Document:-

A/CN.4/SR.362

Summary record of the 362nd meeting

Topic:

Law of the sea - régime of the territorial sea

Extract from the Yearbook of the International Law Commission:-

1956, vol. I

362nd MEETING

Thursday, 7 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-7) (*continued*)

Article 3: Breadth of the territorial sea (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 3 of the draft articles on the regime of the territorial sea.

2. Mr. KRYLOV, reverting to the Anglo-Soviet fisheries agreement, which he had mentioned at the previous meeting,[1] said he was convinced that such a settlement represented the best solution of the problems arising out of the breadth of the territorial sea.

3. Perhaps the most interesting aspect of the new agreement was the exchange of notes in which each Government stated its views on the delimitation of territorial waters. According to *The Times* of 5 June, Lord John Hope, Parliamentary Under-Secretary of State, Foreign Office, had stated that the Agreement signed in Moscow on 25 May permitted fishing vessels registered in the United Kingdom to fish in an area, defined in the agreement, up to a distance of three miles from low-water mark on the Soviet Union coast. In reply to a question whether there was recognition by both parties that three miles was the normal breadth of the territorial waters, Lord John Hope had said that he would not wish to give the impression that the Soviet Union Government recognized three miles as the normal limit. In its view, that was a direct concession to the United Kingdom Government.

4. He had quoted that agreement as an example of the way in which, by making mutual concessions, two great Powers had resolved difficulties that had arisen in respect of the breadth of the territorial sea. The agreement accepted the fact that no single solution of general application was possible. Nevertheless, despite the diversity of views on the question in the Commission, every effort should be made to reach an agreed decision.

5. Three amendments to the draft article had been submitted by the Special Rapporteur,[2] Mr. Zourek[3] and Mr. Hsu[4] respectively. The Special Rapporteur's proposal could not be regarded as satisfactory. Quite apart from the awkward drafting of the opening phrase of paragraph 1, the conception of the three-mile breadth of the territorial sea was erroneous; he need only quote the United States cartographer Boggs, who had ascertained that 65 States did not recognize that limit.

6. Paragraph 2 was too vague, because customary law was not an absolute conception of general application, for it varied with individual countries.

7. Paragraph 3 was defective in its second part. The Anglo-Soviet fisheries agreement had acknowledged the juridical validity of the concepts adopted by each party. The Special Rapporteur, however, had laid down a limit of three miles and implied that any limit in excess of that figure was unworthy of consideration. The principle of the freedom of the high seas was traditionally acknowledged, but human evolution demanded that principles should change, and that concept was in the process of becoming as out-of-date as the uniform of a general in a Gainsborough portrait. The philosophy of Grotius, which Mr. Scelle had mentioned,[5] had indisputable literary value, but of all his precepts the best adapted to the circumstances of contemporary life was *suum cuique*.

8. Mr. Zourek's proposal opened well, although it would be advisable to bring the last phrase of paragraph 3, referring to the delimitation of the territorial sea between three and twelve miles, into greater prominence. Moreover, the text would gain by the transfer of the mention of the " real needs of the coastal State " from paragraph 3 to paragraph 1; Mr. Hsu's proposal referred specifically to " economic and strategic needs", but whether that was a better version could not be decided without further consideration.

9. In his paragraph 2, Mr. Zourek referred to the conflicting principles of the rights of the coastal State and the freedom of the high seas. Those two concepts could be reconciled only by the application of common sense inspired by a desire to reach agreement. The drafting of the paragraph might be tightened up, but in substance it was acceptable.

10. As to paragraph 3, he would recall that Mr. Amado's proposal at the previous session[6] had tackled the problem on broad lines within the limits of three and twelve miles.

11. With regard to Mr. Hsu's text, the first paragraph was acceptable, with the exception of the final proviso. The fact had to be faced that, if there was a desire for settlement, States would reach a satisfactory agreement; if the desire was lacking, no solution was possible. With regard to paragraph 2, he had already amply made clear

[1] A/CN.4/SR.361, para. 101.

[2] *Ibid.*, para. 65.

[3] *Ibid.*, para. 68.

[4] *Ibid.*, para. 76.

[5] A/CN.4/SR.359, para. 18.

[6] A/CN.4/SR.311, para. 63.

his views on arbitration; that provision provided no way out of the difficulty.

12. The Commission must apply its best efforts to seeking a precise and unequivocal formula which would recognize the sovereign rights of the coastal State in respect of areas adjacent to its coasts, with the proviso of a reasonable limitation of the breadth of the territorial sea in which those rights would be exercised.

13. Mr. EDMONDS said that, in view of the lengthy discussion that had been devoted to the question at the previous session,[7] he would confine himself to re-stating certain basic principles. In the first place, it should not be overlooked that the Commission's objective was the codification of international law. Existing juridical provisions and practice, therefore, should be the starting-point in the study of any subject that it undertook. The principle of the freedom of the high seas had received general recognition over a long period of time, and the doctrine of the territorial sea was a derogation from that principle. It followed that the breadth of the territorial sea should be a minimum, because by its nature the territorial sea was an encroachment upon the high seas and the common rights applicable thereto. If every State had the right to appropriate areas of the high seas without restriction, that freedom would be completely destroyed.

14. The three-mile limit had been generally recognized by thirty States, whose fleets represented some 80 per cent of world shipping resources. No other territorial delimitation had received such widespread recognition. In codifying the rule of law, the Commission should state the majority rule, referring to any deviations therefrom in the comment to the article. On the basis of law, the only limit to the breadth of the territorial sea accepted by a large number of States was that of three miles.

15. The claim to an extension of that limit had been based mainly on the fisheries needs of the coastal State. Since, however, the Commission had formulated articles protecting the rights of the coastal State in that respect, that claim had been met.

16. While reserving the right to revert to the subject at a later stage, he would for the moment merely reiterate that the limit of three miles for the breadth of the territorial sea should be incorporated in the draft article.

17. Mr. HSU, referring to Mr. Krylov's comment on his proposal, said that paragraph 1 seemed acceptable to him (Mr. Krylov) up to the phrase " within the limits of three and twelve miles ". But if he deleted the last phrase and ended the paragraph at that point, there would be a hiatus, for some provision ensuring the recognition of the freedom of the high seas in the belt between the three- and twelve-mile limits was called for. The gap might be filled by the substitution of some phrase such as " subject to limitation by the principle of the freedom of the high seas ". It was on that point that the difficulty arose, and he would ask Mr. Krylov how he proposed to establish workable criteria for the application of that principle.

18. Sir Gerald FITZMAURICE said that his own view that the three-mile limit for the breadth of the territorial sea should be embodied in the draft article because it was the correct rule of international law was well known to the Commission. He would be prepared, however, to accept the Special Rapporteur's proposal as accurately reflecting the existing situation on the assumptions on which it was based.

19. Without re-stating in full the arguments in favour of the three-mile limit that he had deployed at length at the previous session [8]—and in that respect he entirely endorsed Mr. Edmonds' remarks—he would revert to certain specific points that, in the light of the discussion, called for mention. If the view that there was no general agreement among States on the three-mile limit as the correct determination of the territorial sea were accepted, it must equally be recognized that there was no agreement on any other numerical limit. It followed that no State was bound to recognize any other limit, with the resulting situation that States were obliged to accept the three-mile limit as a minimum—that was not in dispute—and that there was no legal basis for a claim to any limit in excess of that figure. There was an illuminating passage in the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case, which 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 upon international law.[9]

That finding was frequently overlooked, particularly by those who endorsed an extension of the three-mile limit based on a purely unilateral appreciation of individual national needs. The Court had stated the position correctly, and its finding quite disposed of the theory that a State could claim whatever breadth of the territorial sea it pleased in accordance with what it regarded as its needs.

20. What were the limitations to the power of the coastal State that had been proposed? Mr. Zourek had suggested the operation of the principle of the freedom of the high seas. As to that, he (Sir Gerald Fitzmaurice) would support Mr. Hsu in asking by what criterion was any alleged infringement of that principle to be decided? What was to be the criterion by which, for instance, a six-mile limit would not constitute an infringement, whereas a nine-mile limit would do so, or a nine-mile limit or twelve-mile limit would not do so, but a fifteen- or twenty-mile limit would? And so on. In practice, such a test was of no value whatever.

21. Further, Mr. Zourek's claim that his proposal would eliminate disputes and ensure certainty was equally baseless, because the text of his paragraph 2 seemed really to turn in a circle. There was no certainty whatever, because any State could maintain that any

[7] A/CN.4/SR.295, paras. 44-68; SR.308, paras. 43-76; SR.309-315; SR.316, paras. 1-9.

[8] A/CN.4/SR.309, 312 and 314.

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

limit in excess of three miles was an infringement of the principle of the freedom of the high seas.

22. As Mr. Edmonds had rightly pointed out, any claim to a breadth greater than three miles was a derogation from the principle that the use of the high seas was open to all. It was clear that the right of a coastal State to a territorial belt must be recognized, but it had always been accepted that that belt should be as narrow as was consistent with the needs of the coastal State. Since the three-mile limit had received widespread recognition over a very long period, it was impossible to establish a logical basis for claims in excess of that figure. The finding of the International Court of Justice in the Anglo-Norwegian Fisheries case, which stated a rule of international law, led to the inescapable conclusion that the only logical solution to the problem was to recognize a fixed limit to the territorial sea. Failing that, there were no valid grounds for any claim more than another.

23. Consequently, unless another *fixed* limit could be regarded as valid, and as being *alone* valid, the limit automatically remained at three miles. He could not accept Mr. Zourek's contention that the three-mile limit had not been accepted over a considerable period of time as a basis for international law. Mr. Zourek had asserted that there was an older limit of four miles.[10] That assertion, however, was based on a misunderstanding of an historical fact, for both the three-mile limit and the Scandinavian four-mile limit proceeded from fundamentally the same idea of the nautical league, though based on different interpretations. In support of that statement he would recall his reference at the previous session[11] to the articles on the subject by Wyndham Walker[12] and H. S. R. Kent.[13] Throughout the nineteenth century the nautical league had been the accepted breadth of the territorial sea, and in practical usage both mariners and the local authorities of coastal States had applied the three-mile limit rule in the conduct of their business.

24. Mr. Zourek had said that in the mid-nineteenth century certain Latin-American countries had claimed a limit of six miles.[14] He would be interested to know what was the authority for such a statement, for it had certainly not been applied to United Kingdom shipping and he was aware of no case in the nineteenth century of a Latin-American State actually asserting jurisdiction within any limit over three miles.

25. With few exceptions, the rule of the three-mile limit had been recognized until the Hague Codification Conference in 1930, when claims to a greater width were put forward by various countries. It was perhaps an unfortunate consequence of codification conferences that accepted rules, which had given rise to no difficulties, were undermined by the submission of exaggerated claims inspired by motives of bargaining. The position was that the three-mile limit was undoubtedly adhered to in practice. Unless, therefore, it could be shown that a greater distance for the breadth of the territorial sea was accepted by States, any claims for such limits were derogations from the existing rule and had no validity in law.

26. With regard to supposed national needs as a justification for such claims, they did not constitute valid criteria. If a three-mile limit was found satisfactory by some States, there was no reason why it should be rejected by others. The root of the problem was that the States that rejected that limit were anxious to exercise exclusive fishing rights over a wider area. If the question of national needs were postulated, and if States were granted specific rights in the contiguous zone and, in addition, certain unilateral rights in respect of conservation measures in areas of the high seas, no State could justifiably claim to need a breadth of the territorial sea exceeding three miles. Further, a claim based on security needs was quite irrelevant, for a twelve-mile limit provided no greater security than a three-mile limit. It was quite erroneous to suggest that, whereas the great Powers could be satisfied with a three-mile limit, smaller States required a wider territorial belt. It was the contrary that was the case, for to patrol a larger territorial sea would require greater resources and, in time of war, enforcement of the laws of neutrality was an extremely burdensome affair. Moreover, an enemy would have no greater respect for even a twenty-mile than for a three-mile limit.

27. In conclusion, he repeated that, although he was convinced that the principle of the three-mile limit should be embodied in the article, he would accept the Special Rapporteur's proposal because it accurately reflected the existing situation and the logical consequences of the lack of general agreement.

28. Mr. PAL said that if the Commission agreed with the illuminating statement made by Sir Gerald Fitzmaurice, its course was quite clear; it was an international rule that the breadth of the territorial sea was three miles and there was no reason to depart from it. However, even Sir Gerald Fitzmaurice did not appear to be quite at ease in accepting the three-mile limit. Moreover the comments of governments, some of which claimed a territorial sea breadth of six miles, nine miles or even more, indicated that the three-mile limit was far from being universally accepted. The statement contained in paragraph 1 of the revised draft of article 3 proposed by the Special Rapporteur[15] did not, therefore, reflect the existing state of international law and was not factually correct. The three-mile limit was not universally accepted, and he did not believe that the Commission would accept it either.

29. Were the Commission to accept the third paragraph of the same proposal, it would be completely stultifying itself. According to that paragraph, while States had the power to extend the limit beyond three miles the

[10] A/CN.4/SR.361, para. 79.

[11] A/CN.4/SR.309, para. 32.

[12] Wyndham Walker: "Territorial Waters: the Cannon Shot Rule", *British Year Book of International Law, 1945*.

[13] H. S. R. Kent: "The Historical Origins of the Three-mile Limit", *American Journal of International Law*, October 1954.

[14] A/CN.4/SR.361, para. 79.

[15] A/CN.4/SR.361, para. 65.

extension would not be binding on any other State. What point could there be in making an extension which other States were not bound to accept? He could not see what contribution such a statement would make to the formulation of international law.

30. Sir Gerald Fitzmaurice had referred to the statement in the judgment of the International Court in the Anglo-Norwegian Fisheries case that the validity of the delimitation of the territorial sea with regard to other States depended on international law.[16] The Court had not said, however, that the international law was that the breadth was three miles. It was precisely the task of the Commission to find out what the international law on the matter was.

31. From the comments of certain governments which had reviewed the background of the question, it emerged that the breadth of the territorial sea had been based on three considerations. The first was the ability to control or occupy the area claimed; that consideration, with the general advance in transport and communications, no longer applied. The second was that of security, which the advance of science had also rendered meaningless. The third, that of economic necessity, still applied, however, and could constitute a criterion for fixing the limit of the territorial sea. The breadth of their territorial sea would often be a question of life and death for States, especially the less powerful ones, and he must accordingly protest against the assumption that States which accepted the three-mile limit were acting in good faith and that those which claimed a wider limit were not. A country such as Iceland, whose whole economy was dependent on fishing, could not be regarded as acting in bad faith if it claimed a broad strip of territorial sea in which to exercise exclusive fishing rights. If a coastal State claimed a wider limit, its good faith must be presumed.

32. He was no more happy about Mr. Zourek's proposal than he was about that of the Special Rapporteur. If, as stated in paragraph 1 of Mr. Zourek's proposal, a coastal State in fixing the breadth of its territorial sea was exercising its sovereignty, it was difficult to understand why its decision should not be binding on other States. Furthermore, according to the proposal, the breadth of the territorial sea must not infringe the principle of the freedom of the high seas. Yet, as Sir Gerald Fitzmaurice had pointed out, the very existence of the territorial sea was an infringement of the freedom of the high seas. It was in fact a compromise between the necessities and interests of the coastal State and the general concern of all States with the freedom of the seas. Since such a compromise had been accepted at one stage, why could not the nations, in view of the changed circumstances, strike another compromise on a wider limit?

33. The CHAIRMAN drew attention to the following proposal by Mr. Sandström to replace draft article 3:

1. Every coastal State is entitled to a territorial sea with a breadth of at least three miles.
2. The breadth of the territorial sea may not exceed twelve miles.
3. If, within these limits, the breadth of a State's territorial sea is not determined by long usage, it must not exceed what is necessary for satisfying the justifiable interests of the State, taking into account also the interests of the other States in maintaining the liberty of the high seas and the breadth generally applied in the region.
4. In case of a dispute the question shall, at the request of one of the parties, be referred to the International Court of Justice.

34. Mr. SCELLE considered that the criticisms levelled against draft article 3 were exaggerated. Prior to the submission of the Special Rapporteur's proposal, the draft article, though still open to improvement, had constituted the best text possible in the circumstances. It described the existing state of affairs, laid down a minimum and a maximum limit, and offered a sound rule of law capable of serving as a basis for an international convention couched in quite strict terms.

35. If no fixed limit were set, there would be no limit to encroachment on the high seas. The diplomatic Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific held by Chile, Ecuador and Peru at Santiago in 1952 was a striking example of the extremes to which the theory of the sovereign right of States to fix the limit of their territorial sea could lead. At that conference the limit had been fixed not at three or twelve miles, but at a minimum of 200 miles, and the States concerned had formed a veritable alliance to enforce respect for their claim if it were not freely accepted. The Declaration on the Maritime Zone issued by the conference was most illuminating:

1. Governments are under an obligation to secure the necessary conditions of subsistence for their peoples and to provide them with the means for their economic development.
2. Consequently, it is their duty to provide for the conservation and protection of their natural resources and to regulate the exploitation of those resources to the best advantage of their respective countries.
3. It is therefore also their duty to prevent exploitation of the said resources outside their jurisdiction from jeopardizing the existence, integrity and conservation of this wealth to the detriment of nations which, owing to their geographical position, possess in their seas irreplaceable sources of subsistence and vital economic resources.

In view of the above considerations the Governments of Chile, Ecuador and Peru, being resolved to conserve and secure for their respective peoples the natural resources of those parts of the sea which wash their coasts, make the following declaration:

(I) Owing to the geological and biological factors governing the existence, conservation and development of the marine flora and fauna in the waters which wash the coasts of the States Parties to this declaration, the former breadths of the territorial sea and the contiguous zone are inadequate for the conservation, development and exploitation of these resources, to which the coastal States are entitled.

(II) The Governments of Chile, Ecuador and Peru accordingly proclaim, as a principle of their international maritime policy, the exclusive sovereignty and jurisdiction to which each of them is entitled over the sea which washes the coasts of their respective countries, to a minimum distance of 200 nautical miles from the said coasts.

(III) Exclusive sovereignty and jurisdiction over the zone specified also includes exclusive sovereignty and jurisdiction over the sea-bed and subsoil.

[16] I.C.J. Reports, 1951, p. 132.

(IV) In the case of island territory, the zone of 200 nautical miles shall be established all round the island or group of islands. If an island or group of islands belonging to one of the States Parties to the Declaration is less than 20 nautical miles from the general maritime zone of another said State, the maritime zone of such island or group of islands shall be bounded by the parallel through the point where the land frontier between the two States meets the sea.

(V) The present declaration implies no disregard for the necessary limitations on the exercise of sovereignty and jurisdiction imposed by international law in favour of innocent and inoffensive passage by ships of all nations through the specified zone.

(VI) The Governments of Chile, Ecuador and Peru declare their intention of concluding agreements or conventions for the application of the principles stated in this Declaration, which will lay down general rules for regulating and protecting hunting and fishing within their respective maritime zones and for controlling and co-ordinating the exploitation and utilization of any other kind of natural products or resources of common interest in the said waters.

36. Thus, the three States claimed exclusive sovereignty and jurisdiction not only over the waters, but also over the bed and subsoil of the sea for a *minimum* distance of two hundred miles. And that the latter claim was no idle one had been shown by the arrest of the whaling fleet of a Greek shipowner *outside* the 200-mile limit.

37. Sir Gerald Fitzmaurice, while adopting a position similar to his own, had said that such extreme claims had no foundation. Personally he was not sure that that was true. In equity they were probably well founded, since it was only equitable that States which had no continental shelf should be able to claim some equivalent. Even States such as the United Kingdom and the United States of America, which had so far adhered to a three-mile limit, might well claim a far broader territorial sea at some future date, if fishing and whaling conditions made it desirable. As the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case had made clear, the question of the territorial sea was one of vital necessity, in the true sense of the term. Some States might feel the need for a broad territorial sea and others not, but the claims of the former, though only claims, were not necessarily unjustified. As was recognized by article 4 of the French Civil Code, the lack of any clear legal provision governing the matter was no justification for brushing a claim aside.

38. Referring to Mr. Sandström's proposal, he observed that it was on much the same lines as, but at the same time an improvement on, draft article 3 and the Special Rapporteur's text. He would, however, prefer paragraph 4 of the proposal to be qualified by the proviso " unless the parties agree to some other means of peaceful settlement ", as in the case of draft article 8 on the continental shelf. He fully supported the proposal, as one in perfect accordance with existing international law, but which contributed at the same time to its development.

39. Failing its adoption by the Commission, he was prepared to retain draft article 3 as it stood. But he was quite unable to accept any proposal containing the rule that coastal States had a sovereign right to fix the breadth of their territorial sea.

40. Mr. SANDSTRÖM, referring to his own proposal, said that after a period in which there appeared to be agreement on a three-mile limit, the situation had degenerated into almost complete anarchy. It being no longer possible, in his opinion, to revert to the three-mile limit as a general rule, it was necessary to make a fresh start. Draft article 3 represented a step in the right direction, and the Special Rapporteur's proposal was an improvement on it, though it still left certain gaps. In particular, the provision in paragraph 3 left the question of the legal validity of a limit fixed under that paragraph rather in the air. In his own proposal he had accepted the maximum and minimum distances laid down in the other two proposals and had incorporated three criteria mentioned by other speakers—namely, that where the breadth of the territorial sea was determined by long usage it should be accepted; that it was necessary to satisfy the justifiable interest of the State, a consideration suggested by Mr. Spiropoulos;[17] and that the extension of the territorial sea should not prejudice the freedom of the high seas. To supplement those three criteria he had added a fourth, that of the breadth generally applied in the area. In the Mediterranean, for instance, almost all countries accepted a breadth of six miles. Such a figure would not be an absolute standard, but merely an element to be taken into account.

41. He had no objection to adding the clause proposed by Mr. Scelle to paragraph 4 of his proposal.

42. Mr. PAL said that Mr. Sandström's proposal marked an improvement on the other texts and was acceptable, subject to drafting changes. While the ideal course would be to fix a uniform breadth for the territorial sea, such a solution, to judge from the comments of governments, appeared to be impossible. There were two points in the proposal that needed clarification. The first was the term " long usage " in paragraph 3 of the proposal. Quite apart from the question of the exact meaning of the epithet " long ", he wondered what was to be understood by " usage ". If a State had claimed a territorial sea of a certain breadth without there being any occasion either for acceptance or for opposition by other States, would such a state of affairs be considered to constitute long usage? Would the exercise of exclusive fishing rights in the area over a certain period of time be regarded as adequate evidence of long usage?

43. The second point requiring clarification was in paragraph 4. It was not clear from the text whether a judgment in a dispute would settle the matter once and for all and apply also to States not parties to that dispute. It would be asking too much of a coastal State to oblige it to refer to the International Court of Justice every time a State chose to challenge its claim.

44. Mr. PADILLA-NERVO said that he had not stated his position at the seventh session, but would do so now. The three-mile limit had never been uniformly observed, even at the time when its application had been most widespread. Many important States had never applied it at all, and many exceptions had been made even by

[17] A/CN.4/SR.361, para. 100.

those States which had customarily used it. It was therefore legitimate to suggest that it was a case of *de facto* jurisdiction, rather than of a rule derived from a settled juridical conviction.

45. The existence of a rule of international law limiting the territorial sea to three miles depended in the final analysis on the extent to which States did or did not accept that limit. The present situation left no room for doubt. The fact that only one-quarter of the States which had coasts accepted it showed clearly that the three-mile limit was not valid as a single standard, and, as Gidel had pointed out, was not a rule in international law. He therefore found it difficult to understand the logic of the principles adopted by the Commission at its seventh session. Several governments referred in their comments to the inconsistencies between paragraphs 1 and 2 and paragraph 3 of the Commission's text; indeed that was the main criticism levelled by them. In explanation the Commission had been told merely that the governments had failed to grasp what had been intended, but no convincing argument had been adduced to show the consistency of the three principles laid down.

46. To state that a breadth of between three and twelve miles for the territorial sea was not a violation of international law could only mean that international law permitted the breadth to be fixed between those limits. It was wrong in law to speak of a right and at the same time to deny the corresponding obligation to respect that right. To accept such a thesis with regard to the territorial sea would lead to an absurdity. If international law granted a State the right to fix a certain breadth for its territorial sea and simultaneously granted another State the right to deny the validity of such a limit, the impossible legal situation would arise where two diametrically opposed and irreconcilable rights would emerge from the same rule. As Mr. Spiropoulos had rightly pointed out, that would create a situation in which there was not and could not be a juridical solution, because two equally valid rights confronted each other.[18] It was hard to conceive of any solution more conducive to the creation of fresh disputes.

47. The Special Rapporteur had recalled the decision in the Nottebohm case[19] that while certain acts by States might be consistent with international law, other States were not obliged to recognize them as valid. As Mr. Spiropoulos had pointed out, that might be true in cases concerning nationality and other similar fields, when the grant of identical rights to two different parties did not create conflicting situations or created situations which were not irreconcilable. It could not apply to the territorial sea. Two equally legitimate but inconsistent rights could not exist at the same time; the dispute would have to be solved in favour of one party or the other.

48. The Special Rapporteur had said that the Commission had proposed no new solution, but had depicted the existing situation, however unfortunate it might be. He himself did not believe that such a situation of systematized legal anarchy really existed. Assuming that a dispute arose between a State claiming a breadth of six miles for its territorial sea and another State which did not accept that unilateral decision, the International Court of Justice obviously could not find that both parties were in the right. Assuming that the dispute was couched in the simplest terms—i.e., without the complication of historical reasons—the solution might be as follows: if the Court found that the six-mile limit was justified, that would mean that in its opinion the claim to the six-mile limit was in conformity with international law and therefore valid *vis-à-vis* all States; if it rejected the claim for the six-mile limit, that would mean that only the traditional three-mile limit was in conformity with international law.

49. The difficulty in which the Commission found itself arose from the fact that it had had to recognize as existing fact that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles and that a great many States had established a wider limit. The Commission had then, however, refused to accept the legal consequences necessarily following such recognition. It was a fact that most States in practice had extended their territorial sea to breadths between three and twelve miles. Instead of frankly recognizing that the deliberate and coincident practice of a majority of States produced legal effects creating a new rule in international law, since it simply reflected what most States had done already, the Commission had reintroduced the three-mile rule, and the Special Rapporteur had repeated it in his proposal at the present session. In reality, according to the Special Rapporteur, only the three-mile rule could be regarded as standard.

50. The reservations in paragraphs 2 and 3 of the Special Rapporteur's proposal were obvious enough. Even if the Commission had not recognized them explicitly, they would still continue to exist. The proposals adopted by the Commission and those now submitted by the Special Rapporteur implied that only the three-mile limit could be supported *erga omnes*—in other words, that only the three-mile rule constituted a rule of international law.

51. In his own opinion, the only practical way to approach the problem was to recognize frankly the possibility that States might fix a different breadth for their territorial sea within a given maximum, instead of trying to solve it by trying to set a uniform breadth. Geographical, geological, biological, economic and security factors influencing States differed so much that a uniform breadth for the territorial sea could not possibly meet their real needs. For example, if the claims of certain Pacific States for an extension of their territorial sea to 200 miles were examined, the fact must be taken into consideration that the ocean off their coasts was 5,000 miles in breadth and so they were claiming only about four per cent of those waters, whereas in the English channel the claim to the three-mile limit implied a claim to about twenty per cent of the waters between the two coastal States. He cited that instance, not because he was proposing a breadth of 200 miles for the territorial sea, but as an example of the way different geographical conditions had to be taken into account in fixing the

[18] A/CN.4/SR.361, paras. 89-91.

[19] I.C.J. Reports 1955, page 4.

breadth of the territorial sea. His argument was not a new one. A somewhat similar argument for allowing each State to fix the breadth of its own territorial sea within reasonable limits had been adduced by the Swedish Government at the Hague Conference for the Codification of International Law and also by Dr. Alvarez, a judge of the International Court of Justice, in his individual opinion in the Anglo-Norwegian Fisheries case.[20]

52. The practice of States themselves as an expression of their needs was the best way of indicating how the problem could be solved. No defined breadth for the territorial sea today had the support of more than one-quarter of the States having coasts, but the great majority of such States had in common a certain minimum and a certain maximum breadth. That point of coincidence might, and indeed did, constitute a basis for a juridical rule.

53. One impediment to a solution of the problem was the practice of starting from the false belief that the rule of international law on the territorial sea should have a precise content—i.e., that the breadth should be uniform for all States. It had been argued that no new rule involving a breadth of six, nine or twelve miles enjoyed the same authority as the traditional limitation to three miles. That did not mean that no rule on the breadth of the territorial sea existed. The rule was, however, of variable content, subject to a given maximum. It was not infrequent to find in international law a rule without a precise content but with variable limits or establishing a form of guidance. That was precisely the case with the law on the breadth of the territorial sea. There did exist a genuine rule that permitted States to fix the breadth of their territorial sea variably, but within a certain maximum limit.

54. As Sir Gerald Fitzmaurice had pointed out earlier, the International Court of Justice had laid down that the determination of the breadth of the territorial sea always had an international aspect. Determination of the breadth of the territorial sea depended in part on domestic law and was in part subject to international law. Obviously, a State had no unrestricted right to determine the breadth of its territorial sea nor could it exercise its right arbitrarily. The opinion of the International Court of Justice cited by Sir Gerald Fitzmaurice was extremely pertinent in that connexion. It would be preferable to adhere to the Court's opinion in the matter.

55. Of course the main problem was to determine the maximum breadth of the territorial sea to be authorized by international law. Obviously the ideal solution would be that it should be determined by a multilateral convention, but the lack of such a convention was no hindrance to the assertion that an authentic rule did exist. The three-mile limit had not come into existence as a result of a convention, but by the coincident practice of a majority of States. At a later stage, a majority of States had made it their coincident practice to derogate from the three-mile rule. There seemed no justification for a State's being required to adduce historic title or special motive to do what a majority of States had already done. That constituted an authentic rule established in precisely the same way as any other rule in international law—namely, by the wish of the States. If the rule in effect was for a breadth of three to twelve miles for territorial waters, no convention was necessary. The coincident practice of States would suffice, as it had sufficed for establishing the three-mile rule.

56. Another impediment to a solution was the attempt to consider the determination of the breadth of the territorial sea as a problem of progressive development of international law. Almost always when the problem was approached the question was asked what the breadth of the territorial sea should be, and innumerable reasons were given for one breadth or another. The trouble was that all those reasons were never pertinent to the establishment of a single standard, since the needs and circumstances of States varied throughout the world. So long as an attempt was made to impose a criterion on all States on the basis of its alleged intrinsic merits, the problem would never be solved. The solution lay in terms of what the majority of States had already adopted. In any rule it adopted, the Commission should reflect the real situation—that of coincident practice.

57. To sum up, first, it would be vain to try to find a uniform solution—namely, to try to fix a precise breadth for all States. Secondly, there existed an authentic legal rule relating to the breadth of the territorial sea, not fixing it precisely, but conferring on States authority to fix different breadths within certain reasonable maximum limits. Thirdly, the basis for that rule was to be found in the will of the majority of States shown through coincident practice. Fourthly, the content and the limits in that rule were given by the elements common to the practice of the great majority of States—i.e., by the fact that almost all particular delimitations fell within certain maximum limits. Fifthly, based on that rule, each State had the right to fix at its own discretion its territorial sea within the maximum limits laid down by the rule. Sixthly, that authority enjoyed by States constituted a subjective legal right based on an existing rule of international law, and therefore that right might be claimed *erga omnes*.

58. Thus, States were not obliged to produce historic titles or invoke special motives to set the breadth of their territorial sea at more than three miles, so long as they remained within the maximum limit authorized by the rule of international law derived from the common elements of the practice of States.

59. Mr. SPIROPOULOS said that at the previous meeting he had with some hesitation proposed that article 3 be re-drafted[21] on lines very similar to those now put forward by Mr. Sandström. Mr. Sandström's first paragraph was more or less identical with what he himself had proposed. In the second paragraph he had proposed that a breadth greater than three miles be recognized if it were based on a legitimate interest of the coastal State; that was somewhat similar to Mr. Sandström's paragraph 3. His own final clause would have

[20] I.C.J. Reports 1951, p. 150.

[21] A/CN.4/SR.361, para. 100.

contained a compulsory arbitration clause, which corresponded to Mr. Sandström's paragraph 4, providing for recourse to the International Court of Justice. At the previous meeting he had been simply throwing out a suggestion, to which he had not wished to commit himself. Mr. Sandström had apparently taken up some of the ideas thus thrown out, and his text might be accepted, although without any great enthusiasm. If the Commission wished to draft a rule, Mr. Sandström's proposal appeared to be the best of those formulated and likely to meet with the approval of a majority of the Commission, whereas the Special Rapporteur's proposal [22] was unlikely to obtain much support.

60. The expression " long usage " in paragraph 2 of Mr. Sandström's proposal might be challenged. Mr. Sandström had obviously been thinking of the four-mile limit, which had been virtually accepted for the Scandinavian countries.

61. The expression " the justifiable interests of the State ", however, gave him greater pause. True, he himself had used the term " legitimate interest of the coastal State ", but with considerable hesitation, because he had been fully aware that it was so vague that any court or tribunal faced with a dispute might be placed in a very difficult position when it came to interpret it. Such a concept was quite new in international law.

62. The concept of the three-mile limit had been based, not on the special interests of any State, but on the range of cannon at the time it had been formulated. A State involved in a dispute before an international tribunal would probably find it very hard to explain exactly why it was claiming a six-mile limit. It might very well be that the real reason was merely a wish to imitate other countries. For example, at the Hague Conference, Italy, Rumania and Yugoslavia had claimed a breadth of six miles for their territorial sea, and shortly afterwards Greece had extended its three-mile limit to six miles. It might or might not be significant that Greece was in the same geographical area. Mr. Sandström had obviously had such instances in mind when he had used the phrase " the breadth generally applied in the region " in paragraph 3 of his proposal.

63. Another reason for wishing to extend the breadth of its territorial sea might be the fact that a country was mainly dependent on fisheries; but that was certainly not true in the Mediterranean.

64. The interests of national defence could hardly be relied on nowadays for a claim to extend the breadth of the territorial sea. Modern science had made the protection likely to be given by the territorial sea meaningless in wartime, while in peacetime there was really no difference from the point of view of protection between a territorial sea of three, six or twelve miles. It seemed entirely probable that States, especially newly formed States, claimed a broader territorial sea merely in a spirit of imitation. Consequently, a tribunal would be in a very delicate position if it had to insist that a State must prove a legitimate or justifiable interest for extending the breadth of its territorial sea beyond three miles. The tribunal might also have to impose a breadth which, in the words of Mr. Sandström's text, " generally applied in the region ".

65. The trouble with the system advocated by Mr. Sandström was that no uniform rule could be applied, but each State must be left to determine the breadth of its own territorial sea, subject to the control of an international organ, which would be the International Court of Justice. The subjective rule adopted by the State in question would thus become objective law after the Court had rendered its decision. As Mr. Pal had argued, if the Court handed down such a decision *erga omnes*, the claim would be maintained not only against the State which had brought the dispute before it, but against all States.

66. If the Commission was unable to accept any article based upon the proposals before it, he himself would favour reverting to the proposal put forward by Mr. Amado at the seventh session,[23] somewhat modified to the effect that the Commission would not take a final decision but would leave that to a diplomatic conference to be convened by the General Assembly. Mr. Amado's proposal had not in fact wholly reflected the real international situation with regard to the territorial sea. His own new proposal was as follows:

(*a*) In paragraph 1, delete the words " traditional " and " to three miles " and replace the word " limitation " by " delimitation ".

(*b*) In paragraph 2, replace the words " does not justify " by the words " does not permit ".

(*c*) In paragraph 3, delete the phrase beginning " considers that international law . . ." and substitute the following text: " notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less ".

(*d*) Add the following new paragraph: " The Commission considers that the breadth of the territorial sea should be fixed by an international conference ".

Article 3, as amended, would then read as follows:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

67. Mr. AMADO said that the discussion so far had led him to the conclusion that a realistic depiction of the situation must involve some amendment of the proposal which he had submitted to the Commission at its seventh session,[24] in order to allow for the fact that the breadth

[22] *Ibid.*, para. 65.

[23] A/CN.4/SR.309, para. 14, and A/CN.4/SR.310, para. 51.

[24] *Ibid.*

of the territorial sea depended on international practice, not on subjective or on objective rules of international law. That was a fact that no eloquence could demolish, and one which could not prejudice any interests. He proposed, therefore, that a new paragraph should be added to his previous text, to the effect that international practice recognized the right of coastal States to determine the breadth of their territorial sea within fixed minimum and maximum limits.

68. Faris Bey el-KHOURI remarked that, under its terms of reference, the Commission was called upon to codify international law and to promote its progressive development. After all the Commission's discussions, consultations with governments and reading of their observations, it had found that there was nothing to codify with respect to the breadth of the territorial sea. It could not adopt the three-mile limit as a uniform standard, because it was not generally accepted, and, indeed, a majority of States had claimed a greater breadth and had not been challenged. The Commission could take any figure—three, six or twelve miles—as a basis, purely as guidance for the General Assembly, but it obviously could not impose its opinion on States which regarded themselves as sovereign and independent in the matter unless they bound themselves by a convention. The Commission might limit itself to giving a picture of the situation, as had been done in the text submitted by Mr. Amado at the seventh session and by the Special Rapporteur at the present one. Or the Commission could give a specific figure, which might lead the General Assembly to convene a diplomatic conference to determine a precise limit. He suggested tentatively, as a basis for discussion, a breadth of six miles.

69. Mr. SALAMANCA observed that he had supported Mr. Amado's original proposal at the seventh session, but when Mr. Amado had accepted the Special Rapporteur's amendment, he had voted against the final text. That text had been purposely adopted in order to elicit comments from governments. The situation had now completely changed, and had become one *de lege ferenda*.

The meeting rose at 1.05 p.m.

363rd MEETING

Friday, 8 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-7) (*continued*)

Article 3. Breadth of the territorial sea (continued)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 3, drew attention to the text submitted by Mr. Amado,[1] which read as follows:

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. International practice accords to the coastal State the right to fix the breadth of its territorial sea between these minimum and maximum limits.

2. Mr. KRYLOV said that the question Mr. Hsu had asked him at the previous meeting[2] had been virtually answered by other speakers. Any further information that Mr. Hsu might wish he would give to him personally, in order not to hold up the Commission's proceedings.

3. Mr. SALAMANCA said that he could see very little difference between Mr. Spiropoulos' proposal and the text adopted at the seventh session. He asked wherein the difference lay.

4. Mr. SPIROPOULOS replied that there were very important differences.

5. In paragraph 1 he had deleted the words " traditional " and " to three miles ", because they were unnecessary, as all members were now agreed on the ideas implicit in those phrases. His own text was therefore more general.

6. In paragraph 2 the words " does not permit " had been substituted for the words " does not justify ". That small change had been made because the new wording was more accurate.

7. In paragraph 3 the phrase beginning " considers that international law... " had been deleted and a new text substituted reading " notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less ". That was the important change. The reference to international law had been deleted and the simple fact stated that many States did not recognize a breadth greater than three miles when that of their own territorial sea was less. In other words, he had deleted the somewhat hazardous statement of international law and replaced it by a statement of fact.

8. Paragraph 4 was a new one, required to complete the text. It implied that the Commission did not wish

[1] A/CN.4/SR.362, para. 67.
[2] A/CN.4/SR.362, para. 17.