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Summary record of the 310th meeting

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

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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

	Page
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)	162

* 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. Amado³ 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.

sea at a distance greater than three miles, but simply stated the existing rule of international law that States other than the coastal State were under no obligation to recognize a greater breadth than three miles except where they themselves claimed such greater distance, or were parties to a convention on the subject, or were bound by a decision by the International Court of Justice or a court of arbitration, recognizing the extension in question.

5. That method of approach had some parallel with the International Court of Justice's recent judgment in the *Nottebohm* case between the governments of Guatemala and Liechtenstein.⁵ The Court acknowledged the undisputed right of Liechtenstein as a sovereign State to naturalize aliens at its discretion, but also proclaimed the right of other States, Guatemala for instance, not to recognize such naturalization.

6. Mr. SANDSTRÖM accepted the Special Rapporteur's proposal and withdrew his own.

7. Mr. KRYLOV did not approve the Special Rapporteur's new draft, which illustrated the French maxim *le mieux est l'ennemi du bien*. Its opening words "subject to . . ." implied that the Special Rapporteur did not have very great faith in the principle he was advocating.

8. With regard to the three principles proposed by Mr. Zourek, he felt that the third made no contribution to the solution of the problem.

9. Of all the proposals before the Commission, Mr. Edmonds' was the best because it would give the Commission an opportunity of examining the problem of the breadth of the territorial sea in the light of the work done by the International Technical Conference on the Conservation of the Living Resources of the Sea. The most serious problem involved in the regime of the territorial sea was that of fisheries and, if the Commission's proposals on that issue proved satisfactory, a solution of the problem of the breadth of the territorial sea might be facilitated.

10. Mr. AMADO said the first paragraph of his proposal recognized that international practice was not uniform in limiting the territorial sea to a breadth of three miles. The Commission had no authority to decide, in view of the diversity of State practice on the subject, that the three-mile rule was part of international law. The formulation he proposed in paragraph 1 gave as much recognition to the three-mile principle as could properly be accorded it.

11. Paragraph 2 of his proposal, by laying down that international practice did not warrant the extension of the territorial sea to a breadth greater than twelve miles, made it possible to call a halt to the more exaggerated claims made by certain States.

12. The CHAIRMAN said that, of the various proposals before the Commission, that of Mr. Edmonds had to be voted upon first because it invited the Commission to defer its decision.

13. For his part he (the Chairman) did not favour that course, because it would merely lead to the whole discussion being renewed at the following session.

14. The suggestion that the Commission would be justified in deferring its decision because of the interconnexion between the problem of fisheries and that of the breadth of the territorial sea was not a valid argument. The question of fisheries conservation had been debated and voted upon without reference to any specific distance from the coast. On the other hand, the various States claiming a wider territorial sea than three miles were doing so not principally for reasons connected with fisheries but mainly owing to problems of security, customs and policing.

15. Faris Bey el-KHOURI opposed Mr. Edmonds' proposal that the decision be deferred. It was most unlikely that, before the next session, the Commission would gather any new information likely to enable it to reach a unanimous decision. He urged the Commission to take a decision now by a majority, since it could not reach unanimity.

16. He himself felt strongly that the Commission should fix some definite distance for the breadth of the territorial sea and that that distance could only be three miles, in accordance with long-standing usage.

17. Mr. EDMONDS said he had introduced his resolution while under the impression that the majority of members were in favour of postponing the discussion. He therefore withdrew it, subject to the right to reintroduce it later.

18. Mr. SALAMANCA asked whether, at an earlier stage in the discussion, the Chairman himself had not proposed that further discussion be postponed. He suggested that a postponement for one year might be appropriate.

19. The CHAIRMAN said that he had not made a proposal in those particular terms. What he had suggested was rather that the Commission should put on record its inability to arrive at a definite conclusion on the breadth of the territorial sea.⁶

20. Mr. AMADO pointed out that that was precisely the substance of his own proposal.

21. The CHAIRMAN, in further clarification of his proposal, said it implied that the Commission would not take a decision on the question, even at the following session.

22. Mr. SANDSTRÖM said the General Assembly expected some definite opinion from the Commission. If a majority could not be obtained in the Commission for any particular formation with regard to the breadth of the territorial sea, the separate opinions of the various members of the Commission might be submitted to the General Assembly.

23. Mr. FRANÇOIS (Special Rapporteur) said the

⁵ *I.C.J. Reports 1951*, p.4.

⁶ 308th meeting, para. 75.

breadth of the territorial sea was the crucial question in regard to all the problems of the international law of the sea on which the General Assembly was awaiting the Commission's final report. It was therefore absolutely essential that the Commission should give some guidance on the question, which had a considerable bearing on all related problems.

24. The CHAIRMAN said he did not press his proposal. He thought, however, that it was quite illusory to expect agreement by States on the breadth of the territorial sea.

25. Mr. HSU said there was general agreement as to the desirability of a general rule for the breadth of the territorial sea. It was, however, clear that the three-mile rule was not accepted by the majority of the members of the Commission as a rule valid for all States.

26. Mr. SALAMANCA suggested that the Commission, even though it might not be able to adopt a solution for the breadth of the territorial sea, might well propose to the General Assembly a means of solving the problem. One such means would be the convoking of a conference of plenipotentiaries so that the problem might be solved by an international convention.

27. Mr. GARCÍA AMADOR pointed out that General Assembly resolution 899 (IX) instructed the Commission to submit a final report on the regime of the high seas, the regime of territorial waters and all related problems, so that they could be considered as a whole, thus avoiding piecemeal solutions.

28. The problem of the breadth of the territorial sea was indirectly connected with that of fisheries conservation. The majority of States which were putting forward claims to an extensive territorial sea were doing so primarily for the purpose of conserving fishery resources. If the draft articles on fisheries acknowledged a special role of coastal States in the matter of conservation, those States would perhaps no longer have any great interest in claiming a very wide territorial sea belt.

29. The Commission would be acting in accordance with the spirit of resolution 899 (IX) if it were to postpone its decision on the breadth of the territorial sea until its next session. By then, the reactions of States to the articles on fisheries would be known and it would be possible for the Commission to take a decision on the breadth of the territorial sea in the light of the comments received on the fisheries issue. For his part he felt he could not vote on any article on the breadth of the territorial sea before he knew the reaction of States to the draft articles on the conservation of fisheries.

30. The General Assembly required from the Commission one final report on the various related problems of the international law of the sea as a whole. At its eighth session in 1956, the Commission would have to discuss all those related problems with a view to drafting that final report. It would be quite an appropriate method of work for the Commission to leave the breadth of the territorial sea to be decided last, i.e., at the Commission's

eighth session, after government comments had been received on the draft articles on fisheries.

31. Mr. AMADO pointed out that the problem of fixing the breadth of the territorial sea had been described by the Chairman and certain members of the Commission as well-nigh insoluble. In those circumstances, it was surprising to hear it suggested that the Commission could not report on all the other questions relating to the international law of the sea until a well-nigh insoluble problem had been solved.

32. He did not support Mr. Sandström's suggestion that the Commission should submit to the General Assembly the various opinions of its members. The General Assembly required the opinion of the Commission as a whole—a decision to which, however, the dissenting views of certain members might well be attached.

33. His own proposal granted a certain measure of recognition to the three-mile rule while stating that State practice was not uniform with regard to it. The second principle formulated in his proposal—namely, that international usage did not warrant a territorial sea of more than twelve miles—would serve to restrain the more extensive claims being made by some States.

34. Mr. SCELLE did not agree to the proposal to defer discussion till the following session of the Commission. Such a decision would be an admission of impotence on the part of the Commission.

35. The Commission had made some progress in its discussion. The new proposal by the Special Rapporteur and Mr. Amado's proposal offered some assurance that the Commission would arrive at some solution of the problem of the breadth of the territorial sea. That solution would not necessarily be a final one, since all the related problems would have to be discussed again at the 1956 session with a view to drafting the final report to the General Assembly in accordance with resolution 899 (IX).

36. It was most improbable that States would reach agreement on the maximum breadth of the territorial sea. The best system would be for the claims made by States to be adjudged by an international authority.

37. Finally, he expressed support for the first two paragraphs of Mr. Amado's proposal.

38. The CHAIRMAN said that, under rule 76 of the rules of procedure, Mr. García Amador's proposal that further discussion be deferred until the next session would be put to the vote after two speakers in favour of it and two against it had spoken for three minutes each.

39. Sir Gerald FITZMAURICE, on a point of order, said Mr. García Amador's proposal raised more than a mere question of procedure and involved the whole substance of the debate. Rule 76 had been framed to deal with a very different type of problem from the one with which the Commission was at present faced. The purpose of rule 76 was to facilitate the disposal of procedural issues before questions of substance at a time when, discussion having been terminated, the

Assembly or one of its committees or commissions was going to vote on the various proposals before it.

40. With regard to the very important question of the breadth of the territorial sea, discussion had by no means been exhausted by the Commission and a number of points had been raised on which he himself would like to express his views. There was no need for any special hurry and the best course for the Commission was to discuss all the proposals before it.

41. Mr. SALAMANCA said he did not favour an abrupt termination of the debate on the breadth of the territorial sea but would have supported postponement of the question for a year, if the majority of the Commission had been in favour of that course.

42. Mr. GARCÍA AMADOR pointed out that he had never meant to propose that the Commission defer further discussion of the breadth of the territorial sea. There were, moreover, certain issues not directly relating to the question of limitation which could also be taken up, such as the first of the three propositions mentioned by Sir Gerald Fitzmaurice at the previous meeting. What he had proposed was that the vote on the question be postponed until the next session. In that connexion he drew attention to the statement he had made at the 308th meeting.⁷ His view had subsequently been endorsed by Mr. Salamanca.

43. His proposal had not been prompted by a desire for delay, since he was perfectly well aware that the Commission must complete its work on the regime of the territorial sea by the end of its next session, but by the belief that any decision taken before the comments of governments on the draft articles on fisheries had been received must necessarily be a provisional one.

44. Mr. LIANG (Secretary to the Commission) said that the proposals before the Commission fell into two distinct groups and could not be treated on the same footing. The texts proposed by Mr. Amado and Mr. Zourek sought to define the attitude of the Commission to the problem of the breadth of the territorial sea and could form part of the comment attached to the draft articles or the Commission's report. They were not intended to serve as texts for an article in the draft, in the same way as the other proposals.

45. Mr. FRANÇOIS (Special Rapporteur) considered the proposal to postpone the vote premature, in view of the fact that the Commission had barely begun discussing the proposals before it and was therefore not in a position to foresee that none of them would secure a majority. He did not believe that the comments of governments on the draft articles on fisheries would greatly simplify the task. On the other hand the Commission itself could help governments by submitting some more definite proposal than the nine alternatives concerning the territorial sea put forward the previous year. The importance of the question of the conservation of the living resources of the sea, though considerable,

should not be exaggerated; its solution could not dispose of the issue of the breadth of the territorial sea, which had always given rise to difficulties, as, for example, at the Conference on the Codification of International Law in 1930—long before there had been any question of conservation or claims to a 200-mile belt.

46. The CHAIRMAN suggested that the Commission take up in turn the proposals before it, starting with those submitted by Mr. Amado and Mr. Zourek.

It was so agreed.

47. Mr. KRYLOV said that if the Commission finally failed to reach agreement on the breadth of the territorial sea it would have to revert to his original proposition that it was a question which came within the domestic jurisdiction of States.

48. Sir Gerald FITZMAURICE observed that Mr. Amado's text formed a balanced whole. Without committing himself in advance to supporting it, because he might prefer other proposals, he would suggest that it be amended by the insertion of the word "traditional" before the word "limitation" in paragraph 1 and the substitution of the words "The Commission, without pronouncing on the question of the correct extension to be given to the territorial sea, considers that in any case" for the words "The Commission considers that" in paragraph 2. With those amendments the text would constitute a statement of fact.

49. Mr. AMADO accepted Sir Gerald Fitzmaurice's amendments.

50. Mr. SCELLE said that he could accept paragraphs 1 and 2 as amended, but not the conclusion in paragraph 3. The first two paragraphs were fully consistent with the Special Rapporteur's text and he hoped that Mr. Amado would see his way to withdrawing the last.

51. Mr. AMADO agreed to withdraw paragraph 3.

52. Mr. GARCÍA AMADOR suggested that paragraph 2 as amended might give the impression that international practice authorized the extension of the territorial sea up to a maximum of twelve miles.

53. Mr. EDMONDS said that if the function of the Commission was to codify international law, he was unable to see the relevance of paragraph 1 which should state the rule accepted by the majority, perhaps adding the proviso that certain States had departed from it. If his understanding of the facts was correct, and he appeared to have been supported by Sir Gerald Fitzmaurice, there had been for years some kind of general agreement on a three-mile rule, and the numerous claims for a wider belt had never gained any appreciable measure of support and had always given rise to objections.

54. Mr. AMADO observed that he had sought to reflect the Commission's attitude.

55. Mr. SCELLE pointed out that international practice, unlike international custom, did not constitute a rule of law and was not binding. If Mr. Amado's pur-

⁷ 308th meeting, para. 69.

pose was to elucidate the situation concerning the delimitation of the territorial sea, paragraphs 1 and 2 were acceptable and might facilitate agreement on a method of delimitation or at least on the minimum breadth, though it was extremely difficult to devise a uniform rule when there were so many divergent interests at stake. Nevertheless, the problem was not insoluble, and perhaps States might eventually be willing to submit their claims to the judgement of an international authority.

56. The insertion of the word "traditional" in paragraph 1 would indicate that there had at one time been an international custom concerning delimitation of the territorial sea which had subsequently undergone modification.

57. He also wishes to stress that the word "authorize" in paragraph 2 was too strong, since international practice could neither authorize nor prohibit. Some other wording would therefore have to be found.

58. Mr. AMADO said he did not insist on the word "authorize".

59. Mr. HSU said that although he preferred his own proposal, Mr. Amado's text would be acceptable provided that the rule or rules finally adopted were liberal, in other words that they met the needs of States.

60. Mr. SANDSTRÖM said that his views were very similar to those of Mr. Scelle and he would find it possible to accept Mr. Amado's text as well as the Special Rapporteur's proposal. However, paragraphs 1 and 2 in the former, even as amended by Sir Gerald Fitzmaurice, were cast in a negative form and could be interpreted to mean that States were virtually entirely free to extend their territorial sea to twelve miles.

61. Mr. ZOUREK said that Mr. Amado's text might usefully pave the way to an ultimate solution. However, for reasons he had given at the previous meeting, he could not accept the insertion of the word "traditional", which would mean that the Commission recognized that the three-mile rule had been at one time part of international law. That would be historically inaccurate, since apart from the rule of the median line and the rule based on visibility from the shore, some countries had long adhered to a four or a six-mile limit. The words "to three miles" should accordingly also be deleted.

62. In the absence of a written text he could not at the present comment on Sir Gerald's amendment to paragraph 2.

63. Mr. SCELLE observed that there had been a customary rule for a three-mile limit but he would personally find it extremely difficult to say whether it had been modified by international practice, and if so, whether that modification was a violation of a rule or the first step in a more liberal direction.

64. Mr. GARCÍA AMADOR said that he still had serious doubts about the implications of paragraph 2, for although Sir Gerald Fitzmaurice's amendment made it clear that the Commission was not proposing any spe-

cific limit, the existence of an international practice was admitted. And Article 38 b of the Statute of the International Court of Justice made it clear that international custom constituted evidence of a general practice accepted as law. If the Commission were of the opinion that international law allowed States to extend the territorial sea up to a limit of twelve miles it should say so explicitly. If it merely wished to make a factual statement, it must frame the paragraph differently, saying that international practice indicated that a number of States had made such an extension, though of course that would be an incomplete description of the situation.

65. Mr. SCELLE pointed out that, as was borne out by Article 38 b of the Court's Statute, it was only the general practice adopted by a number of States which was recognized as a rule of law.

66. Sir Gerald FITZMAURICE observed that Mr. García Amador had drawn attention to a real danger in paragraph 2, but it had surely not been the intention of the author that the text should be interpreted in that way. The purpose of the paragraph was purely negative since it did not seek to state what was the correct extension but only to affirm that any extension beyond twelve miles was inadmissible, a point he had tried to bring out more clearly by his amendment. Perhaps the point should be further elucidated in the comment so as to show that the Commission was not necessarily endorsing extensions up to the limit of twelve miles.

67. Faris Bey el-KHOURI considered that there was a discrepancy between paragraphs 1 and 2. The great majority of States adhered to the three-mile rule mentioned in paragraph 1, but no international practice existed extending the territorial sea to twelve miles, only claims by certain States.

68. Mr. AMADO said that some mention might be made of the fact that certain States had extended their territorial sea to six or twelve miles.

The discussion was adjourned.

The meeting rose at 6.5 p.m.

311th MEETING

Tuesday, 14 June 1955, at 10 a.m.

CONTENTS

	<i>Page</i>
Proposal to amend the Commission's Statute	167
Date and place of the Commission's eighth session (item 8 of the agenda) (<i>resumed from the 308th meeting</i>)	167
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) (<i>resumed from the 310th meeting</i>)	
Provisional articles (A/2693, chapter IV) (<i>resumed from the 310th meeting</i>)	
Article 3 [3]*: Breadth of the territorial sea (<i>resumed from the 310th meeting</i>)	168

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