

Document:-
A/CN.4/SR.340

Summary record of the 340th meeting

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

Extract from the Yearbook of the International Law Commission:-
1956, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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

	<i>Page</i>
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) . . .	32

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. Pal¹ 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.

as he had indicated,² the two proposals before the Commission were on two entirely different subjects and had quite different purposes. Mr. Pal's text was altogether too drastic to be acceptable, for there were numerous inventions, such as motor vehicles, which it could be claimed might be harmful to some part of mankind.

7. He also wished to point out to Mr. Salamanca that fishing was only temporarily prohibited in areas within a certain radius of the site of nuclear tests.

8. Faris Bey el-KHOURI suggested that Mr. Pal's point was, in fact, covered in the Special Rapporteur's text, which would prohibit tests of new weapons that interfered with the rights of other States on the high seas. Perhaps the text might be slightly modified to make that point more explicitly.

9. Mr. Pal's provision would be difficult to apply, because some expert body would have to decide what tests were likely to be harmful.

10. Sir Gerald FITZMAURICE agreed with Faris Bey el-Khouri's interpretation of the Special Rapporteur's text, beyond which he did not feel that the Commission, as a body of lawyers, could go, since it was in the present instance engaged in codifying existing law and not in devising rules *de lege ferenda*. The Special Rapporteur had emphasized the implicit corollary to the freedom of the high seas—namely, that it could not be exercised in a way which prevented other States from doing the same. Mr. Pal, on the other hand, had proposed what was virtually a new rule of law prohibiting the use of the high seas for certain purposes.

11. Mr. SANDSTRÖM also affirmed that the two proposals were of an entirely different nature, and supported the Special Rapporteur's proposal for the reasons given by Sir Gerald Fitzmaurice.

12. Mr. ZOUREK considered that the first sentence of Mr. Pal's text simply enunciated the same principle as was expressed in the third sentence of the first paragraph of the comment, which read: "States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States." In his second sentence he had gone no farther than to state that tests of new weapons were also subject to the same limitation.

13. Mr. Edmonds had argued that other modern inventions might be harmful, but there was an essential difference because, unlike tests of new weapons on the high seas, they did not endanger the nationals of other States, and furthermore the danger was of a different order of magnitude. Nor could he agree that the Commission had not sufficient facts on which to take a decision. He need only refer to the works of various Japanese specialists in international law, particularly those of Mr. Kaoru Yasui, Professor of international law at Hosei and Kagawana Universities. There was no doubt whatsoever in his mind that the Commission was discussing a purely legal question connected with the definition of the freedom of the high seas, and that

to accept the limitation proposed by Mr. Pal on that freedom would not go one jot beyond existing law, since his proposal was simply a logical development of the rule already stated in the second paragraph of the comment.

14. Mr. FRANÇOIS, Special Rapporteur, said that there was no need to amend his text, as suggested by Faris Bey el-Khouri, because it already referred to freedoms of the sea in general and was not restrictive in the way some members appeared to think.

15. The real difference between his text and Mr. Pal's was that his own wording prohibited activities which "unreasonably" prevented other States from exercising their rights, whereas Mr. Pal's ruled out altogether any use of the high seas which might be harmful to man. As Sir Gerald Fitzmaurice had emphasized, Mr. Pal's text went too far because certain activities, though they might adversely affect other States, might be justifiable, and that was why he (the Special Rapporteur) was convinced that the concept of "reasonableness" must be introduced.

16. As he had already stated at the 335th meeting,³ he would be prepared to meet Mr. Krylov's point by deleting from his text the reference to States.

17. The CHAIRMAN said that the Special Rapporteur's text should be read in conjunction with the third sentence of the comment and was designed to safeguard the exercise of the freedoms listed in article 2, whereas Mr. Pal's object was an entirely different one—namely, to protect human beings from the noxious effects of certain scientific experiments.

18. Mr. PADILLA-NERVO said that if the Special Rapporteur's text was to be incorporated in the comment, for reasons he had given at the previous meeting, the second sentence should be modified to read: "Scientific research and tests of new weapons are also subject to this general principle of international law." That would make it clear that, as Sir Gerald Fitzmaurice had emphasized, the Commission was not creating new law. If, on the other hand, the Commission rejected the first sentence of the Special Rapporteur's draft in favour of the third sentence of the comment, the second sentence as amended by him would need to be inserted in the comment.

19. Mr. PAL considered that if that course were taken the word "experiments" should be substituted for the words "tests of new weapons", since such tests might have been carried out already but were not yet recognized as legal.

20. Mr. FRANÇOIS, Special Rapporteur, said that he was prepared to withdraw the second sentence of his text and to accept Mr. Padilla-Nervo's proposed insertion in the comment.

21. Mr. ZOUREK believed the Commission should first vote on Mr. Pal's text, which was in effect an amendment. If that were rejected, it would be preferable to

² A/CN.4/SR.335, para. 56.

³ A/CN.4/SR.335, para. 50.

retain the third sentence of the comment, followed by the first sentence of the Special Rapporteur's proposal.

22. Sir Gerald FITZMAURICE asked for separate votes on the two sentences of the Special Rapporteur's text. He saw no grounds for singling out scientific research as the only kind of activity which could be prejudicial to the rights of other States, particularly when that freedom was not even mentioned in article 2.

23. He welcomed the Special Rapporteur's decision to withdraw the second sentence of his text, but regretted his willingness to introduce the same statement in the comment. In his opinion the Commission should only make some kind of general statement to the effect that the freedom of the seas could not be used in such a way as to impair the rights of other States.

24. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice that it was undesirable to make specific reference to tests of new weapons and that a general statement of the kind outlined by Sir Gerald was what was needed.

25. Mr. Pal's text, being the most radical, should be voted on first.

26. Mr. PAL said that if the Commission followed the advice of Sir Gerald Fitzmaurice there would be no room for his own proposal, which was intended as a limitation on the right mentioned in the second sentence of the Special Rapporteur's text, so that in that eventuality he would withdraw his proposal altogether.

27. Mr. PADILLA-NERVO agreed with Mr. Zourek in preferring the third sentence of the comment to the first sentence in the Special Rapporteur's text. His purpose in suggesting an amendment had been to take Mr. Pal's proposal into account, but if it were withdrawn and the Special Rapporteur's second sentence were also dropped, there would be no need to refer to tests of new weapons at all.

28. Mr. AMADO proposed that, instead of adopting the Special Rapporteur's text, the third sentence of the comment be retained, since it amply covered the ground.

29. Mr. SANDSTRÖM said that the only difference between the two texts was that the Special Rapporteur had introduced the concept of "reasonableness"—perfectly justifiably in his (Mr. Sandström's) opinion since it was the condition governing the exercise of rights on the high seas. If the third sentence of the comment were retained, he would have no objection to its being amended in that sense or even to introducing the concept in the text of article 2 itself.

30. He joined Sir Gerald Fitzmaurice in asking for separate votes on the two sentences of the Special Rapporteur's draft.

31. Mr. PADILLA-NERVO observed that, once the Commission had chosen between the third sentence in the comment and the first sentence in the Special Rapporteur's text, which said virtually the same thing, it could decide whether or not specific reference should be made to tests of new weapons.

32. Mr. ZOUREK considered that the Commission should first vote on Mr. Amado's proposal, which he supported.

33. Mr. EDMONDS said that he had assumed that the wording of the comment would remain unchanged if the Special Rapporteur's text were rejected.

34. Mr. PAL said that if a new sentence of the kind suggested by Mr. Padilla-Nervo were added to the comment, his own proposal still stood.

35. Mr. PADILLA-NERVO said that as the Special Rapporteur had withdrawn the second sentence of his text, his own proposed amendment was eliminated.

36. The CHAIRMAN pointed out that the third sentence of the comment would then refer only to the four freedoms enumerated in article 2.

37. Mr. ZOUREK said that unless a formal vote were taken there would be a risk of a subsequent—and decidedly unprofitable—reopening of the whole discussion. Whatever the text adopted it must refer not only to the four freedoms listed, but also to freedom to engage in scientific research. That matter, however, could be safely left to the Special Rapporteur.

38. Sir Gerald FITZMAURICE pointed out that the sentence in the comment was in fact comprehensive. If any doubts remained, however, all that was required was to change its position in the comment.

39. The CHAIRMAN concurred.

40. Mr. LIANG, Secretary to the Commission, suggested that some modification of the comment on article 2 would still be required in order to avoid creating the impression, in the report, that the question was still under consideration.

41. Mr. AMADO urged the overwhelming advantage of the sentence in the comment, namely, that it was comprehensive.

42. In reply to the CHAIRMAN, who had suggested that the question could be safely left in the hands of the Special Rapporteur, Mr. FRANÇOIS, Special Rapporteur, appealed to the Commission to give him some clearer guidance in the matter.

43. Mr. SALAMANCA failed to see the advantage of voting on the question. The text approved at the seventh session (A/2934) contained a general principle which seemed to meet Mr. Pal's point. He had every confidence in the Special Rapporteur's ability to draft a text that would faithfully reflect the Commission's mind.

44. Mr. ZOUREK pointed out that the Commission was engaged in preparing a report for the General Assembly, and that in the interests of absolute clarity the Commission should give the Special Rapporteur a rather more precise directive.

45. The CHAIRMAN put to the vote the proposal to retain the third sentence of the first paragraph of the comment on article 2.

The proposal was adopted by 11 votes to none, with 1 abstention.

46. Sir Gerald FITZMAURICE, explaining his abstention, said that he had no actual objection to the proposal in itself, but preferred to abstain in view of the implica-

tions which, in the light of the debate, might now be read into it.

47. Mr. ZOUREK, supported by Mr. AMADO, proposed that the sentence should be so placed that it was perfectly clear that its application covered the whole use of the high seas, including scientific research and experiments with thermo-nuclear weapons.

Mr. Zourek's proposal was adopted unanimously.

48. The CHAIRMAN said the Commission should take a decision with regard to the Special Rapporteur's proposed text for article 2, given in paragraph 26 of the addendum to his report (A/CN.4/97/Add.1).

49. Mr. KRYLOV said that, in the light of Mr. Amado's unanswerable arguments, he would agree that, at the end of the first sentence of the article, the term "sovereignty" alone should be used.

50. The CHAIRMAN said that, in view of the difficulties arising out of the interpretation of the term "jurisdiction", he too would prefer the term "sovereignty".

51. Mr. PADILLA-NERVO also supported Mr. Amado's proposal to retain only the term "sovereignty" and delete the words "jurisdiction" and "or any authority whatsoever".

52. In view of the subjective element in the word "purport", he would oppose its insertion as proposed by the United Kingdom. It would unnecessarily complicate interpretation of the article.

53. Mr. PAL urged the acceptance of the United Kingdom proposal to insert the words "purport to". That additional concept improved the text.

54. The CHAIRMAN pointed out that Article 1 of the Charter of the United Nations referred not only to "acts of aggression", but to "threats to the peace". There was some advantage in stressing the idea of intention.

55. Mr. LIANG, Secretary to the Commission, understood the verb "purport" as being synonymous with "claim" and he would differ from those who read into it the idea of intention. To "purport" was an act capable of objective ascertainment.

56. Faris Bey el-KHOURI proposed the insertion of the words "any part of" in the first sentence of the Special Rapporteur's text between the words "subject" and "them".

57. Mr. PADILLA-NERVO, supported by Mr. AMADO, said that the proposal should be voted on by parts. First, the United Kingdom proposal in paragraph 21 (A/CN.4/97/Add.1) for the insertion of the words "purport to"; secondly, Faris Bey el-Khoury's proposal for the insertion of the words "any part of", taken from the United Kingdom proposal in paragraph 21; and, lastly, Mr. Amado's proposal to delete the words "jurisdiction" and "or any authority whatsoever", retaining only the

word "sovereignty". He himself could accept the last proposal only; acceptance of the first two would only complicate the General Assembly's task when it came to consider the Commission's report at its forthcoming eleventh session.

58. The CHAIRMAN put to the vote the United Kingdom proposal in paragraph 21 to insert the words "purport to".

The United Kingdom proposal was adopted by 7 votes to 4, with 1 abstention.

59. Mr. PADILLA-NERVO and Mr. AMADO explained that they had voted against the proposal for the reasons they had already given.

60. Mr. SALAMANCA said that he also had voted against the proposal for the same reasons.

61. Mr. ZOUREK explained that he had voted against the proposal because he could see no necessity for the insertion of the word "purport" without qualification. The concept required modification by some such word as "legitimately".

62. The CHAIRMAN put to the vote Faris Bey el-Khoury's proposal to insert the words "any part of" between the words "subject" and "them" in the Special Rapporteur's text in paragraph 26.

Faris Bey el-Khoury's proposal was adopted by 8 votes to 4.

63. Mr. PADILLA-NERVO explained that he had voted against the proposal for the reasons he had already given.

64. The CHAIRMAN put to the vote Mr. Amado's proposal to delete from the Special Rapporteur's text in paragraph 26 the words "jurisdiction" and "or any authority whatsoever".

Mr. Amado's proposal was adopted by 10 votes to 2, with no abstentions.

65. The CHAIRMAN put to the vote the Special Rapporteur's text in paragraph 26, as a whole and as amended.

The Special Rapporteur's text for article 2, in paragraph 26 of document A/CN.4/97/Add.1, as a whole and as amended, was adopted by 11 votes to none, with 1 abstention.

66. Mr. KRYLOV, referring to the third freedom listed in article 2, drew attention to the comment of the Swedish Government regarding the possibility of the submarine transmission of electric power.⁴

The meeting rose at 1 p.m.

⁴ A/CN.4/99, p. 30.