Document:-

A/CN.4/SR.339

Summary record of the 339th meeting

Topic:

Law of the sea - régime of the high seas

Extract from the Yearbook of the International Law Commission:-

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possibility of the principle of conservation being applied as if it were one of appropriation.

33. Mr. Padilla-Nervo, while accepting the conditions in sub-paragraphs (*a*) and (*b*) of article 29, paragraph 2, had raised serious objections to the provisions for compulsory arbitration, preferring the provisions in Article 33 of the United Nations Charter, under which the method of settlement of a dispute was left to the choice of the parties. Although the Commission had preferred the method of compulsory and automatic arbitration adopted in 1948 at the ninth Inter-American Conference, held at Bogotá, he would admit that that solution might not command general support. That particular point, however, was not the Commission's immediate concern, save in regard to the question of the type of arbitration that should be adopted. The disputes that the Commission had had in mind had been mainly of a technical nature, arising out of the use of fisheries in those areas of the high seas in which the Commission had recognized the special interests of the coastal State. The principle of arbitration was essential to the functioning of the system proposed by the Commission. A coastal State could rest assured that, provided it had fulfilled the requirements in article 29, paragraph 2, and had acted in good faith, no question of compulsory arbitration would arise.

34. Mr. AMADO said that he had not heard the phrase " fishing industry " used during the discussion. Yet it was the rapid and extensive development of fishing owing to scientific research and technical progress that really lay behind the new provisions that the Commission was attempting to codify. The idea of conservation of the living resources of the high seas had been born of the necessity for protection against large-scale fishing by big industrial interests, with the consequent possibility of abuse and the risk of denuding the sea of vital marine products. The Rome Conference had acknowledged the responsibilities of States fishing in areas of the high seas and had recognized the special position of coastal States —he had in mind the case of Peru—whose special interest in the area of the high seas off its coast was paramount. The extension of rights previously restricted to the three-mile limit had opened wide the door to the coastal State, which previously had been excluded from the enjoyment of such rights in sea areas of vital importance to it.

35. Mr. Padilla-Nervo had felt that the Commission had not gone far enough in that respect; it must therefore decide whether it would be possible still further to improve the position of the coastal State. He would not conceal the fact that in matters of arbitration his own preference was for the voluntary method which, though perhaps old-fashioned, had solid advantages. He would go to the limit of practicability in attempting to meet Mr. Padilla-Nervo's point, but in that process care should be taken not to undo the valuable work already accomplished.

The CHAIRMAN *declared closed the general discussion on the conservation of the living resources of the high seas.*

The meeting rose at 12.55 p.m.

339th MEETING

Thursday, 3 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary of the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add.1, A/CN.4/99 and Add.1-5) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of item 1 of the agenda: Regime of the high seas.

2. Mr. FRANÇOIS, Special Rapporteur, introducing the addendum (A/CN.4/97/Add.1) to his report on the regime of the high seas and the regime of the territorial sea, pointed out the impossibility of dealing in such a document with all the comments by governments, some of which were excessively detailed; others proposed drafting changes, and those could be dealt with by a drafting committee. If the articles were discussed *seriatim*, he would outline the salient comments by governments and, where necessary, explain his own views.

It was so agreed.

Article 1: Definition of the high seas

3. Mr. FRANÇOIS, Special Rapporteur, referring to the comment of the Philippine Government, said that as the Commission had discussed the question of groups of islands at its seventh session and provisionally decided against the insertion of special provisions,[1] he would suggest that that question be dealt with in connexion with " groups of islands " in the chapter on the territorial sea.

4. The criticisms of the Turkish and Israeli Governments might be met if a definition of internal waters were given in the chapter on the territorial sea, as suggested in paragraph 6 of the addendum to his report.

5. The Yugoslav proposal seemed to regard the contiguous zone as not forming a part of the high seas. That

[1] A/CN.4/SR.319, paras. 57-66.

had not been the view of the Commission, which had accepted the contiguous zone as being definitely part of the high seas.

6. His conclusion, therefore, was that the article should stand as drafted.

7. Mr. KRYLOV, while appreciating the risks taken in formulating definitions, sympathized with the Israeli point of view, which might perhaps be met by an indication in the comment that " high seas " was used in the article in a general sense. Certain waters, such as landlocked seas, had special characteristics, and it could not be assumed that the only high seas were the broad open spaces of the ocean. That question was clearly a matter of concern to the Turkish Government also.

8. Mr. SANDSTRÖM said that those criticisms could to some extent be met if the chapter on the regime of the territorial sea preceded that on the regime of the high seas.

9. Faris Bey el-KHOURI agreed with the Special Rapporteur that the article should not be amended. The Philippine objection could be covered by article 10 of the draft on the regime of the territorial sea. In the case of islands in a group that were remote from one another, each would have its own territorial sea and the zone between them would necessarily fall under the regime of the high seas.

10. Sir Gerald FITZMAURICE, while agreeing with the Special Rapporteur's conclusion, said the Israeli and Turkish criticisms ought to be considered, if only in order to place on record the Commission's reasons for rejecting them. He could sympathize with Mr. Krylov's point concerning the Turkish objection, in the sense that normally there would be no need to make specific mention of internal waters, because they did not form part of the sea. Since the introduction of the straight baseline system, however, certain areas of the sea had become internal waters and had to be distinguished from the territorial sea and the high seas. While appreciating the Turkish concern that the term " internal waters " might not apply to an internal sea, he agreed with the Rapporteur that an internal sea would geographically be a lake and could not be regarded as anything else but internal waters. Mr. Krylov's point was also covered. There were two types of landlocked sea. On the one hand, seas such as the Mediterranean and the Baltic, whose shores were the territory of several coastal States, were obviously not internal waters; on the other hand, a sea wholly surrounded by the territory of one country would be so regarded.

11. Mr. PAL observed that the Israeli Government's criticism raised two points. First, the definition of the high seas by reference to the territorial sea and internal waters suffered from lack of precision, inasmuch as there was no clear definition of those two expressions themselves. Secondly, reference to internal waters was meaningless because internal waters never formed part of the high seas, since territorial sea always intervened. There was no substance in the second point. High seas had been defined by reference to the sea and by exclusion of two distinct parts of the sea; the territorial sea having been taken as part of the sea, its exclusion in express terms was not irrelevant or meaningless. The first point, however, indicated a genuine shortcoming of the present definition. The Commission was well aware of the difficulty of finding a precise definition of the territorial sea acceptable to all States. It would probably have to remain satisfied with the present imprecision in its definition of the territorial sea and consequently of the high seas. As regards internal waters, no definition had even been attempted in the draft articles but what little indication they afforded seemed to show that hitherto internal waters had been taken to be something that was part of a sea. Both Mr. Krylov and Sir Gerald Fitzmaurice, however, had referred to internal waters in the shape of a landlocked sea. That made it imperative for the Commission to define the term " internal waters " as used in the draft articles.

12. Mr. SPIROPOULOS shared the views of Mr. Pal to some extent. There were obvious disadvantages in defining one term by other terms ill-defined in themselves. He wondered, however, what was the practical value of a definition. Admittedly, there were special cases of internal waters, such as the Black Sea, but it must be realized that no definition would cover all cases. In any event, any attempt to define the high seas should take into account other existing rules of international law.

13. Mr. FRANÇOIS, Special Rapporteur, explained that the definition of high seas in the article had been arrived at by process of elimination, and its validity therefore depended on a clear understanding of the meaning of the terms " internal waters " and " territorial sea ". Since the essential purpose of the report was the presentation of a balanced corpus of provisions, the question of explaining existing definitions could be resolved only after consideration of the other chapters of the report. He would propose that the article be adopted provisionally, pending further examination in the light of the discussion of the other parts of the report.

14. Mr. KRYLOV, endorsing Mr. Sandström's view, suggested taking first the chapter on the territorial sea. He was not proposing to amend the article, but merely to insert in the commentary a reference to the fact that certain waters had special characteristics.

15. Mr. SANDSTRÖM said that, alternatively, the text might define high seas as being waters outside the territorial sea.

16. The CHAIRMAN said that Mr. Sandström's first point was pertinent. The Commission was, for the first time considering the articles relating to the law of the sea as a whole, and in considering article 1 the criterion appropriate to the whole must be applied. The terms used in the chapter on the territorial sea must bear an exact meaning so that a reader of the following chapter on the high seas would be left in no doubt as to the meaning of that concept. That, of course, would not preclude the insertion of a reference in the commentary as suggested by Mr. Krylov.

17. Mr. SPIROPOULOS concurred.

18. Mr. ZOUREK said that certain comments by governments stressed the vague nature of some of the

definitions employed. The meaning of the term " territorial sea " would be expounded elsewhere, but the commentary on article 1 should attempt to meet the criticisms by defining internal waters. The criticism that the definition was too categorical also had some force, and the discussion had revealed cases such as landlocked seas where the regime of the high seas was not applicable. The case of the polar seas was another that was not covered by the draft. The commentary should bring out that the article did not apply to those two cases.

19. The objections raised by the Philippine Government were important, because they might well be shared by all island States. The Commission might consider the reintroduction of the article on groups of islands, which it had omitted, although, to the best of his recollection, only provisionally, at the seventh session.[2]

20. Mr. PAL thought that mere definition of internal waters might not solve the problems relating to landlocked seas, because the draft articles treated internal waters only as part of an open sea. Nothing in the draft applied to any questions relating to landlocked seas, and even if the definition of internal waters were now made to cover landlocked seas the application of the substantive articles would not extend to landlocked seas. Some comment at any rate was surely called for in that respect.

21. The CHAIRMAN said that the Special Rapporteur's proposal to adopt the article provisionally pending further consideration of the chapter on the territorial sea should meet with approval.

It was so agreed.

Article 2: Freedom of the high seas

22. Mr. FRANÇOIS, Special Rapporteur, said that the Belgian amendment had probably been inspired by difficulties arising out of the different meanings attached to the English and French usages of the word " jurisdiction ". In the interests of clarity, the amendment was acceptable.

23. The proposal of the Indian Government, however, really had no justification, for the point it covered was obvious.

24. With regard to the Israeli amendment, the question of aerial law was one for future consideration.

25. The United Kingdom amendment in paragraph 21 was really a drafting point, and was acceptable.

26. The United Kingdom proposal in paragraph 23, for the addition of a fifth item, " Freedom of research, experiment and exploration " had already been taken up at the 335th meeting, when he and Mr. Pal had submitted proposals.[3] It might be as well to revert to that question there and then. Alternatively, the point might be deferred until a decision had been taken on his and Mr. Pal's proposals.

27. He would suggest, therefore, that the article, as amended by the Belgian proposal and the United Kingdom amendment in paragraph 21, be adopted, subject to a decision on the United Kingdom proposal in paragraph 23 being deferred.

28. Sir Gerald FITZMAURICE pointed out that paragraph 25 did not reflect the intentions of the United Kingdom Government. The proposal was not, as stated, to add a sixth freedom, but to add to the list of limitations in the penultimate paragraph of the comment on the article (A/2934, page 3), the item as drafted in paragraph 25.

29. Mr. PAL said that, if the Special Rapporteur's conclusions referred only to the four freedoms in the article as drafted, that was well and good. He foresaw difficulties, however, in the case of the United Kingdom proposal for the addition of a fifth item on freedom of research, experiment and exploration.

30. Mr. FRANÇOIS, Special Rapporteur, supported by Mr. KRYLOV, said he had no objections to reserving the question of the fifth freedom, but that was surely the appropriate moment for the discussion of the United Kingdom proposal.

31. Sir Gerald FITZMAURICE, explaining the reasons for the United Kingdom proposal, said that the point was actually mentioned in the second paragraph of the comment, which made it clear that the list of four freedoms was not restrictive. In paragraphs 53 to 55 of the Special Rapporteur's report (A/CN.4/97) attention was drawn to the concern aroused in international scientific circles by the Commission's proposals on the continental shelf. The omission of freedom of research, experiment and exploration from a specific list of the freedoms open to all nations on the high seas had not unnaturally aroused serious concern, based on the apprehension that a State might use its rights over the continental shelf to the detriment of scientific research. That fifth freedom was surely as important as the four others that had been listed.

32. The CHAIRMAN said that, in view of the importance of the United Kingdom proposal, the Commission should discuss it together with the Special Rapporteur's draft and Mr. Pal's proposal as amended by Mr. Krylov, for the two latter were not mutually exclusive.

33. Mr. AMADO said it should be borne in mind that acceptance of the United Kingdom proposal would open the door to demands for the addition of further freedoms. The list of four freedoms as drafted was quite adequate and the words " *inter alia* " made it clear that it was not intended to be comprehensive.

34. While appreciating the desire of the Belgian Government for a comprehensive text, he could not refrain from pointing out that its text was too repetitive and that the terms " sovereignty " and " any authority whatsoever " were hardly compatible; it would be advisable to delete both the word " jurisdiction " and the words " or any authority whatsoever " from the Belgian and the Special Rapporteur's texts.

35. The CHAIRMAN pointed out in that connexion the relevance of the second paragraph of the comment on the article (A/2934, page 3).

[2] A/CN.4/SR.319, paras. 57-66.

[3] A/CN.4/SR.335 paras. 35 and 36.

36. Mr. SANDSTRÖM shared Mr. Amado's opinion on the United Kingdom proposal; the proposed fifth freedom was not in the same category as the four listed, which were, so to speak, every day freedoms, whereas freedom of research would not be exercised frequently and was of less importance. At most, the Commission might insert the first part of the Special Rapporteur's proposal as contained in paragraph 57 of his report (A/CN.4/97).

37. Mr. SPIROPOULOS, endorsing the views of Mr. Sandström and Mr. Amado, said that previously international law had concerned itself only with the three classic freedoms: freedom of navigation, freedom of fishing and freedom to lay submarine cables and pipelines. The fifth freedom proposed by the United Kingdom was adequately covered by the comment and the article had simply emphasized the most important freedoms; an extension of the list of freedoms would be undesirable. His own feeling was that the fourth freedom had really no place in the article either, because there was no question of the use of the sea as such; what was involved was rather freedom of the air.

38. The word "jurisdiction" in the first sentence adequately conveyed the meaning intended, and did not call for any addition. He would not, however, oppose its replacement by the word "sovereignty". He saw no advantage in the United Kingdom amendment. In modern times, no State would in fact ever claim jurisdiction over the high seas. He did not attach great importance to the point, but in general he did not favour the amendment of texts already adopted unless by so doing they were definitely improved.

39. Mr. KRYLOV said he could not agree with Mr. Spiropoulos' last remark. The United Kingdom amendment, in foreseeing possible contingencies, had some force.

40. In reply to Mr. Amado, he said that repetition was sometimes of great value in clarifying the meaning of a concept, and the idea of jurisdiction was by no means easy for continental jurists to grasp.

41. If the United Kingdom proposal concerning a fifth freedom were accepted, there should be a proviso that such freedom of research, experiment and exploration should not be exercised to the detriment of humanity. He could not share Mr. Sandström's view of the relative importance of that freedom. Other important aspects of the question stressed by the Special Rapporteur and Mr. Pal should not be overlooked. In view of the interest in that point taken by other bodies, the Commission should decide the question of its competence in the matter.

42. Mr. LIANG, Secretary to the Commission, emphasized the need for precision in the wording of a key article. Like Mr. Amado, he questioned the wisdom of juxtaposing the words "sovereignty" and "jurisdiction", and thereby creating doubts about their meaning. It might also be ambiguous to refer to "authority" without specifying whether it was national or international. In view of the explanation contained in the second sentence of the comment, it might be preferable to retain the text as it stood and refer only to "jurisdiction".

43. Sir Gerald FITZMAURICE said that, following the comments by Mr. Amado, Mr. Sandström and Mr. Spiropoulos he would not press for the addition of a fifth freedom in article 2, and if the Commission decided that such an amendment was either undesirable or unnecessary he would remain content with the statement contained in the first two sentences of the second paragraph of the comment. If that were to be the final decision, however, and if the Commission contemplated incorporating in article 2 either the Special Rapporteur's or Mr. Pal's text, the subject of scientific research would be introduced without any previous mention of it in the earlier part of the article. Consequently the subject might better be treated in the comment. Another reason for that procedure was that the incorporation of Mr. Pal's proposal in the draft articles could render the whole project unacceptable to certain governments because the proposal went far beyond the restriction on the freedom of the seas intended by its author. If its scope were restricted by deleting the second sentence it might become less objectionable.

44. Turning to the United Kingdom Government's proposal to insert the words "purport to" in article 2, he explained that its purpose was to remove what might be considered an element of tautology in the present text, since, strictly speaking, no State could assert exclusive jurisdiction over any part of the high seas; even if a physical attempt to do so were made, it could have no legal validity. On the other hand, there could be instances of States purporting to assert such jurisdiction, to which category he would assign claims to a territorial sea of 200 miles' breadth. However, the matter was not of major importance and he would not press the amendment.

45. By and large he shared the Secretary's preference for referring only to "jurisdiction" in the text of the article, particularly as "sovereignty" and "authority" were mentioned in the comment.

46. Faris Bey el-KHOURI contended that no State would make the preposterous claim to subject all the high seas to its jurisdiction; the article should accordingly be qualified by referring to "any part of the high seas".

47. Mr. FRANÇOIS, Special Rapporteur, said that if it were agreed not to add the fifth freedom proposed by the United Kingdom, the Commission must first decide on the text of a provision concerning scientific research, and then decide what should be its proper place.

48. He had no very rigid views about the term "jurisdiction", which was frequently misunderstood, and had found the Belgian Government's proposal acceptable because both "sovereignty" and "authority" had been referred to in the comment adopted the previous year.

49. Mr. AMADO said that he had often been questioned by students of international law about the meaning of the words "sovereignty" and "jurisdiction", and though he did not wish to insist, he was anxious that the Commission, as a scientific body, should not propose texts capable of creating confusion and doubt. He had been satisfied with the text adopted at the previous session because of the explanation furnished in the

comment. If, however, the Commission decided to use the word " sovereignty ", coming as he did from the Latin-American continent where the greatest importance was attached to that concept, he must urge that it stand alone.

50. Mr. SANDSTRÖM considered that the Belgian Government's amendment was of dubious value and that the words " any authority whatsoever " might be in contradiction with the fact that certain rights were exercised by the coastal State in the contiguous zone. He felt that article 2 should refer either to " sovereignty " or to " jurisdiction ", but he had no particular preference.

51. Mr. PAL said that he was satisfied with the wording of article 2 as it stood and did not believe there was any need to amplify it in the way proposed by the Belgian Government.

52. He had thought that the fifth freedom (to conduct research, experiment and exploration) referred solely to the matters enumerated in the first three sub-paragraphs of article 2, in which case the United Kingdom proposal would have been innocuous because limited in scope, though he hardly thought it was a freedom of the high seas properly speaking. However, as Sir Gerald Fitzmaurice was not pressing that proposal, the Commission must choose between his own and that put forward by the Special Rapporteur in paragraph 52 of his report (A/CN.4/97). As he had already pointed out [4] the latter text failed to come to grips with the real point at issue, which was whether or not States were entitled to test atomic weapons on the high seas at all. The Special Rapporteur, after referring in paragraph 51 of his report to the two points of view, had then proceeded, in paragraph 52, to evade the whole question by presenting a text on an entirely different point prohibiting States from using the high seas in a manner which would unreasonably prevent other States from doing the same.

53. Mr. ZOUREK, fully supporting Mr. Pal's views, said that the Commission must state unequivocally that no State had the right to carry out experiments on the high seas with weapons of mass destruction, because they were undoubtedly a danger to man, caused pollution of the seas from radio-activity and were a source of contamination of various species of fish. Remembering that the Pacific danger zone for atomic and hydrogen bomb experiments was at present 400,000 square miles, it could hardly be claimed that such experiments did not affect the regime of the high seas. It would certainly be difficult to reconcile his point of view with that of the Special Rapporteur, who, accepting the defence of the experiments put forward in an article published in the *Yale Law Journal*, had concluded that such experiments, even if they violated the freedom of the high seas, were permissible if they could be claimed to be " reasonable ".

54. Mr. SPIROPOULOS observed that, if the United Kingdom proposal for the addition of a fifth freedom were rejected, the passage in the comment concerning scientific research must be retained. The question raised by Mr. Pal, however, was an entirely different one, and must be decided on its merits.

55. Mr. PADILLA-NERVO welcomed Sir Gerald Fitzmaurice's decision not to press for the acceptance of the United Kingdom Government's proposal for the addition of a fifth freedom. If Mr. Pal's assumption that freedom of research was related to the other freedoms listed in article 2 was correct, there was no need for the proposed addition, particularly in view of the clear statement made in the second paragraph of the comment. He was far from certain, however, whether that had in fact been the intention of the United Kingdom Government, since scientific bodies were clearly concerned that freedom of research in the waters above the continental shelf should not be endangered. He believed that a resolution on the subject had been transmitted to the Economic and Social Council through the United Nations Educational, Scientific and Cultural Organization (UNESCO) and he would be interested to know if the matter had been examined by the Council and, if so, with what results. The Commission itself might be interested to know that a number of Latin-American States had jointly reached certain decisions concerning the exploitation and exploration of the continental shelf.

56. With regard to atomic tests on the high seas, which were an entirely different problem, he believed that the Commission should take no positive stand, because of the political implications involved. The draft statutes of the proposed international atomic energy agency had been sent to governments for comment and would subsequently be referred to an international conference, which would also consider the effects of experiments connected with the peaceful uses of atomic energy. Certain aspects of the problem were also under consideration in the Disarmament Sub-Committee, where no final decision had yet been taken. Finally, the Scientific Committee on the Effects of Atomic Radiation had only just started its work and had not yet arrived at any conclusions. Thus the Commission, which did not possess the necessary technical knowledge to take into account all the complicated problems at stake and was not in a position to pronounce on the type of experiment which was permissible or the restrictions to which it should be subjected, must proceed with the greatest caution.

57. If the subject were mentioned in the comment, the reference should be limited to a statement that the high seas must not be used by any State in a manner harmful to mankind. A universal provision of that kind stated in general terms would not arouse objections.

58. Sir Gerald FITZMAURICE wished to make clear that if he did not press the United Kingdom amendment for the addition of the fifth freedom, it was only on the understanding that the reference to scientific research, as it stood in the comment, would be retained. The omission of that perfectly innocuous passage would cause serious alarm in scientific circles by giving the wholly unintended impression that the Commission was seeking to prohibit scientific research.

59. Mr. Pal's interpretation of the United Kingdom Government's intention was not entirely correct, since

[4] A/CN.4/SR.335, para. 36.

research was regularly carried out on, for example, meteorological conditions and mineral deposits under the sea-bed, which were not specifically mentioned in the present text of article 2.

60. Mr. Spiropoulos and Mr. Padilla-Nervo were perfectly correct in thinking that there was a fundamental difference between the proposal made by the Special Rapporteur and that made by Mr. Pal. The former was a legal proposition deriving naturally from article 2, and though unobjectionable hardly needed stating. The latter, on the other hand, entirely prohibited the use of the high seas for certain purposes and was politically highly controversial. Mr. Padilla-Nervo had adduced strong arguments against acceptance of that text, and he himself was firmly of the opinion that the Commission should say nothing on the subject.

61. Mr. PAL said that while it was true that the first sentence of the Special Rapporteur's text added nothing of substance, the whole mischief lay in the second sentence, which indirectly sought to sanction tests of new weapons on the high seas. That second sentence surely did not come within the scope of article 2 as it now stood, and could not appropriately be included in any comment on the article. Should that nevertheless be done, his own (Mr. Pal's) text must also be included. It was more appropriate for inclusion than the Special Rapporteur's text, since it sought to define freedom itself and emphasized that freedom of the seas must not be understood as unqualified licence. The fence and the boundary line were indeed the symbols of the spirit of justice, and the Commission should not refrain from setting up fences and boundaries, especially in view of the unfortunate human tendency to be more concerned with one's own weal than with that of others.

The meeting rose at 1.10 p.m.

340th MEETING

Friday, 4 May 1956, at 10 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2934, A/CN.4/97 and Add. 1, A/CN.4/99 and Add. 1-5) (*continued*)

Article 2: Freedom of the high seas (concluded)

1. The CHAIRMAN observed that it had been generally agreed at the previous meeting not to add a fifth freedom concerning scientific research to those listed in article 2, but to retain the reference to it in the comment (A/2934, p.3). It remained for the Commission to decide whether a passage should also be included in the comment either on the lines of the text proposed by Mr. Pal[1] or in the form suggested by the Special Rapporteur in paragraph 52 of his report (A/CN.4/97).

2. Mr. SALAMANCA said that both the Special Rapporteur and Mr. Pal had recognized that the freedom of the high seas would be endangered by tests of nuclear weapons, since areas of several thousand square miles were declared prohibited zones for fishing while such tests were being conducted. Mr. Pal had brought out clearly that States could not exercise their rights on the high seas to the injury of others.

3. The Commission must bear in mind that the General Assembly, recognizing the importance of problems relating to the effects of ionizing radiation upon man and his environment, had, in its resolution 913 (X), established a scientific committee for their study, and on the basis of its findings might eventually decide that atomic experiments on the high seas should be prohibited.

4. It was difficult to foretell the fate of the draft articles at present under consideration, and even if they were finally accepted it would be some time before they were applied in international practice. In the meantime he believed a solution could be found which would conform with the nature of the Commission's strictly legal task and the decisions of the General Assembly concerning the problem of radiation. In fact, the Commission was really faced with a question of drafting, and he personally could have supported either of the two texts, since both stated that freedom of the seas was subject to certain conditions—an obviously legal proposition free from any political element.

5. Mr. PAL wished to remove one misapprehension about his proposal which some members repeatedly characterized as a political proposal. Perhaps those members were influenced by considerations of political prudence or expediency in so doing. In article 2 the Commission was dealing with the question of freedom of the high seas. It was accordingly perfectly logical, relevant and legal to proceed to define that freedom itself, and to say that it did not extend to certain categories of acts. He must consequently disown the characterization of his proposal as a political one, when in fact it contained a purely legal definition of the limits of the freedom of the high seas.

6. Mr. EDMONDS disagreed with Mr. Salamanca that the problem was merely one of drafting, because,

[1] A/CN.4/SR.335, para. 36.