO thought that the Commission should indicate what that principle was.

42. Mr. YEPES requested Mr. François to outline the general principles of the Barcelona Declaration.

43. Mr. FRANÇOIS complied.

44. The CHAIRMAN remarked that the Barcelona Declaration enunciated very general principles.

45. Mr. YEPES and Mr. ALFARO said that they would prefer the principle to be enunciated without the Declaration of Barcelona being quoted.

46. The CHAIRMAN thought that the Declaration might be mentioned in the commentary and not in the text of the principle.

It was so agreed.

47. Mr. el-KHOURY suggested that, to facilitate the discussion of each section, Mr. François should prepare a brief principle for submission to the Commission. In the case of the last paragraph, Mr. Amado had endeavoured to extract a principle from it. He hoped that Mr. François would receive his suggestion favourably.

48. Mr. FRANÇOIS said he had already stated that he had another conception of his task. He had wished to clear the ground and to invite the Commission to indicate what points it wished to study.

49. The CHAIRMAN declared that Mr. François was right, and that the decision taken by the Commission at its last meeting had changed the position. The Commission desired, on certain points, to adopt principles indicating its opinion. When Mr. Alfaro drew up his general report he would, in concert with Mr. François, formulate the ideas of which the Commission had expressed approval.

50. Mr. CORDOVA pointed out that Mr. Amado had already drafted some principles and that the Rapporteur had declared himself in agreement with him on certain points. He suggested that Mr. François and Mr. Amado together examine the document submitted by the latter, which could thus constitute a useful basis of discussion for the Commission.

51. Mr. HUDSON thought that the Commission was not seeking to draw up a text, but to choose the points it wished to deal with. Mr. François would give a precise formulation to those points in the light of the discussions and after having received certain directives from the Commission.

52. Mr. el-KHOURY was, on the contrary, under the impression that the Commission intended to adopt principles.

53. Mr. CORDOVA thought that the Commission should decide to draw conclusions from the report and to seek to formulate concrete declarations. It was for

that purpose that Mr. Amado had submitted a document to the Commission. He thought it most desirable for definite points to be discussed.

54. Mr. AMADO recalled that, at the previous meeting, the trend of the discussion had been in favour of seeking to arrive at conclusions on the subjects enunciated in the report, with a view to formulating general principles based on those conclusions. He also drew attention to the fact that Mr. Spiropoulos had urged that the Commission should enunciate the general principles implicit in the report. The conclusions he himself had submitted were derived from the report and all, with one exception, were affirmations of existing principles of international law.

54 a. A decision taken at the previous meeting could not be annulled. He could not accept Mr. Hudson's interpretation. The Commission should endeavour to draw conclusions from the report and to establish those general principles it considered it possible to formulate. He would stand by the decision taken by the Commission.

55. The CHAIRMAN did not consider that that was exactly what had been concluded at the previous meeting. He was under the impression that the Commission had decided that it was called upon to select certain principles but that it would be necessary beforehand for it to decide whether it should leave any particular subject out of account. Mr. Amado himself had, in fact, ruled out certain subjects and did not submit proposals on all the subjects broached in the report. He thought the Commission should decide whether it wished to deal with a particular question or not and then see whether the texts submitted by Mr. Amado and Mr. François were in agreement. If they were not, it would be necessary for the Commission to make its choice.

56. Mr. FRANÇOIS thought Mr. Amado's proposals were very useful, but might prejudice the result of the examination that the Commission was due to carry out at its next session. It was only after a more thorough preliminary study and after discussion of the report which he would submit at the next session that any decisions should be taken.

SECTIONS 5 AND 6: SHIPS WITHOUT A NATIONALITY; SHIPS POSSESSING TWO OR MORE NATIONALITIES

57. The CHAIRMAN declared that the principle was that "Every ship should have a nationality and not more than one nationality." He did not think that the Commission could go into the details of sections 5 and 6 which the Rapporteur had, in any case, suggested leaving on one side.

58. Mr. FRANÇOIS accepted the principle but considered that it was necessary above all to discover what the position was when a ship had two or more nationalities or none at all.

59. The CHAIRMAN thought that the principle in question was just as important at that which laid down that every State had the right to confer its nationality on a ship.

60. Mr. ALFARO shared the Chairman's views. The

principle must be enunciated. When any dispute arose it must be settled by another rule. The Chairman's formulation of the principle was ideal.

61. The Chairman proposed leaving on one side all the detailed conclusions relating to section 5 and 6 and enunciating only the general principle. He agreed however with the Rapporteur that by so doing they would not be making any very great contribution to knowledge.

62. Mr. HUDSON proposed substituting the words "national characters" for the word "nationality". He enquired how it could come about that a ship had more than one nationality and if such cases were at all frequent.

63. Mr. FRANÇOIS replied that it often happened that a ship was registered in more than one country. Registration in one country did not always cancel a previous registration in another. Such cases frequently occurred and were of great importance.

64. Mr. HUDSON would like to be able to determine the criteria for deciding whether a ship possessed national characters. He thought that section 5 could be eliminated, since the case could not occur very often. With regard to section 6, he did not see how it was possible for a ship to possess several nationalities.

65. Mr. Yepes recalled that the Commission had decided that each State was free to establish the conditions under which a ship was authorized to fly its flag.

66. Mr. SANDSTRÖM thought that there might be such a thing as ships without nationality, and quoted the case of ships flying the flag of a country which no longer existed as an independent State.

67. The CHAIRMAN pointed out that, generally, a ship without nationality was a pirate, and that the Commission had decided not to study the question of piracy. It might however be supposed that a ship flew two different flags alternately. It was possible to eliminate sections 5 and 6.

68. Mr. SANDSTRÖM recalled the fact that the question of Esthonian ships had caused some concern in Sweden, where they were uncertain what nationality to attribute to such ships, since Sweden had recognized the annexation of Esthonia by the Union of Soviet Socialist Republics.

69. Mr. HUDSON remarked that, in that case, the ships were no longer Esthonian ones.

70. Mr. ALFARO stressed the need for adopting an undisputed general principle. The principle of the right to a nationality was as important for ships as for men. A ship might, in fact, be without nationality pending its registration, and it might be necessary to draw up certain rules applicable to a ship during the period between two registrations in different countries. Those were, however, exceptions to the general principle and did not affect it. The Esthonian ships flying the Esthonian flag possessed that nationality for all those countries recognizing the Republic of Esthonia and, as far as all other countries were concerned, were without nationality. That, however, was an exception which did not concern the Commission at that moment.

71. Mr. el-KHOURY considered that there would continue to be cases of ships without a nationality and ships with two nationalities: it could not be denied that such a situation existed. The principle should be adopted that ships had one nationality and one only, and the Rapporteur could develop that principle later.

72. Mr. CÓRDOVA noted that the Commission was discussing the general principle and the exceptions to that principle. Everyone was in agreement on the general principle, and they would come to consider the possibility of applying that principle later. Ships without nationality did in fact exist. They would be subject to special regulations.

73. Mr. SANDSTRÖM suggested that the Commission should consider whether the exceptions were of sufficient importance to warrant its dealing with them.

74. Mr. SPIROPOULOS held a different opinion. In his view, the Commission was met to codify the rules of international law. Those rules were known and the task was to convert them into positive ones. Codification and progressive development should not be confused. He thought that there was a very clear distinction between the two. Should any lacuna or ambiguity exist, the Commission should lay down precise rules, but it was essential not to confuse codification with the other process.

74 a. International law merely stated that the nationality of ships came within the domestic competence of States. The Commission should therefore confine itself to the principle that every ship should have a nationality and one only. To go any further would be to tackle a problem of unification of law. In his opinion, the question of the nationality of ships had nothing to do with the regime of the high seas. With regard to the other question—that of absence or plurality of nationality—the Commission could, for ships without nationality, determine what regime should be applied to them. As for ships possessing several nationalities, he knew of no such case.

75. The CHAIRMAN could not accept the opinion expressed by Mr. Spiropoulos. Regulation of the question of the nationality of ships was a problem of public order which arose equally on the high seas. If, for example, a certain ship roaming the high seas was able to fly one flag or two, it would no longer be possible to police the high seas. If there were no regulations with regard to the flying of the flag, it might happen that a ship would hoist the Italian flag when passing a French ship and hoist the French flag when passing an Italian one. Any policing of the high seas would be inoperative. He did, however, think that a discussion on the point would go too far and would take up much of the Commission's time. For that reason he would like there and then to consult Commission as to whether it intended to include in its draft code a general principle relating to ships without a nationality and to ships possessing two or more nationalities, or whether, on the contrary, it did not wish to deal with the question. He would begin by asking the Commission whether it accepted the principle that a ship should sail under a flag and only one flag.

76. Mr. HUDSON maintained that that question con-

tained two points. The second point might prove to be contrary to some municipal laws.

77. The CHAIRMAN said that, to put the question more precisely, he would submit the following first proposal to the Commission: "Every ship must sail under a flag." He thought the Commission accepted that proposition.

It was so agreed.

77 a. The CHAIRMAN then submitted the second proposition, worded as follows: "Every ship may sail under only one flag."

The Commission adopted that proposition by 9 votes to 1.

SECTION 7: DISTINCTION BETWEEN PUBLIC AND PRIVATE SHIPS

78. Mr. el-KHOURY observed that private ships were those belonging to private persons. They should fly the flag of the country of their owner. But there were ships with several owners. He enquired of Mr. Spiropoulos what he thought would be the nationality of a ship, equal shares in which were held by two private persons, one of Greek and the other of Egyptian nationality. What flag should the ship fly in that case?

79. Mr. SPIROPOULOS replied that he was not acquainted with Egyptian law but that, according to Greek law, a ship belonging to a Greek must be registered in Greece and fly the Greek flag.

80. The CHAIRMAN remarked that the discussion on that point was hardly likely to lead to any precise conclusions. He would like to ask the Rapporteur whether he agreed that the Commission should deal for the moment solely with public ships.

81. Mr. FRANÇOIS replied that the question of public ships did not require discussion, as it was regulated by the Brussels Convention for the Unification of Certain Rules relating to the Immunities of State-owned Ships, signed on 10 April 1926, and by the additional Protocol of 24 May 1934 relating to the Immunities of State-owned Ships.

82. Mr. HUDSON pointed out that that convention regulated the question of the immunities of public ships in port. On the high seas, the distinction to be made between public and private ships was less important and for that reason he thought that the Commission need not consider the point.

83. Mr. FRANÇOIS stated that it was for the same reason that he had suggested in his report that the Commission should not deal with the point.

84. Mr. el-KHOURY and Mr. CÓRDOVA declared themselves of the same opinion as Mr. Hudson and Mr. François.

85. The CHAIRMAN concluded that consideration of the question could, in the view of the Commission, be postponed.

SECTIONS 8 AND 9: SAFETY OF LIFE AT SEA;⁵ SIGNALS

86. Mr. HUDSON noted that under section 8 the

⁵ See also 66th meeting, paras. 1-5.

Rapporteur mentioned those regulations which had been described as "the maritime rules of the road". It was a question worthy of careful examination. Such rules had been in existence since 1863, and had been revised in 1889 by a Conference held at Washington, D.C. They had since been received in 1929 and in 1948.⁶ The rules in question were not in the nature of international conventions, and their international application was not compulsory. They were only adopted and applied by States in their municipal laws. In his report, Mr. François said that the regulation annexed to the Final Act of the London Conference of 1948 could be ratified separately. He did not think that was correct, and had heard nothing about such ratifications. He would accordingly like to see inserted in the draft international code some provisions similar to those rules and which could be ratified by all States.

86 a. It was regrettable that there were no compulsory international regulations of general application in existence so far, but only a concordance between municipal laws; it was probable however that the rules mentioned by the Rapporteur had been adopted by the majority of States.

86 b. However that might be, the matter was one of great importance from the standpoint of international law. Any ship sailing the high seas was in danger if each ship was free to navigate as it pleased. Gidel, talking of the *Lotus* case, had remarked that on the question of navigation on the high seas, some of the rules adopted by States were uniform, but others were not. Uniformity alone could not, however, guarantee the safety of navigation on the high seas. He considered, therefore, that the rules, as amended in 1948, should be adopted by all governments. He hoped that the Rapporteur would be able to study the matter and to deduce from existing rules a principle which the Commission could discuss the following year with a view to its insertion in a draft code.

87. The CHAIRMAN attached great importance to Mr. Hudson's suggestion. Since national regulations were in agreement on a large number of points, the Commission could express the desire to see such rules codified with a view to their ratification by States.

88. Mr. HUDSON added that he knew of no other case of a subject of such great international significance being left to a concordance of municipal laws instead of being regulated by international convention.

89. Mr. FRANÇOIS pointed out that the London Conference of 1948 had elaborated two sorts of rules, the first category of which related to the construction etc. of ships, and the second to the prevention of collision. Until 1948, those two categories of rules had been combined in a single treaty text, but the Final Act adopted at London contained, in two annexes, regulations concerning the construction etc. of ships (Annex A) and an international regulation for the pre-

vention of collisions at sea (Annex B). The said Annex B could be ratified separately by States without the adoption either of Annex A or of the Final Act. In the texts established before 1948, no provision had been made for the ratification of the rules by the signatories. He suggested that the Commission should express the hope that all States would accept and ratify Annex B.

90. Mr. HUDSON said that at one time the Government of the United States of America had mistakenly sought to ratify the earlier Convention of 1929, and had then discovered that the rules contained in that Convention were simply rules that the various States could adopt but that they were not required to ratify.

91. Mr. FRANÇOIS pointed out that, since 1948, the rules could be ratified.

92. Mr. HUDSON agreed that the Final Act of 1948 marked a great step forward.

93. Mr. SPIROPOULOS observed that the point raised by Mr. Hudson was of the greatest importance. While recognizing that the Commission should deal with it, he thought it his duty to point out that the Commission did not seem to him to be prepared for dealing with questions as technical as those raised by certain problems of navigation on the high seas and particularly by that of the safety of human life. He thought that the best solution would be to ask the Rapporteur to study existing rules and conventions and to submit the following year a precise account to the Commission which could not enunciate a general principle that States could then judge in full possession of facts.

94. The CHAIRMAN agreed with Mr. Spiropoulos that the Commission was quite unable to draw up a series of technical rules, and he accordingly supported the latter's proposal to invite the Rapporteur to examine the question, bearing in mind that it appeared to be the desire of the Commission for international unification to be achieved in that field.

95. Mr. ALFARO wondered whether the Commission could not enunciate a general principle that States should, in the field of navigation on the high seas, employ measures guaranteeing a minimum of safety to persons on board ship. It seemed to him highly desirable to enunciate such a principle, which would serve as a means of urging every State to adopt the best possible measures for safety at sea. The technical details could be settled by special convention.

96. Mr. AMADO was afraid that discussion of the question might be re-opened when the Commission came to consider the general report to be submitted to it. He agreed that the principle formulated by Mr. Alfaro was a very important one, but, in view of the fact that the Commission would not have a great deal of time for consideration of the general report, he was not very much in favour of adopting that principle which had not been advanced so far either by navigational experts or by the competent authors. Before formulating such a principle, it was essential, he thought, to ascertain the views of such experts and authors. A recommendation by the Commission would undoubtedly draw their attention to that point, but he feared that at that stage the

⁶ International Convention for the Safety of Life at Sea, signed at London, 31 May 1929. See Final Act of the International Conference for the Safety of Life at Sea, signed at London, 10 June 1948.

Commission would waste too much time discussing the terms of such a principle.

97. The CHAIRMAN said, in reply to the fears expressed by Mr. Amado, that he had intended proposing that the Commission discuss the general report next week. It would thus have a fortnight for its consideration instead of the week it had had the year before. On a number of points, the decisions taken by the Commission had been somewhat vague and would no doubt give rise to new discussions. That being so, he thought that the Commission should commence consideration of the general report the following week. He enquired whether the Rapporteur-General approved that proposal. As for the principle formulated by Mr. Alfaro, he considered it too self-evident to be of much use.

98. Mr. ALFARO said he accepted the Chairman's proposal with regard to the consideration of his report. He thought that, in spite of the fears expressed by certain members of the Commission, the report should contain a principle such as he had formulated. After the *Titanic* disaster, all States had recognized the need for more intensive safety measures than were previously in force. All States, or at least a large number of them, had endeavoured to protect human life more effectively, either by their own laws or through agreements. No means should, however, be neglected of urging States to recognize that human life was sacrosanct and to seek and apply the best safety measures.

99. Mr. HUDSON thought it would be premature to formulate a general principle for insertion in a code. He would like the principle suggested by Mr. Alfaro to be formulated with reference to historical development, and on the basis of the rules which had been in existence for nearly ninety years and which were gradually being perfected. He thought the best solution would be to leave it to the Rapporteur to study the question thoroughly, and to submit his findings to the Commission the following year. The Commission should not, however, undertake the premature enunciation of a principle which would certainly not go far enough. He himself, in any case, would not be in a position to judge the question until more familiar with the texts. For that reason, he would like to study the Final Act of 1948 and its Annexes and the latest edition of international or national regulations on the question.

100. Mr. FRANÇOIS shared Mr. Hudson's opinion. He saw no use in enunciating, at that stage, rules which would of necessity be too vague and of slight practical value for the purpose envisaged by the Commission.

101. The CHAIRMAN concluded that there was a suggestion before the Commission that the Rapporteur-General should mention in his general report the discussions which had taken place in the Commission, and that Mr. François should collect all available information and submit it in the form of an analysis to the Commission at its next session.

102. Mr. AMADO enquired whether the Rapporteur-General, in his general report, would include his own comments or whether he would confine himself to giving

an objective statement of the opinions expressed in the course of discussion.

103. Mr. ALFARO replied that he had no intention of making comments of a personal nature, and that he would endeavour to give an objective report of the discussions.

SECTION 10: COLLISION

104. The chairman pointed out that the question of collisions was a very difficult and complex one raising problems of conflicting laws and of competence. He wondered whether the Commission would be in a position to arrive at any conclusion. The Committee would recall that Mr. Amado had made a proposal offering a drastic solution.

105. Mr. AMADO said that, when submitting his proposal, he had wondered whether the Commission would be prepared to accept it. He had been in the same position as the Rapporteur, who found himself confronted with four different theses:

- (1) exclusive competence of the courts of each flag State;
- (2) competence of the State of either the vessel collided with or of the colliding vessel;
- (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 of refuge.

105 a. He thought that at that moment no jurist would be in a position to choose between the four hypotheses, or even to combine them. He had tried to picture the position of the Permanent Court of International Justice when it had had to deal with the *Lotus* case. In his opinion, it was not possible for the Court to give satisfaction either to France or to Turkey. Its judgment had, in any case, been strongly criticized. In that field, as in that of safety of human life at sea, he thought that the best solution would be to invite the Rapporteur to study the question and to submit a detailed report the following year. That would enable him to study the question thoroughly and to formulate positive conclusions on points which there was hardly any use in the Commission discussing at that stage.

106. Mr. FRANÇOIS was entirely in favour of Mr. Amado's proposal. He only wished to know whether the Commission was prepared to study the question and to invite him to submit a more detailed document the following year. He would, however, like the Commission to decide whether it wished him to deal with the civil aspect as well as the criminal one. It would be recalled that the criminal question had aroused deep concern in the *Lotus* case. He could confine himself to the criminal question, but felt that there was a very strong connexion between the criminal and the civil aspects, and that it would therefore be rather difficult to leave the civil aspect entirely out of the question. There was another institution, the International Maritime Committee, which was also dealing with the matter. He could obtain information about the work of that Committee and give analysis of it in his report.

107. Mr. CORDOVA asked if Mr. François would inform the Commission whether collisions on the high seas were very numerous.

108. Mr. FRANÇOIS and Mr. HUDSON replied that there were a large number of collisions on the high seas every year.

109. Mr. AMADO declared that, as far as the question of conflicting laws was concerned, the Commission was entrusted with the codification of public international law but not of private international law, and that it therefore seemed wiser to him to leave out of consideration for the moment the question of private international law. He proposed, therefore, that the Rapporteur should not venture into that very complex and difficult field.

110. Mr. SPIROPOULOS said that three questions arose in connexion with collisions:

- (1) What law decided on the question of civil responsibility ?
- (2) What law was applicable in regard to criminal responsibility, for instance, when a collision caused loss of life ?
- (3) What was the competent court in cases of collision ?

The first question belonged to the sphere of private international law with which the Commission was not for the moment dealing. The second question fell within the field of the codification of international criminal law, which likewise was not on the Commission's agenda. The Commission could study the third question, but he wondered whether it really belonged to public international law of the high seas. He rather thought that the third question should also be left out of account.

111. Mr. el-KHOURY noted that, according to Mr. Hudson's assertion, collisions on the high seas were very numerous. He would like to know what the practice was in such cases in order to have a little information on which to base his opinion. What courts claimed competence in the matter ?

112. Mr. HUDSON recalled that the whole world had followed with great attention the deliberations of the Permanent Court of International Justice on the *Lotus* case. The court had ruled that Turkey, in instituting criminal proceedings under Turkish law against the captain of the French ship *Lotus* after it had collided with a Turkish ship on the high seas, had not acted in contradiction to the principles of international law. In coming to that decision, however, the Court had been extremely divided and it was only by the casting vote of the President that the matter had been decided. The Court, on that occasion, had been the target of a very large number of criticisms from all countries, and the International Maritime Committee had in 1933 adopted a resolution on the subject.⁷

112 a. He, personally, would be sorry if the Commission did not deal with the question of collision. After the *Lotus* case and its repercussions throughout the

world, he did not feel it possible for the Commission to keep silent and would request the Rapporteur to examine the question. He still felt that in the *Lotus* case the Court had come to a just decision. The Rapporteur could present a detailed report on the point the following year.

113. The CHAIRMAN noted that the Commission seemed to be agreed on requesting Mr. François to submit to the Commission the following year a principle of a positive character to supplement the negative ruling given by the Permanent Court of International Justice.

It was so agreed.

SECTION 11: ASSISTANCE AND SALVAGE

114. Mr. HUDSON considered section 11 very important, and was in agreement with the conclusions reached by the Rapporteur in his report. He would like to get something positive out of the Brussels Convention of 1910 which, to his knowledge, had not been very widely ratified. Hence, it was perhaps difficult to assert that the matter was governed by customary law. The Commission could not pass over the question and fail to establish principles based on the rules enunciated in the Convention. Many countries had passed legislation rendering salvage compulsory. In the United States of America, failure to render assistance was assimilated to a crime. It seemed to him that the Commission should formulate some rules for inclusion in a code of international scope.

115. Mr. FRANÇOIS thought that the principles might be formulated on the basis of articles 11 and 12 of the Brussels Convention.⁸

116. The CHAIRMAN presumed that the Commission was in favour of inviting the Rapporteur to submit a more detailed report on that point the following year.

117. Mr. HUDSON thought that the Commission, before taking a decision, should be acquainted with the text of the Convention and with the principles of assistance in general.

118. The CHAIRMAN requested Mr. François to bring the text of the Convention to the Commission's next meeting.

SECTION 12: CEREMONIES ON THE HIGH SEAS

119. The CHAIRMAN thought there was no need for the Commission to examine the paragraph and invited it to pass on to section 13.

SECTION 13: POLICE OF THE HIGH SEAS

120. Mr. FRANÇOIS said that the paragraph concerned general police measures allowed in time of peace by international law—namely, the right to ascertain the identity and nationality of the ship. The right was the subject of international regulation.

121. The CHAIRMAN asked Mr. François if he thought that the right of approach was the sole exception

⁷ For the text of the resolution, see *La Revue du droit maritime comparé*, vol. 29 (Jan. - June 1934), p. 23.

⁸ Convention for the Unification of Certain Rules with respect to Assistance and Salvage at Sea, signed at Brussels, 23 September 1910.

permitted to the general principle which forbade, in time of peace, any interference in the navigation of ships of another nationality on the high seas, unless there was serious ground for suspecting that the ship was engaged in piracy.

122. Mr. HUDSON drew the attention of the Commission to the control measures taken by the coastal State in the contiguous zone to prevent infringement of its customs or sanitary laws or regulations, or interference with its security by foreign vessels. He wondered whether such measures could be applied by a State when, for example, a ship was trans-shipping its cargo on the high seas for delivery at one of its ports. If the Rapporteur considered that the right of approach was allowed in such cases only within a certain distance from the ports, he might declare himself in agreement, but he would like the report to be more definite on the point.

123. Mr. FRANÇOIS asked whether Mr. Hudson would agree to accept the principle formulated by Pearce Higgins, which he had reproduced in his report—namely:

“Any interference with a foreign vessel on the high seas is, apart from treaty, an act for which the State may have to answer; it is allowable only if there is reasonable ground for suspicion that the character of the ship is feigned”,

or Gidel's formulation quoted in the previous paragraph.

124. Mr. HUDSON replied that he was in agreement neither with Pearce Higgins nor with Smith, who was also quoted in the same paragraph. He tended rather to agree with Gidel, though the latter did not go far enough. Before committing himself, he would like to have further information on more recent developments. However, he was basing his opinion neither on Higgins nor on Smith nor on Gidel. He wished to ascertain the practice of States.

125. The CHAIRMAN observed that when the Commission came to examine the question of the continental shelf it would discover that that point was also liable to give rise to difficulties with regard to smuggling.

126. Mr. BRIERLY thought that the whole question was in principle related to the problem of the continental shelf and the contiguous zone, and that the Commission might discuss it when it came to examine those points. He wondered whether the rules enunciated in the report were not sufficient for the high seas.

127. Mr. HUDSON thought that there was, in practice, greater latitude in the application of rules of police; a warship meeting a ship on the high seas could call for verification of the flag.

128. Mr. FRANÇOIS replied that there was no international regulation on that question and that the French had always contested the practice.

129. Mr. AMADO remarked that the discussion showed the importance attached to the nationality of a ship. It was for that reason that he had formulated his proposal. States often doubted whether the flag denoted the true nationality of a ship.

130. The CHAIRMAN noted that the right of ap-

proach was not in doubt; but that the longer the Commission considered the point, the more it was forced to the conclusion that there were a large number of exceptions to the rule. He thought that the Commission could enunciate a principle on the right of approach, adding that there were a number of exceptions to the right which it would consider later.

131. Mr. AMADO observed that reference had been made to the continental shelf and the contiguous zone. Those points would be considered later and the question at the moment was that of police of the high seas.

132. The CHAIRMAN thought that the two questions mentioned came within the regime of the high seas.

133. Mr. FRANÇOIS affirmed that right of approach outside of the territorial waters and of the contiguous zone should exist. There were cases in which there was a presumption of piracy, of slave trade or of arms traffic in which it was necessary to be able to exercise a control and to take the appropriate measures.

134. Mr. AMADO said that in case of doubt as to the nationality of a ship, any State had the right of approach.

135. The CHAIRMAN replied that such a right did exist, but not the right of investigation; it was sufficient for a ship to show its flag in order to satisfy the provisions relating to the right of approach.

136. Mr. SPIROPOULOS thought that the right of verification of the flag did exist. Mr. François could inform the Commission the following year on any exceptions to the right of approach.

137. Mr. FRANÇOIS declared that he did not admit the right of verification of the flag.

138. The CHAIRMAN thought that the Commission was agreed to postpone detailed examination of the question of the right of approach until the following year, and that it was preferable not to formulate any principle that year.

The meeting rose at 6 p.m.

65th MEETING

Tuesday, 11 July 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.