Document:-
A/CN.4/SR.309

Summary record of the 309th meeting

Topic:
Law of the sea - régime of the territorial sea

Extract from the Yearbook of the International Law Commission:-
1955 , **vol. I**

309th MEETING

Friday, 10 June 1955, at 10 a.m.

CONTENTS

* 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. Gilberto AMADO, 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.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 3, said that in order to refute the suggestion that he was seeking to stifle discussion on the breadth of the territorial sea, he wished to point out that several meetings had been devoted to the subject at the fourth session.[1] At that session most members had expressed their views at length and Mr. Kozhevnikov's proposal that a decision be deferred had been adopted,[2] together with his own amendment that the Commission should request the Special Rapporteur to submit specific proposals at the fifth session in the light of the views expressed and the proposals made.

2. If Mr. Hsu, who was opposed to leaving it to States to find a solution, were to examine the summary records of the fourth session, he would see that he (the Chairman) had held very similar views.

3. Mr. HSU considered that the discussion at the fourth session had not been so thorough as the Chairman had suggested. It was true that the Chairman had throughout maintained a very consistent attitude, but there was a wide gulf between the belief that no agreement was possible, to that the Commission could do nothing, and the feeling that every effort should be made to reach an agreement, failing which and as a last resort, the matter should be referred to a diplomatic conference. He persisted in thinking that, at the last session at any rate, discussion had been avoided, and he therefore hoped that the Commission would now get down to the task with which it had been entrusted, and attempt to reach some conclusion.

4. Mr. AMADO shared the Chairman's view. It would be idle for the Commission to suppose that it could change rules which had grown up through custom and long practice. Codification was not feasible on such a controversial issue, and the Commission should refrain from putting forward a solution which States would not take seriously.

5. Mr. KRYLOV said that there was no agreement, either between States or in the Commission, about the breadth of the territorial sea. Nor was it true, as had been argued by several members, that the sole principle at stake was the freedom of the seas, a point which the Government of Iceland had clearly brought out in its comment (A/2934, Annex, No. 7). The other principle involved was the sovereignty of the coastal State over the territorial sea. Bearing those two principles in mind, it was possible to reach certain practical conclusions. First, each State determined the breadth of its own territorial sea. For example, the Imperial Russian Government had in 1912 established a twelve-mile limit, and that rule had been embodied in the legislation of the Soviet Union Government. Some other countries, Bulgaria, for instance, had followed suit. The Scandinavian countries claimed a breadth of four miles, and so far as the Baltic was concerned might have reason for disliking the twelve-mile rule. However, specific difficulties could be overcome by special agreement. The Mediterranean countries generally adhered to a six-mile limit.

6. In his book entitled "The Problem of Territorial Waters in International Law",[3] Mr. Nicolaev, showed that of the seventy maritime States which were already Members of the United Nations or wished to become Members, more than thirty applied a limit exceeding three miles. The Special Rapporteur's new text for article 3 seemed therefore to be the least felicitous in the whole history of the draft articles.

7. If any provision were to be inserted at all, it might read:

> "The breadth of the territorial sea shall be determined by the national legislation of each coastal State."

[1] *Yearbook of the International Law Commission, 1952,* vol. I, 165th-169th meetings.

[2] *Ibid.*, 169th meeting, paras. 15, 17, 26-27.

[3] A. N. Nicolaev, *Problema territorialnykh bod b mejdunarodnom prave* (Moscow, gosudarstvennoe izdatelstvo yuridicheskoy literatury. 1954).

8. The establishment of an international organ within the United Nations, as proposed by the Special Rapporteur, might be envisaged, but the Commission should duly consider whether it was desirable to expand the already large staff of the United Nations any further. If differences could not be settled by diplomatic means, they might be submitted to conciliation or arbitration.

9. He had put forward those considerations, not in any spirit of pessimism, but because he wished the Commission to make progress. He could not agree with the United Kingdom Government's view that the present tendency to claim extended, and in many cases very extensive, limits for the territorial sea was retrograde, and had been greatly surprised by its continued adherence to the three-mile rule.

10. Mr. SANDSTRÖM considered that even if the chances of reaching final agreement were slight, the discussion should be continued, particularly as replies had been received from governments and as the Special Rapporteur had made a most commendable effort to carry out the ungrateful task of reconciling what appeared to be conflicting points of view. However, even his new text was open to criticism. First, it would entitle States to extend their territorial sea, subject to the approval of an international organ, and that was contrary to the essential function of law to create stability in human relations. It might lead to the unfortunate result of humble fishermen encountering in their traditional fishing grounds a vessel of the coastal State which would prohibit further fishing, possibly confiscate their catch and even fine them. Secondly, it would be very difficult to induce States claiming an extensive territorial sea, or affirming that they already possessed rights over such a sea, to renounce their pretensions and submit them for examination by an international administrative authority. Thirdly, it would not be easy to establish the criteria by which an international authority could render its decisions. There could be some uncertainty about historical reasons, and it would be still harder to determine what constituted geographical reasons.

11. Despite the difficulty of the subject, he still considered that the Commission should state what the law was, if any existed. He personally believed that certain rules had been established which should be upheld. In the first place, it would be natural to take the three-mile rule as a starting point, since it had commanded the greatest measure of agreement. On the other hand, the four-mile rule proclaimed by the Scandinavian countries had also long been recognized, and had not been questioned by the International Court of Justice in the Fisheries Case.[4] The situation concerning countries claiming a six-mile limit might be similar.

12. Thus, if certain rights did exist with regard to the breadth of the territorial sea, they should be safeguarded, and he accordingly proposed that article 3 read as follows:

> "The breadth of the territorial sea is three nautical miles measures from the base line of the territorial sea, or such other distance from the same line to which a State is entitled to extend its territorial sea on account of continuous and ancient usage."

13. He was unable to accept Mr. Krylov's text, which would legalize anarchy, but could support any reasonable limit, provided that some definiton of what was reasonable could be found.

14. Mr. AMADO submitted for the Commission's consideration a proposal he had just put forward at the fourth session.[5] It read:

(1.) The Commission recognizes that international practice is not uniform as regards limitation of the territorial sea to three miles.

2. The Commission considers that international practice does not authorize the extension of the territorial sea beyond twelve miles.

(3.) In view of the lack of uniformity in international practice, the Commission has not been able to propose a general formula for recommendation.

15. Mr. ZOUREK considered that the Special Rapporteur's new text was unrealistic both in respect of the proposed limit and in respect of the international organ to be set up within the framework of the United Nations. It was regrettable that his views should have developed in a direction which was hardly conducive to any considerable consensus of opinion, let alone general agreement. The Special Rapporteur had first proposed that States should themselves determine the breadth of their territorial sea up to a maximum of six miles. He had then extended that maximum to twelve miles, but had now reverted to the three-mile rule. If a solution was to be found, the Commission must take as its starting point existing international law and prevailing conditions. Accordingly, the legend that the three-mile rule had enjoyed general acceptance must be exploded. In reality, the breadth of the territorial sea had originally been determined by the rule that *terrae potestas finitur ubi finitur armorum vis*. Despite technical progress, the three-mile limit had been upheld by certain authorities, although the rule had really been based on the *de facto* jurisdiction of the coastal State. Some States, however, such as the Scandinavian countries and Russia, had never accepted the three-mile rule, and in 1760 Spain had adopted a six-mile limit. Even those States professing to uphold the three-mile rule were not always consistent, and Seward, a Secretary of State of the United States of America, had proposed an extension to five miles for normal purposes and to ten miles for belligerent vessels. Yet Mr. Edmonds had at the previous meeting affirmed that his country had never claimed more than three miles. It was interesting to note that the Institute of International Law had proposed a six-mile limit at the end of the last century, and that the same proposal by the Netherlands Government at

[4] *I.C.J. Reports 1951*, p. 116.

[5] *Yearbook of the International Law Commission, 1952*, vol. I, 168th meeting, para. 45.

a later date had met with firm opposition on the part of the United Kingdom Government.

16. Thus, there could be no doubt whatsoever that the three-mile rule did not exist in international law, and could not provide a basis for agreement.

17. The Commission must also reject the contention that the freedom of the seas was the sole principle at stake, and that the exercise of jurisdiction by the coastal State in the territorial sea was an exception to that rule, since that contention was historically inexact. The two principles were of equal importance, and must be reconciled by means of some reasonable compromise acceptable to all.

18. He did not consider that there was any absolute necessity for establishing a uniform limit, because the breadth of the territorial sea was determined by several factors, such as the configuration of the coast, economic interests and considerations of security. The present practice of States was the result of a long process of evolution, and it would be illusory to suppose that they would be prepared to abandon claims which had already become part of their municipal law, though it was of course necessary to find some means of preventing States from claiming excessive extensions. He believed that the best approach would be, on the one hand, to recognize that coastal States had a right to determine the breadth of their territorial sea in accordance with their requirements and the configuration of the coast, and, on the other hand to seek a means of fixing a maximum limit. Such an approach had in fact been advocated by several governments, including those of Sweden and India (A/2934, Annex, Nos. 8 and 13), the latter proposing a maximum limit of twelve miles, and he suggested that the Commission should consider what the prospects were of reaching agreement on those lines.

19. Mr. SCELLE said that the Commission had entered the domain of pure speculation and the philosophy of law. He would be bold enough to state at the outset that in his opinion the concept of the territorial sea was a pure abstraction, which, as A. de Lapradelle[6] had demonstrated, was bound to meet with failure, because it did not correspond to reality.

20. Mr. Krylov's proposal would lead to anarchy or, if Mr. Krylov preferred the lesser, a state of feudalism; to allow each State to determine its own territorial sea was not codification, which called for the establishment of common rules. In that connexion, the judgement of the Permanent Court of International Justice in the case concerning the factory at Chorzów was most instructive, because the Court had held that, from the point of view of international law, a rule of municipal law constituted nothing more than a simple fact and, unless it had come to form part of an international rule, had no legal validity.

21. He did not believe that it would be possible to devise a uniform rule for fixing the limit, because requirements varied; but international rules already existed for determining the breadth of the territorial sea of each State. At that point his views approached those of the Special Rapporteur, who had proposed a minimum limit of three miles to meet the essential requirements of States, coupled with the establishment of an international authority within the framework of the United Nations to approve individual claims. Such a proposal had considerable appeal, merited careful study and, despite the difficulties which the Commission had encountered in considering the part to be played by experts in the settlement of fisheries disputes, he hoped it would be adopted. The system proposed was very similar to that adopted in the draft articles on fisheries, since the international organ would clearly have to have recourse to experts in ruling on the validity of claims. The growth of a corpus of case law had already begun with the International Court's finding in the Fisheries Case[7] that the Norwegian claim was well-founded. It was important to note that the Court had not affirmed that the claim was in conformity with international law, but had stated that it was not at variance with it. Thus, the foundations had been laid of an excellent system whereby each State might claim a particular limit which would then have to be approved by an international judicial body: in fact, what he had proposed in the case of the draft articles on fisheries. Personally, he would prefer that international authority to be either the International Court of Justice or an arbitral tribunal.

22. Mr. AMADO observed that States, such as France, the United Kingdom and the United States of America, with large fishing interests and highly equipped fishing fleets, always claimed a narrow limit for the territorial sea, because they wished to safeguard the freedom of their fishermen to operate near the coasts of other States. That point of view was perfectly admissible, because it was one of the primary duties of any State to foster the prosperity of its people. Mr. Scelle's arguments were therefore easily comprehensible; but in such matters it was perhaps hardly necessary to address the gallery. Any lawyer worth his salt must be a realist.

23. Mr. SCELLE stated in reply to Mr. Amado that, when in the realm of international law, he (Mr. Scelle) was not influenced in the slightest degree by the political interests of his country.

24. Sir Gerald FITZMAURICE said that, though the subject had been discussed at the fourth session, five of the seven new members elected since were now present and ought to express their views on so important a question. Mr. García Amador's suggestion that the Commission should defer its final decision until it had received the comments of governments on the draft articles on fisheries deserved examination, because claims to an excessive belt of territorial sea were undoubtedly largely inspired by consideration of fisheries, and if the draft articles gave reasonable satisfaction con-

[6] A. de Lapradelle, *La Mer* (Paris, 1934).

[7] *I.C.J. Reports 1951*, p. 116.

cerning the safeguarding of special interests, States might modify their attitude considerably.

25. However, the Commission would eventually have to pronounce itself on the problem of the breadth of the territorial sea, and could not present the General Assembly with a purely negative reply. In view of the wide differences of opinion, it could state that its primary duty was to codify *lex lata* and that the practice of States in respect of the breadth of the territorial sea was so divergent that it was difficult to lay down a rule—if indeed one existed—and that it was unable to make a definite proposal *de lege ferenda* because of the technical and political problems involved. It could then propose a diplomatic conference. He was not necessarily advocating that procedure, which followed the lines of that suggested by the Belgian Government (A/2934, Annex, No. 2), but wished to indicate that it would provide a possible method of approach if a strong majority did not emerge in favour of any particular solution at the eighth session.[8]

26. Even in the event of the Commission's achieving a purely negative result, it could decide on certain general propositions which might serve to clarify and introduce some order into the situation. First, the breadth of the territorial sea was governed by international law, and was not a matter which each State was free to decide entirely on its own. Secondly, the Commission should lay down that in principle uniformity was desirable, though it was subject to special considerations based on historic usage or geographical considerations. The strong practical argument in favour of uniformity was that States were equal, and that every claim to a territorial sea beyond the normal limit was a claim to previlege because it derogated from the principle that the use of the high seas was open to all mankind. Such claims must therefore be substantiated by cogent special considerations. Thirdly, the Commission must stipulate that, whatever the proper extent of the territorial sea, there must be some restraint on the claims of States, thus laying down a principle of relative restriction.

27. Turning to the first of those three principles, he stressed that the territorial sea entailed restriction of the areas which were common to the use of all nations and in which all States had equal rights. There could be no doubt that the extent of such restriction was governed by international law: a State could not appropriate at will the high seas, which were an area common to all nations.

28. In its judgement of 18 December 1951 in the Fisheries Case, the International Court of Justice had stated:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends on international law."[9]

The Anglo-Norwegian fisheries dispute had been concerned with two main issues: first, whether the limits of territorial waters could be measured from straight base lines instead of from the low-water mark following all the sinuosities of the coast; and secondly, whether Norway had the historic right, by long continued usage, to delimit its territorial sea in a certain manner. The mere fact that the International Court of Justice had had to go into those two issues and render judgement upon them constituted irrefutable proof that international law provided for a limitation of the breadth of the territorial sea. Clearly, if as had been suggested by certain members of the Commission—the coastal State had the right to define at will its territorial waters, the discussion on those two issues would have been completely irrelevant. Apart from any question of internal waters, there would have been no point in giving a ruling as to straight base lines which "rounded off" the outline of the territorial sea, had Norway been completely free to extend its territorial sea to any limit it desired. For fishing purposes it could have got all the waters it wanted without bothering about the base-line problem.

29. International law undoubtedly prescribed some maximum limit to the breadth of the territorial sea; to hold the contrary opinion would be tantamount to suggesting that international law did not govern the breadth of the territorial sea but that it was a matter for the municipal law of coastal States.

30. He recalled that Mr. Lauterpacht, in the course of the discussions at the fourth session, had emphasized that there was no practical difference between the two following propositions: one, that States were free to fix at their discretion the breadth of the territorial sea; and two, that under international law there was no limit to the breadth of the territorial sea.[10]

31. As to the maximum breadth which international law allowed for the territorial sea, there could be only one answer in the light of history and of constant practice: the extent of the breadth of the territorial sea was equivalent to one marine league. He purposely referred to a marine league, and not to three miles, because the Scandinavian four-mile limit proceeded on fundamentally the same idea, but was based on the different concept of the marine league held by the Scandinavian countries.

32. Two recent articles by Mr. Wyndham Walker[11] and Mr. H. S. R. Kent,[12] based on a great deal of

[8] See *Yearbook of the International Law Commission, 1956*, vol. I, 363rd meeting.

[9] *I.C.J. Reports 1951*, p. 132.

[10] *Yearbook of the International Law Commission, 1952*, vol. I, 168th meeting, para. 9.

[11] Wyndham Walker, "Territorial Waters: the Cannon Shot Rule", *British Year Book of International Law*, vol. 22 (1945) pp. 210 *et seq.*

[12] H. S. R. Kent, "The Historical Origins of the Three-Mile Limit", *American Journal of International Law*, vol. 48 (1954), pp. 537 *et seq.*

historical research, had shown quite conclusively that the origin of the three-mile rule of western Europe —the four-mile rule of Scandinavia—had only an incidental connexion with the reach of cannon-shot, and were both fundamentally based on the concept of the marine league.

33. There was no solid basis for any of the distances, other than the marine league, which were now being claimed by various States: the situation of those States was in most cases no different from that of those which abided by the three- or four-mile rule. There was no special justification, for instance, for the claim made by some of the Mediterranean and other countries to a six-mile limit.

34. There were, on the other hand, very solid grounds for considering the distance of one marine league as representing the rule in international law. The fact that a number of States did not apply it in no way detracted from its validity. The actions of those States merely represented breaches of international law, unless they were based on historical or other valid grounds. It was not accurate to suggest that a legal rule ceased to exist because it was occasionally, or even often, broken.

35. The marine league had a strong historical foundation; it had been almost universally observed for well over a century. Until about 1930, it had scarcely been challenged. It was true that the Institute of International Law had at its session in 1894 proposed that the rule be changed to six miles, but the same body had, as late as its session at Stockholm in 1928, endorsed the three-mile rule, which the International Law Association had also endorsed at its Conference in 1926.

36. At the Conference on the Codification of International Law of 1930, only two out of the twenty-one governments which replied to the questionnaire had claimed more than three—or four—miles; no less than eighteen had supported the marine-league rule. At the Conference itself, only five or six States had proposed more than the marine league, and none had gone further than six miles.

37. In his third report (A/CN.4/77), the Special Rapporteur had shown that twenty-five out of fifty-five States supported the marine-league rule. The other thirty adopted various distances, and no particular distance—other than the marine league—had the support of more than a few States.

38. Again, examination of the comments by governments (A/2934, Annex) on the Commission's report covering the work of its sixth session (A/2693) showed that out of the ten States which had made specific replies on article 3 of the Commission's draft, no less than six, i.e., a majority, considered the marine league as part of existing international law.

39. He emphasized that the preponderance of States adhering to the marine league was not purely numerical. It included most of the leading maritime Powers. And any rule on the breadth of the territorial sea must command the support of those Powers if it was to be invested with the necessary authority and be capable of effective enforcement. In time of war—and that had been significantly the case in both the world wars—no belligerent had been prepared to admit the application of the rules of neutrality beyond a distance of one marine league from the coast of neutral States.

40. The marine league had in its favour a great many practical arguments. It represented the normal horizon of an average man standing a little above ground level. Shipping experts attached great importance to the normal horizon even at the present time when modern scientific aids to vision were generally available. Most fishermen did not possess such equipment, and, in order to keep outside the limits of the territorial sea of the coastal State, were accustomed to getting out of the range of visibility — a process which enabled them to fix their position with some degree of certainty.

41. As had been pointed out by Judge Alvarez in his dissenting opinion in the Anglo-Norwegian Fisheries Case,[13] the possession of territorial waters entailed duties as well as rights. The coastal State had among other things to assist shipping and to exercise police duties with regard to navigation. Even important maritime Powers were not in a position to discharge those functions beyond a comparatively short distance from the coast.

42. It had been suggested that the marine league had no scientific basis; but if so, that was equally true of all the other distances that had been proposed. And, as he had already said, the marine league had in its favour a number of extremely cogent practical reasons.

43. It had also been suggested that a distance of three miles had become insignificant in the light of modern progress, particularly as regards the speed of motor boats and aeroplanes. Such an agreement could be progress, particularly as regards the speed of motor in view of the fact that the speeds now attained, particularly by aeroplanes, were of a very high order. But scientific progress actually contributed a very powerful argument in favour of the marine-league rule. The use of radar equipment now made it impossible for a smuggler to reach the coast unperceived. The coastal State no longer required a broad belt of territorial sea to detect smugglers, or, indeed, any other persons engaged in undesirable activities near its shores.

44. The provisions adopted by the Commission in connexion with the continental shelf and fisheries conservation, together with the notion of contiguous zones, were quite sufficient to give the coastal States all the scope they could reasonably require to meet special purposes. He emphasized that the contiguous zone was an area in which the State exercised certain rights—in respect of such matters as customs and sanitation—without enjoying therein or thereover any sovereignty or dominion. Such sovereignty or dominion were in no way necessary beyond a very limited distance.

45. With an eye to the future, it was essential that the

[13] *I.C.J. Reports 1951*, pp. 145–153.

Commission adopt a conservative policy. If the Commission were to adopt as the maximum breadth for the territorial sea a distance greater than the marine league, twenty years thence the same arguments that were now being levelled against the three-mile limit would be adduced against the longer distance thus adopted. It was clear that once a breach was made in international law on the subject there would be no end to the process of disintegration of the freedom of the high seas.

46. He would not oppose a proposal along the lines of the one made by the Special Rapporteur (A/CN.4/93) or along those of Mr. Sandström's proposal (para. 12, above). He would, however, prefer the Commission clearly to recognize the principle of the marine league, coupled with the notion of contiguous zones.

47. Mr. EDMONDS made the following formal proposal for inclusion in the Commission's report:

> "After discussions at the present session of the Commission, there continue to be wide differences of opinion as to the limit which should be fixed for the width of the territorial sea. It appears that the claims of many States to more than three miles are based upon real concern for the conservation of the resources of the sea or other legitimate interests. The Commission has dealt with two of such interests in the adoption of articles in regard to the continental shelf and in articles on the subject of fisheries now being formulated which will be presented in the report to be submitted to the General Assembly.
>
> "In these circumstances, the Commission defers its decision of the breadth of the territorial sea until it has reached final conclusions as to fisheries and its articles upon that subject have been studied and commented upon by governments."

48. Mr. GARCÍA AMADOR recalled that he had stated at the previous meeting that he would abstain if any vote were taken during the present session on a resolution concerning the breadth of the territorial sea. But he would certainly vote against any such proposal as that put forward by Mr. Krylov, which suggested that the coastal State had absolute freedom to delimit the breadth of its territorial sea.

49. The determination of the breadth of the territorial sea could not be considered as an attribute of sovereignty. At all events, sovereignty was coming to be compassed to an ever increasing extent by international law in all fields. It was not permissible for a State to take possession of parts of the high seas in which interests of the international community existed in respect of such matters as fishing and freedom of navigation.

50. The dangers of unilateral action were obvious, and recent examples, both of claims to the superjacent waters of the continental shelf and of claims to an extensive breadth of territorial sea, had clearly demonstrated those dangers.

51. International law could not grant a coastal State the right to extend its territorial waters without limitation, because such a privilege would affect the interests of other States.

52. If a vote were taken on the three principles put forward by Sir Gerald Fitzmaurice, he would vote wholeheartedly in favour of the first principle — namely, that the breadth of the territorial sea was governed by international law. A vote on that principle would help the Commission to arrive at a decision on the issue as a whole.

53. The CHAIRMAN said that the breadth of the territorial sea was an interstate problem, and as such was undoubtedly governed by international law. He felt certain that Mr. Krylov did not mean to deny that proposition: all that he intended was that under international law States were entitled to determine the breadth of their respective territorial seas. The question before the Commission was whether any definite limit existed to that breadth.

54. Mr. HSU said that if the Commission failed to lay down any maximum for the breadth of the territorial sea, it would have to fall back on Mr. Krylov's idea — namely, that States were free to delimit their own territorial sea.

55. Sir Gerald Fitzmaurice's argument about the variety of distances adopted by the thirty States out of fifty-five which did not recognize the marine-league rule in no way belittled the fact that those thirty States were more numerous than the twenty-five which did respect that rule.

56. The argument based on the refusal of belligerents to recognize neutrality beyond a distance of three miles from the coast of a neutral State was not decisive. Neutral States themselves adopted a diametrically opposed attitude. During the Second World War, the meetings of Ministers of Foreign Affairs of the American Republics, held in Panama in September 1939 and at Rio de Janeiro in January 1942, had laid down security zones hundreds of miles in breadth.

57. The problem of security was vital to any discussion on the territorial sea. It was necessary to think not in terms of large fleets that might invade the territorial waters, but rather in terms of subversive activities that might be conducted under the guise of fishing. The Commission had to deal with the problem of the breadth of the territorial sea, having in mind that problem as well as that of coastal fisheries. The latter meant the livelihood of poor people who might be left destitute if well — organized fishing expeditions from remote lands could rob them of their catch.

58. The Commission had above all to bear in mind that some definite limit must be set to the claims being made on behalf of coastal States, which were becoming more and more extensive simply because the international community had not yet taken its stand on some well-defined limit for the breadth of the territorial sea. Article 13, paragraph 1(*a*) of the United Nations Charter —pursuant to which the International Law Commission had been set up—provided that the General Assembly

should initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. From that formulation, it was clear that the Commission's main duty was to ensure the progressive development of international law; its secondary duty was to codify existing law. International law was going through a period when it stood in need of principles based on equity. The Commission, which was not representative of States but rather a technical body acting in the interests of humanity as a whole, could not do better than submit to the General Assembly a proposal which would constitute an equitable solution to the problem of the breadth of the territorial sea.

59. The CHAIRMAN pointed out that it would be dangerous to postpone the problem of the breadth of the territorial sea, for in that case the Commission would have to cover much the same ground at its next session. In accordance with its Statute, the Commission had submitted its draft to governments for their comments, and now that those comments had been received (A/2934, Annex) was preparing its final draft. Having reached that stage, it could not do otherwise than take some decision on the breadth of the territorial sea. Constitutionally, there was no other course open to it.

The meeting rose at 1.05 p.m.

310th MEETING

Monday, 13 June 1955, at 3 p.m.

CONTENTS

* 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

Present:

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

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. The CHAIRMAN recalled that at the previous meeting proposals for article 3 had been submitted by Mr. Krylov,[1] Mr. Sandström,[2] Mr. Amado[3] and Mr. Edmonds.[4] Mr. Zourek had now proposed the following principles as a basis for the drafting of the article:

"1. The coastal State has the right to fix the breadth of its territorial sea in the light of its requirements and of the shape of its coastline.

"2. Consequently, it is not possible to fix a uniform breadth of territorial waters for all maritime States.

"3. However, since the principle of freedom of the high seas constitutes a limitation of the coastal State's powers in regard to fixing the breadth of the territorial sea, it is essential to lay down objective criteria for the exercise of the right in question, in order to preclude any arbitrary measures."

2. In addition, the Special Rapporteur himself had now submitted a new draft for the article which he would read to the Commission.

3. Mr. FRANÇOIS (Special Rapporteur) proposed that article 3 should read as follows:

"Subject to any historical rights which a State might claim over a greater breadth, the breadth of the territorial sea which a State can lawfully claim against all other States is three nautical miles.

"Other States are under an obligation to recognize territorial waters fixed by the coastal State at a greater breadth than that laid down in the foregoing paragraph only if

"1. They have assumed treaty obligations in the matter, or claim an equal or greater breadth for their own territorial sea,

"2. They have been parties in a case which has given rise to a judgement by the International Court of Justice or an award by a court of arbitration recognizing the legitimacy of the extension."

4. Earlier proposals before the Commission on the breadth of the territorial sea had given rise to the objection that they disputed the right of States to fix the breadth of their territorial sea. That difficulty was avoided in the text he now proposed, which did not actually deny to States the right to fix their territorial

[1] 309th meeting, para. 7.

[2] *Ibid.*, para 12.

[3] *Ibid.*, para. 14.

[4] *Ibid.*, para. 47.