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Summary record of the 312th meeting

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

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

ment that international practice *ne comporte pas* the extension of the territorial sea beyond twelve miles.

56. Mr. GARCÍA AMADOR said that, under Article 38, paragraph 1, sub-paragraph b, of the Statute of the International Court of Justice, a general practice accepted as law constituted international custom and as such was part of international law. If the Commission were to state that international practice did not justify the extension of the territorial sea beyond twelve miles, it would be making a legal pronouncement and adopting the twelve-mile limit as part of international custom and hence of international law.

57. Sir Gerald FITZMAURICE said paragraph 2 merely registered the fact that the practice of States did not go beyond twelve miles. It definitely ruled out as invalid any claim to more than twelve miles, but it made no pronouncement on the validity of claims between three and twelve miles.

58. Faris Bey el-KHOURI said that in his view international practice ruled out all claims in excess of three nautical miles.

59. Mr. AMADO said his proposal made it clear that the territorial sea did not extend beyond twelve miles. It did not, however, give any guidance on claims to distances between three and twelve miles.

60. Mr. LIANG (Secretary to the Commission) said Mr. Scelle's proposal to substitute the words *ne comporte pas* for the term "does not justify" would obviate the Commission's pronouncing a judgement with regard to the extension of the territorial sea. In the English text, the same idea could be conveyed by amending the final phrase to read: "any extension of the territorial sea beyond twelve miles is not a part of international practice". By stating the position in those terms, the Commission would avoid the theoretical problem of deciding whether such international practice constituted international custom.

61. Mr. AMADO pointed out that international practice did not itself constitute international law. International practice blazed the trail for the progress of international law.

62. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "international practice" be replaced by the words "international law".

Mr. Spiropoulos' amendment was adopted by 6 votes to 3, with 4 abstentions.

63. The CHAIRMAN then put to the vote Mr. Amado's proposal as a whole and as amended to read as follows:

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

"2. The Commission, without taking any decision as to the question of the proper extension of the territorial sea, considers that in any case international law does not justify the extension of the territorial sea beyond twelve miles."

Mr. Amado's proposal was adopted by 6 votes to 1, with 6 abstentions.[5]

64. Mr. ZOUREK said he did not press for a vote on his own proposal.

65. Mr. HSU provisionally withdrew his proposal for article 3, while reserving the right to resubmit it at a later stage.

The meeting rose at 1 p.m.

[5] See *infra*, 315th meeting, para. 79.

312th MEETING

Wednesday, 15 June 1955, at 10 a.m.

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Article 3 [3]*: Breadth of the territorial sea (*continued*) . . 171

* 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. Mr. EDMONDS explained that he had voted against Mr. Amado's proposal at the previous meeting[1] because it could reasonably be interpreted as meaning that,

[1] 311th meeting, para. 63.

whereas any claims to a territorial sea of more than twelve miles were contrary to international law, claims to less than that distance were not.

2. For the reasons he had given in the course of the discussion, he considered that there was no rule recognized by international law other than the three-mile rule.

3. He could not, therefore, accept the implication that extensions of the territorial sea up to twelve miles were not contrary to international law, as Mr. Amado's proposal appeared to suggest. In the London *Times* of that morning[2] the following comment on the resolution voted by the Commission had appeared:

> "This was interpreted as meaning that extensions beyond the twelve miles would be contrary to international law, but that increases up to that limit would not be."

That such was not just an outside interpretation was shown by the fact that Mr. Hsu had withdrawn his proposal,[3] under which the Commission would recognize the coastal State's right to extend its territorial sea up to a limit of twelve nautical miles from the base line. Clearly, several members of the Commission interpreted the resolution voted at the previous meeting in the sense which he had indicated.

4. The CHAIRMAN said that the resolution voted at the previous meeting left no doubt whatsoever that any claims to more than twelve miles were contrary to international law. The question, however, of claims to between three and twelve miles remained an open one, and was the subject of the specific reference: "The Commission, without taking any decision as to the question of the proper extension of the territorial sea..."

5. Sir Gerald FITZMAURICE agreed with the Chairman's interpretation. If Mr. Edmonds' interpretation had been the correct one, he (Sir Gerald Fitzmaurice) would have voted against the resolution.

6. Mr. GARCÍA AMADOR explained that he had voted against the second paragraph of Mr. Amado's proposal firstly because it stated that international law did not recognize the extension of the territorial sea beyond twelve miles. It could be inferred from that—*a contrario*—that extensions up to twelve miles were valid under international law.

7. He had voted against that paragraph secondly because it obviously lent itself to several interpretations and he did not consider it appropriate for the Commission to adopt—on a matter of such vital importance as the breadth of the territoral sea—a resolution which was not construed in the same manner by all members of the Commission.

8. The CHAIRMAN suggested that the matter could be clarified by voting an interpretative resolution to the effect that the adoption of Mr. Amado's proposal left open the question of the breadth of the territorial sea.

9. Mr. AMADO said he had never aimed at solving single-handed the problem which had baffled the greatest legal minds in the past and on which The Hague Codification Conference of 1930 had foundered. The purpose of his resolution had been a more modest one: while acknowledging that State practice was not uniform with regard to the traditional three-mile rule, it also acknowledged the fact that a certain number of States claimed distances up to twelve miles.

10. The validity or otherwise of the various claims to four, six, or twelve miles would be determined in each case by decisions of the appropriate international courts which would build up a case-law on the subject.

11. Mr. LIANG (Secretary to the Commission) pointed out that interpretative resolutions could be dangerous. In that particular instance, any statement by the Commission that the question of the breadth of the territorial sea remained entirely open would not accurately reflect the meaning of the resolution adopted at the previous meeting. It was true that that resolution had left open the question of the validity of claims to more than three but less than twelve miles, but the Commission had taken a very clear stand on claims to more than twelve miles.

12. Mr. FRANÇOIS (Special Rapporteur) agreed with Mr. Liang. The only matter left open by the adoption of Mr. Amado's proposal was the validity of claims to more than three but less than twelve miles.

13. Any doubts concerning the interpretation of the Commission's resolution would be resolved once the Commission came to discuss his own proposal for article 3.[4]

14. He had little to add to his previous remarks on the subject of article 3 except in connection with Faris Bey el-Khouri's suggestion that any judgement of the International Court on the subject of the breadth of the territorial sea should be valid *erga omnes*. According to the Statute of the International Court, its decisions were valid only as between the States parties to the dispute. Faris Bey's suggestion therefore involved certain difficulties.

15. Mr. HSU said that the Special Rapporteur's proposed article 3 was no more than a very ingenious defence of the three-mile limit. Except for the case referred to in the second paragraph, where a State which claimed a breadth greater than three miles would be under an obligation to acknowledge a similar claim by other States, Mr. François' proposal laid down that explicit consent by other States would be necessary for the recognition of the coastal State's claim to more than three miles. Those provisions were not wide enough to satisfy many States in the Far East and in Latin America which, although some of them—like his own country, China—had previously adopted the three-mile limit, now

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[2] *The Times*, Wednesday, 15 June 1955, p. 5, column 2.

[3] 311th meeting, para. 65.

[4] 310th meeting, para. 3.

desired to extend their territorial sea beyond three miles, partly in order to defend themselves against subversive activities and partly in order to protect their small fishery industry against ruinous competition by well-organized foreign fishing concerns. The remedy suggested by the Special Rapporteur's draft was not adequate because States which rested on the three-mile rule would not in any circumstances agree to the extension of the territorial sea by the States he had referred to.

16. Mr. SANDSTRÖM said that the Special Rapporteur's proposed article 3 corresponded exactly to the present state of international law on the subject of the breadth of the territorial sea. The proposal by Mr. Amado which the Commission had adopted seemed more appropriate for the comment to the article.

17. Mr. GARCÍA AMADOR said he approved in principle of the Special Rapporteur's proposed article 3. He did not agree, however, to the somewhat vague reference to "historical rights". That term provided only a subjective criterion, the application of which would depend upon the judgment of the State concerned. Before recognizing a claim to extension of the territorial sea beyond three miles it was essential to lay down certain objective criteria by means of which an international tribunal could decide whether the extension in question had some valid foundation or not. A reference to important social or economic considerations would be preferable to a reference to "historical rights".

18. Faris Bey el-KHOURI said the Special Rapporteur's draft contained very useful indications for the purpose of adjudging the validity of claims to a territorial sea of more than three, but less than twelve miles. He did not agree, however, to the second part of proviso 1 in the second paragraph, which suggested that if two States were in agreement on the extension of their territorial seas, their respective claims would thus be somehow validated. The sea was the common property of all nations and the agreement of two or more States was not sufficient to enable them to partition it. The idea of a reciprocal agreement between two States could only be entertained in cases where the dispute concerned the interests of those two States only.

19. The high seas, as public property common to all nations, required a guardian in the shape of an international organ.

20. Mr. AMADO said that the Special Rapporteur's proposed article 3 did no more than recognize the three-mile limit pure and simple and ran counter to the resolution which the Commission had adopted on his (Mr. Amado's) proposal at the previous meeting.[5] That resolution constituted a statement of fact — namely, that international practice was not uniform with regard to the limitation of the territorial sea to three miles; it further stated that international law did not recognize the extension of the territorial sea to distances greater than twelve miles. The breadth of the territorial sea was a subject on which international law was undergoing a process of evolution and the Commission could not say anything more about it than it had said in the resolution adopted at the previous meeting.

21. If the Commission were to adopt the Special Rapporteur's proposed article 3 it would simply be reverting to the three-mile rule, which the Commission had already declared did not constitute a uniform international practice.

22. The CHAIRMAN agreed with Mr. Amado that the Special Rapporteur's draft article 3 was simply a recognition of the three-mile rule. The exceptions which it appeared to lay down—explicit acceptance by other States, or a judicial decision on the point, or even the notion of reciprocity—were so obvious as hardly to need stating.

23. He recalled that at the 1930 Codification Conference he had been in favour of the three-mile rule. Subsequently, his own country, Greece, had adopted a distance of six miles as the breadth of its territorial sea, probably in order to bring it into line with the distance adopted by other Mediterranean countries. It was clear that, under the Special Rapporteur's draft article 3, Greece would have no remedy if a State adhering to the three-mile rule were to dispute its claim.

24. The Special Rapporteur's proposal amounted to acknowledging a claim by a coastal State to a distance of more than three miles only when other States were in agreement. But what was required was a rule that would be applicable without the necessity of explicit agreement by non-coastal States.

25. Mr. LIANG (Secretary to the Commission) drew attention to the fact that proviso 2 in the second paragraph of the Special Rapporteur's proposed article 3[6] was drafted in the past tense in English, in the present tense in French and in the future tense in Spanish. Such drafting differences should be removed.

26. Going on to discuss the compatibility or otherwise of the Special Rapporteur's proposed article 3 with Mr. Amado's proposal as adopted by the Commission, he pointed out that the inclusion of Sir Gerald Fitzmaurice's amendment "without taking any decision as to the question of the proper extension of the territorial sea" had left no doubt as to the fact that claims to more than three, but less than twelve miles, remained an open question; only claims beyond twelve miles were condemned as contrary to international law.

27. In the Special Rapporteur's proposed article 3, the three-mile rule appeared as the fundamental one. It was said that any claim to more than three miles would only be recognized if certain particular conditions were fulfilled. If the Special Rapporteur's proposal were adopted by the Commission, it would imply that the Commission had expressed an opinion in favour of the three-mile rule, thereby contradicting the resolution adopted at the previous meeting,[7] which stated that international practice was not uniform with regard to that rule.

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[5] 311th meeting, para. 63.

[6] 310th meeting, para. 3.

[7] 311th meeting, para. 63.

28. Mr. SCELLE said the Special Rapporteur's proposal was a progressive one. He did not, however, approve of the phrase in proviso 1 of paragraph 2: "or claim an equal or greater breadth for their own territorial sea". A State might have good grounds for claiming a territorial sea of more than three miles for itself, and yet be justified in disputing another State's claim to more than three miles, because it did not rest upon the same good grounds.

29. He therefore proposed that the phrase in question be deleted and replaced by the following: "or have made a declaration accepting the distance claimed by the State concerned".

30. Such a provision would be in line with the Permanent Court of International Justice's ruling in the eastern Greenland case to the effect that a declaration by a Minister for Foreign Affairs on behalf of his government was binding upon the country to which the Minister belonged.[8] Clearly, a non-coastal State would be under an obligation to recognize the territorial waters fixed by the coastal State, not only where treaty obligations had been assumed in the matter but also where it had—through its Minister for Foreign Affairs—accepted in a declaration the distance claimed by the coastal State.

31. With regard to proviso 2, he preferred in the French text the term *parties jointes* rather than *parties en cause*. It was not necessary for a State to be a party in a particular dispute for the decision to be binding upon it; it was enough that the State should have intervened in the court proceedings. In fact, provisions might be made in proviso 2 also for the case where a State, even if not a party to the proceedings, accepted by declaration the decision of the Court. Such a system would enable the decisions of the International Court on the question of the breadth of the territorial sea to obtain the widest possible validity.

32. The ideal solution would be a supra-national system of expert examination and arbitration to determine whether a claim to a particular breadth of territorial sea was legitimate or not. Unfortunately, such a system was not practicable at the present stage of development of international relations. The next best course was to make provision for the voluntary acceptance, by States that were not parties to the proceedings, of decisions by the International Court of Justice.

33. Mr. EDMONDS enquired whether the words "they have assumed treaty obligations in the matter" did not cover all cases where a State accepted the particular breadth of territorial sea claimed on behalf of the coastal State.

34. Mr. SCELLE said that the term "treaty obligations" implied the signature of a document following a particular procedure. As distinct from that, there was the case—for which he suggested provision should be made—of the unilateral acceptance by a State of the equally unilateral pronouncement of the coastal State in respect of its territorial sea.

35. Mr. ZOUREK said that the Special Rapporteur's proposed article 3 did not correspond to the present state of international law. Its purpose was simply to consecrate the three-mile rule, whereas it was incumbent upon the Commission to acknowledge that international law did not contain any rule regarding the breadth of the territorial sea. In the absence of such a rule, the coastal State was competent to fix the breadth of its own territorial sea. Such had been the opinion expressed by many States in their replies to the Preparatory Committee for the 1930 Codification Conference. Thus, the Swedish Government had replied as follows: "The Swedish Government is of the opinion that, failing any international agreement determining the breadth of territorial waters, each State should itself fix within reasonable limits the breadth of its own territorial waters."[9]

36. The failure of the 1930 Conference and the replies of governments following the Commission's 1954 draft were conclusive evidence that the so-called three-mile rule did not enjoy any general measure of acceptance on the part of States. It was sufficient to note that out of 71 States having a coast-line, only 20 adhered to the three-mile rule, and out of those 20, two claimed greater distances for certain specific interests such as fisheries. It was unreasonable to suppose that a rule practised by only 18 States could be imposed on more than 50 other maritime States.

37. He was not impressed by the argument that three miles represented the distance of normal vision. In the sixteenth century, in both France and England, the criterion of maximum distance of vision had given rise to a rule based on seven leagues—21 nautical miles.

38. The Special Rapporteur's draft made reference to "historical rights"—a term which was unduly vague. Besides, such a notion would be unfair to States that had only recently appeared in the international community and concerning which it could be alleged that they did not possess any historical rights.

39. A text such as that proposed by the Special Rapporteur would gain the approval only of that handful of States which already practised the so-called three-mile rule. It would be most unwise to work on the assumption that States that did not adhere to the three-mile rule—who constituted the majority—would abandon their views.

40. Mr. SALAMANCA recalled that, by the resolution adopted at the previous meeting, the Commission had acknowledged that international practice was not uniform as regards limitation of the territorial sea to three miles.

41. That resolution was now being tacitly contradicted by the Special Rapporteur's proposed article 3, which was a consecration of the three-mile rule.

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[8] Publications of the P.C.I.J., Judgment of April 5, 1933. *Judgments, Orders and Advisory Opinions*, Fascicule No. **33**, p. 71.

[9] League of Nations publication, *V. Legal, 1929.V.2* (document C.74.M.39.1219.V), p. 33.

42. According to the Special Rapporteur's draft, any coastal State wishing to extend its territorial sea beyond three miles would have to negotiate with other States. And those States could only be the twenty States which adhered to the three-mile rule and which included all the great maritime powers. Those powers were most unlikely to accept such claims by coastal States.

43. The point of view of the great maritime powers was certainly worthy of respect, but equal attention had to be paid to claims by other States which had their own problems.

44. He recalled that he had favoured Mr. Amado's original proposal; he had, however, abstained from voting on the final resolution because of the substitution of the term "international law" for "international practice". He had been in favour of framing the resolution so as simply to set out the existing state of affairs in connexion with the breadth of the territorial sea.

45. Mr. SCELLE said that the Special Rapporteur had never claimed that the three-mile rule was accepted by everybody. His proposal for article 3 merely placed on record that that distance was a necessary minimum.

46. All the difficulties which the Commission was facing were due to the concept of sovereignty: the Commission had unfortunately accepted the notion that the coastal State exercised sovereign rights over the whole extent of its territorial sea. That concept of the territorial sea made it difficult, if not impossible, to recognize an extension beyond three miles. The best solution to the problem raised by the needs of coastal States was to allow those States to proclaim contiguous zones for certain particular needs, such as customs and health inspection. As for fisheries, in its draft articles on the conservation of fisheries the Commission had adopted the concept of a contiguous zone, although the actual extent of the zone had not been defined in terms of a fixed distance.

47. Sir Gerald FITZMAURICE said that, following Mr. Zourek's intervention, he in turn wished to expose the fallacies in the arguments adduced against the proposition that the three-mile limit represented the correct rule of international law. There had been a trend towards progressive liberalization some time towards the end of the seventeenth century and the principle of the marine league had been applied for the last century and a half —a period of time which surely sufficed for the establishment of a rule of international law. Indeed he would venture to suggest that few international rules had such a long history. Any serious departure from that principle had only begun since the end of the First World War and it was significant to note that at the Conference for the Codification of International Law in 1930 only five or six States had claimed as much as six miles. The facts did not bear out Mr. Zourek's contention that the three-mile rule had only been applied by a small group of States. In reality its application during the nineteenth century and the first fifteen or twenty years of the present century had been quasi-universal and virtually unchallenged.

48. It was yet more fallacious to argue that though the three-mile rule had been applied by the largest single group of States it was not supported by a far greater number, since even if that contention were valid juridically speaking, there was no larger group upholding any other distance. The fact that many States did not adhere to the three-mile rule was no ground for claiming that it was not the correct one.

49. It was generally agreed that the question of the breadth of the territorial sea was governed by international law, which imposed limits on the breadth that could properly be claimed by States. If that were the case, some precise spatial limit—until comparatively recently the marine league—must be imposed. A parallel could be found in internal legislation restricting the maximum height of buildings. Anyone seeking to show that that particular restriction no longer existed must prove that it had been replaced by another, otherwise no limitation at all would remain. But the three-mile rule had certainly not been superseded by another, because there was no international agreement. Consequently the only possible juridical conclusion was that the three-mile rule, which unquestionably had been the rule at one time, was still valid. Otherwise it must be admitted that international law no longer governed the breadth of the territorial sea and imposed no limitation.

50. In the light of the foregoing considerations he supported the Special Rapporteur's text, which was correct in laying down that in the absence of another rule the three-mile rule still held good, while not excluding the possible validity of individual claims to greater distances.

51. He agreed to a great extent with what Mr. Scelle had said about sovereignty and the contiguous zones. It was perfectly true that the whole difficulty with regard to the delimitation of the territorial sea lay in the fact that it involved a claim to complete dominion over a large area of the seas. The principle of contiguous zones, on the other hand, was a just one because it recognized that the coastal State might need to exercise special rights, as distinct from complete sovereignty, in a particular area outside the territorial sea proper. Thus a balance was preserved between the general rights of all States over what still remained a portion of the high seas and the rights of the coastal State over a comparatively narrow territorial sea, coupled with reasonable recognition of its requirements in the contiguous zones. If the draft articles on fisheries were adopted, the legitimate requirements of States would be met and they would no longer have to put forward excessive claims in respect of the territorial sea for the protection of fishery interests.

52. Mr. FRANÇOIS (Special Rapporteur) said that some members were quite mistaken in thinking that the purpose of his text was to reintroduce the three-mile rule in a disguised form. He was perfectly aware that it was not acceptable to all States and had sought to find some common ground of agreement in an effort to attract the widest measure of support. He accordingly believed that the Commission should accept a minimum breadth of three nautical miles which States could "lawfully claim

against all other States": words which had perhaps been overlooked in the discussion. That should be expressly stated. However, he had not excluded the possibility of States claiming a wider belt, though that did not necessarily imply recognition by other States. He had thus followed the International Court of Justice in the Nottebohm Case [10] by drawing a distinction between the right of States to take certain measures and the obligation on others to recognize the effects of those measures.

53. Any difference between States about a limit beyond three miles should be dealt with by the usual procedure for the peaceful settlement of disputes. He had not provided for compulsory arbitration, not wishing to go beyond what was strictly necessary in order to make the text acceptable. He had therefore left the greatest possible degree of freedom to States.

54. He had no desire to prevent States from claiming a limit beyond three miles and regarded the maximum limit of twelve miles laid down in Mr. Amado's text as perfectly compatible with his own proposal. Nevertheless that maximum limit had given rise to misunderstandings even in the Commission itself and in view of Mr. Amado's own explanation of his purpose it might perhaps be wise to make clear in his (the Special Rapporteur's) text that any extension to over three but not more than twelve miles need only be recognized by other States if certain conditions were met.

55. Though his use of the expression "historical rights" had been questioned he still considered it perfectly appropriate because it clearly meant claims which had been recognized by the international community. Whether in fact a historical right existed was a quite separate issue.

56. He could not agree with Faris Bey el-Khouri that findings of the International Court of Justice in cases concerning the breadth of the territorial sea should be valid *erga omnes*, but a proviso might be added on the lines suggested by Mr. Scelle to the effect that States not parties to the case could by a separate declaration accept the decision. On the other hand, there seemed no need to make any express reference to general tacit acceptance of a claim, since in such cases no disputes would arise.

57. He would not have any objection to the other modifications suggested by Mr. Scelle, which were mainly of a drafting character, but must insist on the substance of his proposal being preserved.

58. The CHAIRMAN, speaking as a member of the Commission, pointed out that a special clause was required conferring upon the judicial authority which was to examine disputes arising from delimitation of the territorial sea the right itself to fix the limit in cases where the claims of the coastal State were found to be contrary to international law. Without such a clause the judicial authority would be powerless. If that proposition were accepted the Commission would have to decide on the criteria to be applied by the tribunal.

59. Mr. AMADO hoped that the Commission would give every attention to the important point raised by the Chairman, since the fact must be faced that States were most reluctant to submit any question directly involving their sovereignty to an international tribunal.

60. Although he admired the skilful manner in which the Special Rapporteur had drafted his text, he could not agree that it amounted to the same thing as his own. For example, in his first paragraph the Special Rapporteur sought to obtain endorsement of the three-mile rule, but that was quite a different thing from stating that "international practice is not uniform as regards traditional limitation of the territorial sea to three miles". In that connexion he had his doubts about the Chairman's amendment [11] whereby the word "practice" had been replaced by the word "law" in his (Mr. Amado's) text, since he was far from convinced that the changed text did not conflict with the facts.

61. The argument put forward by Mr. Scelle concerning contiguous zones was more suitable for laymen than a body of jurists and there was little purpose in trying to argue away the fact that within the territorial sea the sovereignty of the coastal State was sacrosanct.

62. Mr. HSU did not consider the fact that the largest single group of States adhered to the three-mile rule in any way weakened the force of other claims; Sir Gerald Fitzmaurice's analogy concerning limitations on the height of buildings was also not very pertinent because it was drawn from municipal law. On the international plane, where there was no sovereign legislative authority, practice was important, particularly when it involved departure from a rule.

63. In the absence of any concrete proposal it was difficult to perceive the force of the argument concerning contiguous zones. The Special Rapporteur had not touched upon the important question as to whether the text met the actual needs of States. In his own opinion it failed to do so for the following reasons: it took no account of the lack of uniform practice concerning the breadth of the territorial sea; it did not give enough weight to claims beyond three miles and to the fact that the territorial sea was delimited by each coastal State for itself; it ignored the concession made by members of the Commission who did not accept the three-mile rule in supporting the maximum limit of twelve miles laid down in Mr. Amado's proposal; it ran counter to the spirit in which the Commission had approached the problems of the continental shelf and the conservation of the living resources of the sea, when the claims of the coastal State had been given fullest consideration; it was not just to States which had refrained from claiming greater extensions of the territorial sea in the belief that the Commission would arrive at some equitable solution; finally, it would make for unnecessary friction.

64. He deplored the fact that the former colonial powers who had introduced the three-mile rule in certain countries of the Far East should now disclaim all

[10] *I.C.J. Reports 1955*, p. 4.

[11] 311th meeting, para. 62.

responsibility for the protection of thos countries' interests. He would appeal particularly for support from the United States which was usually so liberal but which now appeared to have taken a rigid stand on the three-mile rule.

65. Mr. LIANG (Secretary to the Commission) said that without expressing any views on the relative merits of the Special Rapporteur's and Mr. Amado's texts, he wished to point out that the Special Rapporteur had raised an extremely important question, namely, the distinction between the rights which might be asserted by the coastal State and the obligation on others to recognize them. He was not sure whether there could be such a hiatus in the correlation between rights and duties.

66. Mr. KRYLOV said that Mr. Amado's excellent statement would enable him to be brief. In his opinion the Special Rapporteur's text and that of Mr. Amado were virtually irreconcilable, since the first took as its starting-point a three-mile rule from which all other rights and obligations flowed, whereas the latter recognized the possibility of other limits. In view of the limited number of States which in fact adhered to the three-mile rule, he was unable to see how the Special Rapporteur could defend his proposition. The Commission would do well to examine existing practice rather than to delve back into history, and he therefore urged it to adopt a more practical standpoint.

67. Referring to the point raised by Faris Bey el-Khouri, he said that the Commission would be transgressing the terms of its Statute if it sought to grant legislative power to the International Court of Justice.

Further discussion of article 3 was adjourned.

The meeting rose at 1.5 p.m.

313th MEETING

Thursday, 16 June 1955, at 10 a.m.

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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)

1-2. Mr. EDMONDS said that the Commission should always bear in mind that its task was to codify and formulate principles of international law. As he saw it, the three-mile limit had been the rule for many years and had been applied by maritime States owning 90 per cent of the world's shipping. In the circumstances the three-mile rule had all the weight of authority behind it and any other limit was a deviation. The American Institute of International Law, in formulating United States law, had consistently upheld the three-mile limit while admitting that certain countries had departed from the established rule. It was also an old rule of international law that the high seas were *res communis* for use by all without restriction or restraint. The régime of the territorial sea was an encroachment upon that freedom and should be strictly circumscribed by the rules which had been applied for many years.

3. No municipal court was guided in rendering judgement by motives of generosity and he had, therefore, been surprised by Mr. Hsu's appeal at the previous meeting that the Commission adopt a generous attitude in giving away what was the property of all nations and by his references to the attitude of former colonial powers. Political considerations should not be allowed to enter into the Commission's discussions, and its members did not sit as representatives of their governments. The attribution of political motives was, therefore, out of place. All that he had sought to do, bearing in mind the Commission's function, was to expound what he believed to be the principles of law.

4. Mr. HSU explained that his remarks had not been directed against the United States of America, which had been the most liberal of the colonial powers in the Far East. He had merely sought to show that the relics of colonialism militated against change in international law.

5. If, as Mr. Edmonds seemed to think, the Commission's sole function was to restate the law, then it should not go outside existing rules. Indeed such work could have been accomplished by any academic institution, whereas the Commission had been set up in order to fulfil the more important task of making good omissions and developing existing law.