circumstances, but should it do so in a case where passage would have been innocent, financial responsibility would ensue.

50. So far as he could see, the only difference between Sir Gerald Fitzmaurice and himself was that in his (Mr. Scelle's) opinion any violation of the United Nations Charter would deprive passage of any claim to innocence.

51. Sir Gerald FITZMAURICE said that it would serve no useful purpose to put the question of principle to the Commission in the form suggested by the Chairman. No member of the Commission doubted that there were some exceptional cases in which the right to forbid passage through the territorial sea existed; the problem was that of defining those cases.

52. Mr. ZOUREK drew attention to the fact that the view attributed to him by the Chairman had not been exclusively his own: it was shared by several other members of the Commission, including Mr. Sandström. The question before the Commission was whether the principle of the article should be the general right of a coastal State to forbid passage, subject to innocent passage being respected, or whether the principle of innocent passage should be asserted as the general rule, the cases where interference was allowed constituting exceptions thereto.

53. At the invitation of the CHAIRMAN, Mr. ZOUREK suggested the following wording for the question on which the Commission should be asked to vote: Does the coastal State enjoy, in virtue of its sovereignty over the territorial sea, the general right to forbid the passage of foreign warships through its territorial sea — in other words, the right to make such passage subject to previous authorization or notification?

54. The CHAIRMAN invited the Commission to decide whether the coastal State could, in law and as a matter of principle, forbid the passage of foreign warships through its territorial sea. If the Commission accepted that principle, it would do so on the clear understanding that the right in question must be construed in the light of international usage and standing practice concerning its exercise. Once the principle had been adopted, the Drafting Committee would have to elucidate in its text the international usage concerned.

The principle was approved by 6 votes to 3, with 4 abstentions.

55. Mr. EDMONDS explained that he had abstained because he could not see how the Commission could take a vote on the question as worded by the Chairman. All members agreed that in certain cases the coastal State had the right to interfere with the passage of foreign warships through its territorial sea. The problem was how to formulate the cases in which such right of interference existed.

56. Sir Gerald FITZMAURICE said that he had voted against the principle because perhaps unintentionally — it held the implication that, in any and in all circumstances, the coastal State had the right to prevent even the innocent passage of foreign warships through its territorial sea. Had the question put to the Commission been that of determining whether there were some circumstances in which interference with the right of passage was permissible, an affirmative answer would have been acceptable.

57. Mr. AMADO said that he had voted in favour of the principle because any refusal to acknowledge the coastal State's right in the matter would have been tantamount to a denial of the whole concept of the territorial sea.

58. Mr. KRYLOV said he had voted in favour of the coastal State's right in principle to interfere with passage in general, not with innocent passage. The issue on which the Commission had just taken the vote involved nothing less than the right of a coastal State to exercise its sovereignty over its territorial sea.

The meeting rose at 1.15 p.m.

308th MEETING
Thursday, 9 June 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS
Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.
Date and place of the Commission’s eighth session  
(item 8 of the agenda)

1. The CHAIRMAN called on the Secretary to the Commission for his observations.

2. Mr. LIANG (Secretary to the Commission) said that, in accordance with its usual practice, the Commission, at a private meeting held the previous day, had discussed, and unanimously decided the time and place of its eighth session; it remained for it to place that decision formally on record. He would then communicate it to the Secretary-General and request his views.

3. The CHAIRMAN announced that the Commission had decided to hold its next session in Geneva, for a period of ten weeks, beginning on 23 April 1956.

4. The Commission required adequate time to complete its final reports on the regime of the high seas, the regime of the territorial sea and related problems, to all of which the General Assembly attached great importance.

5. Mr. GARCIA AMADOR said that he intended at the next meeting ¹ to propose that article 12 of the Commission’s Statute be amended to provide that the Commission should sit at Geneva, instead of at United Nations Headquarters, with the right to hold meetings at other places if it so decided. He recalled that on several occasions difficulty had been encountered in securing the General Assembly’s approval to the holding of sessions in Geneva, a city which had proved very well suited to the Commission’s work. The purpose of his amendment to the Statutes was to avert such difficulty in the future.

Régime of the territorial sea (item 3 of the agenda)  
PROVISIONAL ARTICLES (A/2693, CHAPTER IV)  
(resumed from the 307th meeting)  
Article 26 [25]: Passage  
(resumed from the 307th meeting)

6. Mr. SALAMANCA explained that he had voted against the proposal not because he was opposed to the principle, but because he was opposed to the implications of the form in which it was couched.

7. In voting in favour of recognizing in principle the right of the coastal State to interfere with the passage of warships through its territorial sea, the Commission had asserted a truism; no one doubted the coastal State’s inherent right of self-protection. But since the Commission was legislating for peacetime it was not permissible to suggest that the coastal State could decide unilaterally the existence of a state of crisis that justified interference with the movements of foreign warships. Automatic intervention by the coastal State could only be justified where foreign warships were acting in violation of the United Nations Charter.

8. Faris Bey el-KHOURI explained that he had voted against the proposal because it drew no distinction either between innocent passage and passage in general, or between peacetime and wartime.

9. In his opinion, all ships engaged in warfare, that was, warships of a belligerent State, could be interfered with by a coastal State in the defence of its neutrality. A belligerent warship could not claim the right of innocent passage, even though the coastal State were completely dissociated from the war in which the warship was engaged.

10. He drew the attention of the Drafting Committee to the desirability of incorporating in article 26 some distinction between belligerent and non-belligerent warships.

11. Mr. HSU said that he abstained for the same reasons as had been given by Mr. Edmonds at the previous meeting.

12. The CHAIRMAN explained he had abstained because he had felt that he ought to do so in his position as Chairman.

13. Mr. FRANÇOIS (Special Rapporteur) said he assumed that article 26 would now be referred to the Drafting Committee.

14. Mr. ZOUREK said that the Commission had first to discuss the principle involved in paragraph 4, which laid down that there should be no interference with the passage of warships through straits used for international navigation between two parts of the high seas. The Special Rapporteur had, in that provision, adopted a geographical criterion about which he (Mr. Zourek) had already expressed doubts at the sixth session. That criterion, which had been applied by the majority opinion in the decision rendered by the International Court of Justice in the Corfu Channel Case,² had been criticized by many leading specialists. Among others, Professor Bruel, the author of a standard work on international straits,² in a recent article published in Mélange en l’honneur du Professeur Louin had emphasized that an international strait was not characterized merely by its geographical position, but rather by the importance of the international traffic using it.

15. It was apparent that paragraph 4 was far too broad, in that it treated identically all straits used for navigation between two parts of the high seas. But there were really three categories of straits: straits which were the subject of international regulation; straits which, although not covered by international conventions, were important to international navigation; and straits which were not used for international navigation.

16. It would appear to suggest that, in certain cases, a strait between an island and the coast, or one through an archipelago, would be considered as an international

¹ The proposal was made at the 311th meeting.

² J.C.J. Reports 1949, p. 28.

³ E. Bruel, International Straits - A treatise on international law (Copenhagen, 1947).
prudence in formulating a principle on which there were
the regulation of the right of passage through straits,
as
recalled that he had expressed a dissenting opinion
were covered by special conventions, but each such
interests” of the great maritime powers, for example,
which access was given by the straits ; and the “oceanic
of the coastal States of a closed or semi-closed sea to
differences of opinion of the kind he had described. He
convention provided for a different regime.
Mr. KRYLOV said that in the matter of straits
three separate interests were involved: that of the State
which guarded the straits, for example, Turkey; those
of the coastal States of a closed or semi-closed sea to
which access was given by the straits; and the “oceanic
interests” of the great maritime powers, for example,
the United Kingdom and the United States of America.

The interplay of those various interests influenced
the regulation of the right of passage through straits,
and made it difficult to draw up a general definition
of an international strait. A number of international straits
were covered by special conventions, but each such
convention provided for a different régime.

He advised the Commission to exercise the utmost
prudence in formulating a principle on which there were
differences of opinion of the kind he had described. He
recalled that he had expressed a dissenting opinion as
a judge of the International Court of Justice when the
Corfu Channel decision had been rendered.

Mr. FRANCOIS (Special Rapporteur) said that
Mr. Zourek’s proposed change to paragraph 4 was no
answer to the problem. It would simply shift the
responsibility for solving it on to the drafting committee,
which would have to draft a definition of the term “inter-
national straits” for inclusion in the comment.
Clearly, it was for the Commission and not the Drafting
Committee to decide to which straits the provision
embodied in paragraph 4 should apply.

Opinions differed about the right of passage of war-
ships through straits. A fairly widely accepted one was
that that right must be respected in the case of straits
necessary for international navigation between two parts
of the high seas. The International Court of Justice had
gone farther, and had adopted the opinion that it was
sufficient for straits to be used for such international
navigation to assure the right of passage of warships. In
its judgement of 9 April 1949 in the Corfu Channel case,
the Court had described that opinion as “generally
recognized and in accordance with international cus-
tom”.

Although he himself was inclined to favour the view
which restricted the right of passage of warships to
straits that were actually necessary for international
navigation between two parts of the high seas, he had
drafted the provision along the lines of the Corfu
Channel decision because it was desirable that the Com-
mmission’s draft articles should agree with that ruling, in
view of the very clear terms in which the Court had laid
down the international law on the subject.

Mr. SCELLE said that, in addition to the three sets
of interests mentioned by Mr. Krylov, there was a fourth
set, namely, the higher interests of humanity and of the
maintenance of peace.

Where a State had reason to suspect that foreign
warships passing through a strait were engaged in the
preparation of an act of aggression, or even in a threat
of force in violation of the terms of the United Nations
Charter, it must have the right—indeed, it was a duty—
to refuse passage, even though the straits joined two
parts of the high seas. The only exception that could be
allowed to that rule was the case where the straits were
indispensable to international navigation between two
parts of the high seas.

Sir Gerald FITZMAURICE said that paragraph 4
did not give an absolute right of passage to warships
through straits merely because those straits connected
two parts of the high seas. It was explicitly provided
that they must be used for international navigation be-
tween two parts of the high seas. That wording was
sufficiently strict, and it was neither desirable nor
practicable to try to change it. It had been suggested
that the term “necessary for international navigation”
be used, but that at once raised the issue of who was to
be the judge of such necessity. Neither was it feasible to
speak of “straits regularly used for international navi-
gation”, because it might easily happen that certain
straits which were only occasionally used by maritime
traffic none the less constituted the natural passage from
one part of the high seas to another. Finally, it had been
suggested that the term “indispensable” be employed.
But that term, besides being open to differences of inter-
pretation, would place an altogether too stringent re-
striction on the right of passage. There were straits which
formed the natural channel between two parts of the high
seas without actually being indispensable to international
navigation; and there was no valid reason why shipping
should be compelled to make a long detour because
right of passage was denied. In the interests of freedom
of navigation, it was undesirable to subordinate that right
to vexatious conditions.

The wording of paragraph 4 was quite sufficient to
safeguard the legitimate interests of the coastal State.

Mr. SCELLE said that he too was an advocate of
freedom of navigation, but the question under discussion
concerned warships rather than merchant ships. He fully
agreed with Sir Gerald Fitzmaurice’s remarks so far as
the latter were concerned, but differed from him in the
case of the former. He felt that even if straits were
indispensable to international navigation between two
parts of the high seas, it should be possible to stop

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4 I.C.J. Reports 1949, pp. 68–79.
5 Ibid., p. 28.
passage through them in cases where the warships concerned were suspected of carrying out acts contrary to the provisions of the United Nations Charter. Admittedly, he had proposed that an exception be made in the interests of freedom of navigation, but it would be quite unwarrantable to go farther and allow freedom of passage—possibly with intent to commit aggression—to warships that did not absolutely need to pass through the straits in question.

30. Sir Gerald Fitzmaurice said that Mr. Scelle's proposal would place tremendous powers in the hands of the coastal State. It was suggested not merely that the coastal State might interfere with passage in defence of its own interests, but also that that State be made the sole judge whether passage was innocent within the meaning of the Charter. The latter question was properly one for the Security Council or the General Assembly of the United Nations, and not for individual States.

31. Mr. Zourek said that, contrary to existing international law, paragraph 4, as it stood, conferred an excessive right on a State other than the coastal State. In international law there was no uniform régime for straits. Some had been placed under an international régime by international convention, and there the passage of warships was accordingly subject to the rules laid down by the convention. Others were essential to international navigation because they served as maritime highways for international trade. Still others linked two parts of the high seas but, not being used for the main stream of international trade, were not essential to international navigation and were subject to the régime of the territorial sea pure and simple. Finally, there were straits whose waters were subject to the régime of internal waters, e.g., the Norwegian Indreled, or the straits between the islands of an archipelago.

32. He emphasized that article 26 related only to warships and did not affect international shipping. Seeing that under existing international law the coastal State had the right, as the Commission had expressly recognized by its vote on paragraph 1 as re-worded, to make the passage of warships through its territorial sea subject to previous authorization or notification, it would be a remarkable state of affairs if it were refused that right where the straits were subject to the régime of the territorial sea or even more so where they constituted internal waters.

33. Mr. Scelle quoted the well-known maxim of the French sixteenth century jurist Loysel: *Qui peut empêcher et n'empêche pas, pêche*. An interesting application of that principle had quite recently been incorporated in French criminal legislation, by the enactment of a law to the effect that any person witness to the preparation of a crime who did not do everything in his power to prevent its perpetration became an accomplice therein.

34. Similarly, a coastal State which did not wish to become an accomplice in an act of aggression should have the right—indeed, the duty—to interfere with the passage through straits of foreign warships bent on aggression or a show of force. He was prepared to concede that there should be no such interference, except by decision of an international authority, where the straits concerned constituted an indispensable channel from one part of the high seas to another. But where the straits were simply useful for the purposes of navigation, there would be nothing untoward in empowering the coastal State to refuse passage on its own responsibility. The only consequence of such refusal would be to oblige the warships concerned to make a detour, which was something a coastal State might well do in order to avoid becoming involved in a possible international crime.

35. Mr. Sandström said that the *Indreled* was acknowledged to be part of Norwegian internal waters. The Commission's draft articles, however, related to the territorial sea; reference to the *Indreled* was therefore irrelevant to paragraph 4.

36. Sir Gerald Fitzmaurice said that the Commission's draft articles were clearly described as articles on the régime of the territorial sea; internal waters were outside their scope.

37. Mr. Krylov pointed out that the *Indreled* was not a strait: it was a shipping lane which could only be used with the co-operation of the Norwegian authorities. There could be no doubt that it was part of Norwegian internal water, and not part of the territorial sea subject to the right of passage.

38. There had been an interesting development in his own country to which the example of the *Indreled* was relevant. Development in Arctic navigation had made it possible for ships to ply from the White Sea to the mouths of the great Siberian rivers. But such navigation was entirely dependent upon the assistance not only of pilots, but also of ice-breakers, from the Soviet Union.

39. Mr. Zourek formally proposed that the phrase "indispensable to international navigation" be substituted for the words "used for international navigation" in paragraph 4.

40. The Chairman suggested that, following that vote of principle in respect of straits, and the previous one relating to the coastal State's right to forbid the passage of foreign warships through its territorial sea, article 26 as a whole could be referred to the Drafting Committee, with a view to a final vote being taken upon it at a subsequent meeting.

It was so agreed.

Article 27 [26]: Non-observance of the regulations

41. Mr. François (Special Rapporteur) proposed the deletion of paragraph 1. It was proposed to re-draft article 21, which dealt with the duties of foreign vessels during their passage, so as to make it apply both to merchant vessels and to warships, and that would make paragraph 1 redundant.
42. Mr. KRYLOV said that paragraph 1 was redundant in any case. Paragraph 2, by stating that warships which did not comply with the coastal State's regulations might be required to quit the territorial sea, was an adequate reference to the duties of warships during passage.

The Special Rapporteur's proposal was adopted unanimously.

Article 27 was referred to the Drafting Committee.

Article 3 [3]: Breadth of the territorial sea
(resumed from the 295th meeting)

43. The CHAIRMAN invited the Commission to resume its discussion of article 3, and drew attention to the amendment submitted by Mr. Hsu to replace the second paragraph of the Special Rapporteur's new text (A/CN.4/93) by the following words:

"The coastal State may, however, extend the territorial sea up to a limit of 12 nautical miles from the base line."

44. Mr. FRANÇOIS (Special Rapporteur) said that as he had already made an introductory statement on article 3 at the 295th meeting (para. 44) and at the previous session, he would be brief. The Commission would remember that he had proposed a new text because it had become clear from the replies from governments that there was little possibility of reaching agreement on a fixed limit for the territorial sea. Mr. Hsu had been very sanguine in proposing a three-mile limit extensible up to twelve miles; the replies from governments certainly did not suggest that even a twelve-mile limit would command majority support. Some other solution must therefore be sought.

45. He had accordingly proposed a three-mile limit which could be extended in special cases, particularly for historical or geographical reasons; perhaps economic reasons might be added. However, if the freedom of the seas were not to be imperilled, States should not enjoy absolute liberty to extend their territorial sea, and he had therefore proposed that their claims should be subject to the approval of an international organ. In drafting that part of the text he had had in mind the type of organ, or separate chamber, provided for in article 3 of the Commission's original draft articles on fisheries. The Commission might also consider an organ similar to the committee to be set up under article 28 of the convention on the Inter-Governmental Maritime Consultative Organization, which had not yet come into force, not having received the requisite number of ratifications.

46. Now that the Commission had decided to make provision in the new draft articles on fisheries for the settlement of disputes by arbitration, it might wish to devise a similar system for dealing with claims concerning the breadth of the territorial sea. He would have no objection in principle, but it must be borne in mind that arbitration in the latter domain might run up against greater difficulties because a great number of States might regard their interests as being affected. That was no reason for rejecting an arbitral procedure outright, but it was nevertheless important not to overlook the difference between fisheries disputes and disputes over the breadth of the territorial sea.

47. Objections to extensions of the territorial sea would probably be based on fisheries considerations. Excessive claims were generally prompted by the desire to establish exclusive fishing rights in the territorial sea for nationals of the coastal State, which then sought to reassure other States by affirming that freedom of navigation and the right of innocent passage would be guaranteed.

48. The CHAIRMAN pointed out that the limit of the territorial sea had been fully discussed at the fourth session, and all members except those who had joined the Commission since that date had expressed their views. The position each would take was virtually known in advance, and further protracted debate was therefore unlikely to be conclusive. He accordingly appealed to speakers to confine themselves to definite proposals.

49. Mr. EDMONDS said that as he had not taken part in earlier discussions on the subject he would, despite the Chairman's admonition, venture to outline certain basic principles which lay at the heart of a difficult and vexatious subject.

50. First and foremost, it must be clearly realized that international relations made necessary the freedom of navigation and use of the high seas, for which a legal status had been established, in the best interests of all nations. It was in the general interest that the régime of the territorial sea, which was a derogation from that principle, should be limited to the utmost possible degree.

51. He had some doubts about the words "shall be" in the first paragraph of the new text proposed by the Special Rapporteur, since they implied that the three-mile limit was something new, whereas it was a fundamental principle of existing international law, which it was the function of the Commission to codify. The three-mile limit was the only one which had ever enjoyed general acceptance by a substantial number of States. That long-established acceptance seemed to have been, and continued to be, overlooked in discussions on the subject. No other limit had ever received common consent, or been claimed without giving rise to objection.

52. By opening the way to unlimited claims, and offering no criteria by which they might be judged, the proposal to provide for extensions in special cases on historical or geographical grounds would only create uncertainty and difficulty. If the claims of one State for a wider belt were admitted, he doubted whether others would be satisfied, and that would give rise to a whole series of conflicting claims which would never be reconciled and would militate against the interests of the freedom of the seas.
53. There was general agreement that at least some of the individual claims for a wider limit were based on sound reasons, mainly connected with the conservation of the living resources of the sea. But they would be better dealt with in the light of special considerations, as was proposed in the new draft articles on fisheries, while maintaining the three-mile limit.

54. Mr. Hsu wished to dispel the impression created by the Chairman that the question of the limit of the territorial sea had been thoroughly discussed in the past. To the best of his recollection, he and Mr. Manley O. Hudson had been the only ones to express their views when the subject had first been broached and at the previous session members had, if anything, shirked discussion, with the result that the onus of commenting had been thrown on to governments, although the Commission alone was competent to pronounce on the matter. The various criteria for determining the limit of the territorial sea mentioned in the report on the sixth session had not been examined at all in plenary meeting.

55. The Special Rapporteur's new text (A/CN.4/93) was even less satisfactory than that submitted at the previous session. That was perhaps because he had not given sufficient weight to the changes that were taking place, and had ignored many facts, one of which was that approximately three-quarters of the States in the world had departed from the three-mile rule, and that the remainder adhered to it not out of conviction, but for other reasons.

56. The States which continued to uphold the three-mile rule fell into three groups: first, certain European countries, hemmed in on the north by the Scandinavian countries which maintained a four-mile rule, and in the south by the Mediterranean countries with their six-mile rule; secondly, the countries formerly under the political tutelage or economic domination of the first group; and thirdly, the United States of America. The last named could not be considered a genuine adherent of the three-mile rule, because it claimed a twelve-mile contiguous zone in which, of course, it could not exercise sovereignty, since the zone was designed for certain special purposes; but if others were added the zone would immediately become territorial sea.

57. For various reasons, most of the countries formerly within the British and Netherlands empires had not expressed their views, but the Union of South Africa had recognized that, in view of the technical advances of the past few years, the historical reasons for the three-mile rule no longer applied, and had suggested a limited extension to 5 or 6 miles. Undoubtedly, the remaining countries in that group, with possibly one exception, would in due course assert the need for extension. Indeed, Australia had already tried, under the pressure of circumstances, to exclude the Japanese from fisheries outside the three-mile limit, and the Republic of Korea had claimed jurisdiction over large areas of the sea in much the same way as El Salvador, Peru, Chile and Ecuador.

58. Of the European countries maintaining the three-mile rule, all those which were in a position to do so had commented (A/2934, Annex), and none could be said to have objected to an extension. The Netherlands was prepared to consider extending certain particular rights of coastal States to a small area beyond the three-mile limit. The United Kingdom, of course, could not be called a genuine adherent of the three-mile rule, since it not only approved of the institution of the régime of the contiguous zones for certain purposes, but also claimed sovereignty over the continental shelf. Belgium had proposed "authorizing a State to extend the territorial sea, and so to limit the zone of the high sea, on condition that agreement has first been reached with the States interested in the fishing zones proposed to be restricted".

59. The Special Rapporteur had thus ignored the existing situation. In his second report (A/CN.4/61) he had proposed a limit of twelve miles, while insisting that exclusive fishing rights could be claimed by the coastal State for its nationals only within a distance of three miles. He had then proposed that a contiguous zone be instituted for the purposes of fisheries conservation. But those proposals failed to meet either the economic or the security needs of the coastal State, and would not solve the problem of conservation in respect of deep-sea fisheries, because they limited the coastal State's right of regulation to the contiguous zone, a defect which the Commission had sought to remedy in its new draft articles on fisheries. In his new text the Special Rapporteur had not even attempted to set a limit to possible extensions, but had passed on the problem to an international organ which, even if set up, would be helpless in the absence of an established limit. If there was a body in the United Nations competent to determine the limit, it was the Commission itself. The Special Rapporteur had referred in his text to special circumstances, forgetting that the extension of the territorial sea for which he had sought to provide did not fall within that category, but was intended to meet needs that were common to all nations, namely, the security of the State and the economic welfare of the people. He had also mentioned "historical and geographical reasons" without realizing that, though some of them might be usefully invoked—as they had been by the United Kingdom Government in its comment (A/2934, Annex, No. 16)—to support the argument that the three-mile rule had once been generally accepted, none was pertinent to the question of extension in order to meet the needs of all coastal States.

60. If the Commission was to do the job properly it would have to draft a far better text, and he suggested that it should revert to the Special Rapporteur's earlier proposal that the territorial sea be open to extension to any distance within a limit of twelve miles, but without the qualification prohibiting the coastal State from regu-
lating fisheries beyond the three-mile limit, since the exclusive right over fisheries in the territorial sea was the most vital point at issue. The question was entirely different from that of fisheries in the adjacent high seas, which could be dealt with by means of international conservation measures, since there only economic interests were involved.

61. Some more drastic solution was necessary in the case of fisheries in the territorial sea because, apart from economic interests, security considerations were involved, and those sufficiently justified the claim to sovereignty by the coastal State. Subversion was more difficult to control and an infinitely greater potential source of harm than the liquor traffic, and if the latter justified the establishment of a contiguous zone, the prevention of subversion justified to an even greater degree the extension of the territorial sea to the same distance. It would be easy to imagine the views of countries in the western Pacific and east Indian Ocean which had suffered at the hands of the Japanese.

62. The twelve-mile limit was the broadest so far adopted for normal purposes, that was, excluding extensions for conservation in deep-sea fishing areas or the exploitation of the natural resources of the continental shelf. That limit might be adopted, if only because it was already upheld by some half a dozen States, including the Soviet Union. It would be unrealistic to ask those States to reduce their limit. Furthermore, such a limit was the only effective one in view of modern technical progress; indeed, the fact that it had been chosen some thirty years before by the United States of America for the contiguous zone suggested that, if anything, it might be too narrow. At all events, it certainly could not be too wide. If the Commission failed to propose a twelve-mile limit, some countries might propose an even wider one, thereby making it still more difficult to reach agreement.

63. Since the Commission had practical problems to solve, it might, instead of seeking to defend the old three-mile rule, consider how best to safeguard the security of the coastal State and protect the interests of its population. It must also seek means of safeguarding the principle of the freedom of the seas from further inroads through the extension of the territorial sea. The Commission had just decided in its draft articles on fisheries to strengthen the position of coastal States with regard to deep-sea fisheries conservation. It might yet decide to withdraw the sovereign rights over the continental shelf conferred on States in the draft articles adopted at the fifth session, and substitute for them exclusive rights of exploitation. Such wise steps might serve to check excessive claims concerning the breadth of the territorial sea. But in dealing with the normal limit based on the general need of all coastal States, he hoped that the Commission would agree that twelve miles, being realistic and reasonably effective, would have some chance of general acceptance.

64. Faris Bey el-KHOURI agreed with Mr. Hsu that the problem had not been adequately discussed in the past, and wished to take the present opportunity of contributing some new considerations to the discussion.

65. In Islamic law, running water, even that used for irrigation, was common property. Lakes, for example, could not be owned by an individual. It was therefore held that the seas were res communis, but that, for strictly indispensable requirements, the coastal State might lay claim to some portion of them as its territorial sea; moreover, the belt must be of a uniform breadth, because all States were equal and none could claim a privileged position in relation to another.

66. Clearly some general principle must be adopted for delimiting the breadth of the territorial sea, since it could not be left to the arbitrary action of individual States. He personally did not agree with certain authorities that the three-mile rule was in fact based on the range of shore batteries, because of the possible variations in range. But the rule did happen to correspond with the range of visibility from a point five feet above the shoreline, and he believed that that easily applicable criterion would be the most appropriate. If it were decided to extend the limit of the territorial sea to four miles, the position of the observer would have to be nine feet above the shore.

67. Mr. GARCIA AMADOR said that at the previous session he had proposed that the Commission defer consideration of article 3 until it had dealt with the question of fisheries, because of the close interrelationship between the two problems. He had on that occasion drawn attention to the fact that in 1930 the Conference for the Codification of International Law had agreed that the principal motive for extending the territorial sea was the desire to protect the living resources of the sea against extermination through over-fishing or the use of modern equipment and techniques. Countries seeking to extend their territorial sea were not in every case claiming exclusive sovereignty beyond the traditional three-mile limit, but only special rights for purposes of conservation. That was the view of a number of experts in maritime law, including Gidel, and was further confirmed by the study in 1930 and subsequently of the different claims.

68. Thus the draft articles on fisheries might provide a basis for solving the problem, since they contained a provision recognizing the right of coastal States to institute conservation measures unilaterally. Before taking a final decision about the limit of the territorial sea, it might be wise for the Commission to obtain the views of governments on those draft articles, in order to ascertain whether the recognition of certain rights of coastal States would satisfy those governments which were claiming an extensive territorial sea. At the present moment, when conservation measures became necessary, coastal States had no other alternative but to extend their territorial sea, and consequently their sovereign rights. He would not encourage the Commission to be too optimistic, but hoped that States would respond reasonably to the draft articles on fisheries and realize that they had materially changed the situation. Perhaps they would then be led
to comply with the conditions governing the new right conferred on the coastal State. In that connexion, he drew the attention of the Commission to the fact that the claims made at the second session of the Inter-American Council of Jurists for the superjacent waters over the continental shelf to be assimilated to the status of the territorial sea, and the arguments advanced at the tenth Inter-American Conference in 1954 in favour of a 200-mile limit, had been rejected as being without sound foundation. Subsequently, certain governments, instead of claiming a considerable extension of their territorial sea, had demanded that their right to take unilateral action for conservation purposes be recognized: that was a most important development.

69. In the light of those considerations he would be unable to vote either for or against any specific limit to the territorial sea, and hoped that the vote might again be postponed.

70. Mr. SALAMANCA agreed with Mr. García Amador that it would take a considerable time to reach a decision on the limit of the territorial sea. Indeed, the subject should be left to the last, since it was clearly not ripe for codification. The replies of governments revealed the existence of various criteria, mostly connected with fisheries and the exploitation of the continental shelf. The wide divergence of views seemed to suggest four possible methods for the settlement of differences. First, an international body responsible for deciding whether special interests justified an extension beyond three miles; secondly, arbitration; thirdly, international agreements on the lines suggested by the Belgian Government (A/2934, Annex, No. 2); and lastly, some method of regulation similar to that adopted in the case of fisheries and the continental shelf. Perhaps a combination of all four methods might be possible, but it should be remembered that a uniform solution was hardly feasible owing to the diversity of local and special interests at stake.

71. Mr. EDMONDS, replying to Mr. Hsu, said that the United States of America had never made any claims inconsistent with the three-mile rule; to apply that argument to its claims concerning the contiguous zone or the continental shelf was to forget the distinction between the two latter and the territorial sea. The claims of States to a territorial sea beyond three miles, which had all been prompted by different motives, had never won general consent.

72. Mr. HSU disclaimed having charged the United States Government with a violation of international law; he had only pointed out that, in company with the United Kingdom, it had never been a genuine adherent of the three-mile rule.

73. Turning to another question, he observed that whether disputes were settled by an international body or by arbitration, some criteria for determining whether claims were justified would still have to be established by an authoritative body. In his opinion, that task could only be carried out by the Commission itself, since the General Assembly was a political body and open to bias. None of the replies from governments suggested what should be the maximum permissible limit, and the Commission could not shirk the problem if it was to conclude its work within the time-limit set by the General Assembly in resolution 899 (IX). He also urged the Commission to shoulder its responsibilities in the face of the anarchy caused by excessive claims. The draft articles on the conservation of the living resources of the sea did not solve all the problems connected with fisheries. As he had sought to explain in his previous intervention, the fishing interests involved in the territorial sea were not so much those of large undertakings, but those of the population living in the coastal area, the vital issue at stake being the livelihood of individuals. He also appealed to the Commission not to ignore the danger of subversive acts in the territorial sea, to which certain States in some areas of the world were particularly vulnerable.

74. The CHAIRMAN observed that Mr. García Amador had confirmed his original view that there was no link whatsoever between the conservation of the living resources of the sea and the limit of the territorial sea. In reply to those members who had argued that the Commission should not take a precipitate decision, he pointed out that, in accordance with the General Assembly's instructions, the work on the régime of the high seas and the régime of the territorial waters and all related problems must be completed by the end of the next session.

75. As he had already stated in the General Assembly, he did not consider it possible to arrive at a satisfactory solution to the limit of the territorial sea, in view of the very divergent views on the subject, or at any rate at a solution capable of commanding a substantial majority, which in such an important matter was essential. The Commission would also do well to bear in mind that a draft containing a single provision unpalatable to a great number of States was in danger of meeting with a very bad reception in the General Assembly. He therefore intended to propose at the proper time that the question should not be dealt with in the provisional articles under consideration.

76. Sir Gerald FITZMAURICE, in reply to Mr. Hsu, pointed out that the United Kingdom was one of the foremost champions of the three-mile rule. It neither claimed a contiguous zone, nor exercised any rights outside the three-mile limit, and had never formally recognized the claims of other States to a contiguous zone. Finally, it had never claimed a continental shelf round the United Kingdom. Admittedly, it had done so elsewhere, but without laying claim to the superjacent waters, which, like the Commission, it regarded as part of the high seas.

The meeting rose at 1.10 p.m.