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Chairman: Mr. Karel PETRŽELKA
 (Czechoslovakia).

AGENDA ITEM 53

Report of the International Law Commission on the work of its eighth session (*continued*):

- (a) **Final report on the régime of the high seas, the régime of the territorial sea and related problems (A/3159, A/C.6/L.378, A/C.6/L.385 and Add.1 to 3) (*continued*)**

1. Sir Percy SPENDER (Australia) associated himself with the well-deserved tribute paid by other delegations to the International Law Commission and its Special Rapporteur for preparing an eloquent, clear and concise report. The Commission's draft (A/3159, chap. II) with the accompanying commentaries was one of the great documents in the history of international law. In seventy-three articles the report set forth the law of the sea.

2. Apart from the question of the breadth of the territorial sea, the Commission had presented some concepts that might serve to reconcile the conflicting interests of individual States on the one hand and the international community on the other. If the proposed solutions conferred upon coastal States rights and powers for the protection of their essential livelihood, then it might be possible to avoid propounding claims to powers, not essential for that purpose, which might deprive the international community of freedoms it had enjoyed for centuries and on which much of modern civilization had been founded.

3. His delegation, one of the sponsors of the joint draft resolution (A/C.6/L.385), strongly supported the proposal to convene an international conference as the most effective way in which the General Assembly could discharge the responsibilities it had assumed under the Charter, and particularly under Article 13. The General Assembly had "initiated studies" and should now "make recommendations for the purpose of encouraging the progressive development of international law and its codification". To do that, it seemed that there were only three possible courses.

4. The General Assembly could take note of the International Law Commission's report and submit it

for consideration and possible action by Member States. The teachings of publicists were expressly mentioned in Article 38 of the Statute of the International Court of Justice as "subsidiary means for the determination of rules of law". There could be no teachings more authoritative than the collective report of the Commission. It was true that the report did not distinguish between *lex lata* and *lex ferenda*, but it could not fail to have some influence on the development of international law. The process would be slow, however, owing to existing divergence of opinion.

5. A second course, feasible at least in theory, was that the Committee might, on the basis of the International Law Commission's report, draft conventions which the General Assembly could approve and recommend to Member States for adoption. That procedure had been followed in some other cases, but it should be clear to all that it could not be expected to produce practical results in the present instance, because a large number of Governments were not yet ready to take a definitive position on all the technical and political questions to be answered before specific texts could usefully be adopted, and because the task would require experts on shipping and navigation, fisheries and national defence, as well as experts on law.

6. If the General Assembly was to fulfil its task and really encourage the development of international law, it must take positive action and choose the third solution, namely to convene a special conference. His delegation agreed with the Mexican and Israel representatives that careful preparation for the proposed conference would be necessary in documentation and organization alike, bearing in mind that the conference would be not only technical but also juridical and political. First, questions relating to the organization of its work, its agenda and its committees would have to be settled. Then factual data would have to be collected on questions such as the conservation of the living resources of the sea. Lastly, Governments, bearing in mind all the interests involved, both national and international, would have to take a position on questions such as the contiguous zone and the breadth of the territorial sea.

7. The best and most practical course would be to ask the Secretary-General to set up a representative preparatory committee with advisory powers. The Secretary-General had enlisted the help of a team of experts selected in a private capacity in preparing for the Rome Conference in 1955. He would probably have to enlist the help of Governments in the present case. In any event, the diverse interests involved should be adequately represented in the preparatory committee.

8. His delegation agreed with the Chilean representative (491st meeting, para. 37) that a full record of the Sixth Committee's proceedings should be placed before the proposed conference, although the International Law Commission's report should be the basic

document for study. A questionnaire might be circulated to Governments to elicit their views for examination by the conference.

9. The conference should be held in New York for reasons of convenience and economy. It was doubtful it could be held before March or April 1958.

10. His delegation did not at that time wish to state its views on the questions of substance raised by the International Law Commission's report. Governments should exchange views in the course of the preparatory work.

11. Australia's position and needs were probably very similar to those of many other countries, but that did not necessarily mean that their interests were identical. Australia was well aware of the special needs of coastal States, but had always considered it vitally important to preserve the historic freedom of the sea. Australia's attitude was determined by what it considered to be the basic element in its geographical situation, namely, the maintenance of communications with overseas countries. With respect to the breadth of the territorial sea, Australia had always regarded the three-mile limit as a general rule of international law, subject only to recognized exceptions.

12. The International Law Commission's report marked an important stage in the development of international law. It took into consideration many of the special interests of the coastal State and offered it means of protecting its marine resources, without recognizing extreme claims to sovereignty. His Government's first reaction to the report was that it could go along with all the various solutions proposed by the Commission if they proved to be generally acceptable.

13. Mr. PINTO (France) said that owing to the wide variety of complex problems, both technical and legal, connected with the law of the sea, the best solution seemed to be to convene an international conference of plenipotentiaries as proposed in the draft resolution (A/C.6/L.385) which France had co-sponsored. The conference should have before it a careful analysis of the observations made by delegations in the course of the Sixth Committee's debates; perhaps in a form similar to that of the reference guide (A/C.6/L.378). It would be better if the conference could be held at Geneva and not in New York, where the necessary documentation was not so readily available.

14. He congratulated the International Law Commission, its Special Rapporteur and the Secretariat on their work, which would be valuable not only for Governments and maritime law practitioners but also for research workers and teachers.

15. The Commission's report dealt with three basic problems: first, the régime of the territorial sea and internal waters; second, the régime of the high seas; and third, the continental shelf. The Commission had adopted a different approach, but as the Special Rapporteur had pointed out, the division into three parts would make it possible to prepare several conventions so as to avoid having a setback, despite general agreement on a large number of points, merely because divergent views on certain specific matters could not be reconciled. The problems raised by the representatives of Peru (486th meeting) and Ecuador (489th

meeting) should be carefully studied and a general convention on fisheries might be considered.

16. The French delegation supported the Commission's proposals on the territorial sea; the rules laid down were sufficiently flexible and enabled the French Government to maintain its traditional position in favour of the three-mile limit. Article 24, despite its rather unusual wording, was acceptable. At first sight it appeared to contradict article 12, paragraph 1, of the 1930 Codification Conference's draft which stated that "... a coastal State... will not require a previous authorization or notification", but in reality the Commission's draft merely gave the coastal State an option, since it stated that "normally" innocent passage would be granted. That wording appeared likely to protect the coastal State adequately against abuse.

17. The definition of internal waters contained in article 26, paragraph 2, would seem more relevant among the articles dealing with the territorial sea, for example after article 6 of the draft. Subject to that reservation, the definition of the high seas called for no other observation. The fundamental principle of the freedom of the high seas was affirmed in the clearest possible terms (article 27). It was debatable, however, whether the word "validly" was appropriate as referring to a rule of law, since it implied a political judgement. The word "legally" or "juridically" would be preferable.

18. As long ago as 1930, during the Conference at The Hague, Professor Gidel, speaking on behalf of France, had proposed the recognition of a contiguous zone over which the coastal State would have fragmentary and specialized competence. The French delegation therefore approved article 66, but felt that the section on the contiguous zone should immediately follow article 27 establishing the freedom of the high seas. Since article 66 provided that the contiguous zone could not extend beyond twelve miles from the inner limit of the territorial sea, there was no reason to prohibit within that zone the exercise of the right of hot pursuit recognized by article 47 of the draft. Article 47, paragraph 3, provided, moreover, that hot pursuit could be begun if the ship pursued was within the contiguous zone.

19. The articles dealing with the right of navigation and the nationality of ships deserved careful study. They employed the concept of nationality to define the *de facto* and *de jure* link existing between a State and the ships under its jurisdiction. Although the concept of nationality had, in general, been adopted by the sponsors, its systematic use in the Committee's draft seemed pointless and even dangerous. It would be possible, without altering the meaning and scope of article 29, to eliminate all references to the so-called "nationality" of the ship. Article 29, paragraph 1, could read: "Each State shall fix the conditions for the registration of ships and for the right to fly its flag. Ships are under the jurisdiction of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the right to fly that flag by other States, there must exist a genuine link between the State and the ship." The legislation of at least thirty-seven countries did not use the concept of nationality to define the legal status of ships. If the word "nationality" were retained in an article which had legal value, there would be the risk of losing sight of the fact that a "pseudo-nationality" was involved.

20. The International Law Commission had investigated whether the United Nations should be given the right to allow ships to sail under its flag exclusively. Mr. Zourek had pointed out (A/CN.4/SR.347, paras 9 and 10) that the recognition of that right would run counter to the provisions adopted by the Commission, under the terms of which ships possessed the nationality of the State in which they were registered. A precedent had been set in that connexion. The United Nations had allowed ships built by the United Nations Korean Reconstruction Agency to sail under its own flag, and no State, either Member or non-member, had made any protest. Mr. Scelle and Mr. García Amador had noted (A/CN.4/SR.347) that the moral or juridical personality of the United Nations and the specialized agencies had been recognized, and that their right to register ships and to sail ships under their own flag should also be recognized. That was, moreover, confirmed by the advisory opinion given by the International Court of Justice on reparation for injuries suffered in the service of the United Nations.¹
21. The French Government reserved the right to study the question carefully, since the Commission had not taken sufficient note of the precedent established and of the Court's opinion. Nor had the Commission succeeded in defining the "genuine link" which, under article 29 of the draft, must exist between the State and the ship. It would therefore be necessary to continue the study.
22. The reference guide (A/C.6/L.378) mentioned in that connexion the Judgement of the International Court of Justice in the *Nottebohm* case.² It stated that some of the principles laid down by the Court might be equally relevant to the question of the nationality of ships. It seemed difficult, however, to link a ship with a State in terms of the operations of the ship, the type of merchandise it transported, or the maritime communications it established across the world. It would be difficult to solve the problem of the flag of convenience by merely trying to define the nature of the connexion between the ship and the State whose flag it flew (article 31). The problem could be solved by the powers every State possessed over its nationals and their property. Furthermore, the co-operation of States which were not strict enough in granting the right to fly their flag must be sought in order to remedy current abuses with respect to the security and working conditions of seamen. Such States should be urged to accept the existing international conventions on those matters.
23. He complimented the Commission on its stand with respect to article 35 on penal jurisdiction in matters of collision. It was customary for proceedings to be brought only before the legal or administrative authorities of the flag State or the authorities of the home country of the persons employed by the ship against which the proceedings were brought.
24. It seemed desirable to change the heading of article 37, which was taken from the General Act of the Brussels Conference of 1890. It crystallized the legal character of the status of slave in a way that was altogether inadmissible.
25. With respect to the pollution of the high seas, the Special Rapporteur had not indicated whether the very general regulations set forth in article 48 were

to take precedence over the more detailed regulations in the London Convention of 12 May 1954. His delegation would prefer the text which enacted the more precise regulations.

26. Articles 49 to 60 concerning fishing would require extensive comments. He merely pointed out that the draft should include a clause defining the term "nationals", which was defined only in the commentaries; otherwise more precise expressions should be used. For example, article 49 could read: "All States have the right for ships flying their flag to engage in fishing on the high seas..."

27. His delegation agreed to the proposed regulations in respect of submarine cables; but it should be specified whether such regulations would revoke the prior provisions of the Convention for Protection of Submarine Cables signed in Paris on 14 March 1884.

28. With regard to the continental shelf, certain terms employed in the draft were open to criticism. The expression "sovereign rights" (article 68) reflected political considerations and a lack of legal precision. If such rights were exercised within the limits of the legal régime of the continental shelf, the adjective "sovereign" was unnecessary because it added nothing to the word "rights"; or if—as was certainly not the International Law Commission's intention—the rights were sovereign because they came within the sovereignty of the coastal State, the expression "sovereign rights" was contradictory because it implied that the State concerned had discretionary or arbitrary powers rather than rights. Similarly, the expressions "reasonable measures" (article 70), "any unjustifiable" (article 71, para. 1) and "at a reasonable distance" (article 71, para. 2) were vague and ambiguous.

29. Commenting on the Soviet Union representative's observations (488th meeting) with respect to the arbitration and compulsory jurisdiction clauses (articles 57 and 73), he noted that although, happily, the representative of the Soviet Union had not rejected arbitration as a means of pacific settlement of disputes, he had held that a State could not agree to submit a dispute to arbitration or to the jurisdiction of the International Court of Justice except by a specific decision taken when the dispute had arisen. That was not a new stand. Some States, including Germany, had defended it at the great peace conferences held at The Hague. But in view of the League of Nations Covenant, the United Nations Charter, and the establishment of the Permanent Court of International Justice and later the International Court of Justice, "the principal judicial organ of the United Nations", such a stand no longer seemed to be in keeping with the fundamental principles of international law. If one were to agree with the representative of the Soviet Union that the undertaking to have recourse to arbitration or to the International Court was contrary to the principles of the sovereignty and equality of States, one must also agree that Article 36 of the Statute of the International Court of Justice was contrary to those principles. Yet the Union of Soviet Socialist Republics was a Party to the Statute of the International Court of Justice.

30. The French delegation had sensed a certain feeling of mistrust on the part of the representative of the Soviet Union towards international bodies which were made up in such a way that their members were not

¹ I.C.J. Reports 1949, p. 174.

² I.C.J. Reports 1955, p. 4.

well informed of the interests and problems of countries having a socialist form of government. It was no longer a question of principle but of the practical adaptation of international bodies to their duties. In that connexion France, which had accepted the compulsory jurisdiction of the International Court of Justice, could cite the odd paradox with respect to the composition of the Court, that the States bound by its compulsory jurisdiction submitted their disputes to judges, some of whom were nationals of States which—like the Soviet Union—refused to subscribe to the optional clause of compulsory jurisdiction. That paradoxical situation would become still more serious if the General Assembly were to adopt the proposal to increase the number of judges. The French delegation was also opposed to that proposal for technical reasons concerning due process of law.

31. He hoped that the Soviet Union delegation would agree to return the problem to its proper level, namely, that of the practical organization of arbitration commissions or bodies which would ensure for everyone adequate guarantees of impartiality and competence.

32. Mr. AYCINENA SALAZAR (Guatemala) complimented the International Law Commission and its Rapporteur, Mr. François, on their diligence in drawing up the draft concerning the law of the sea. Since the meeting of plenipotentiaries would provide the opportunity for discussing in detail all questions related to the project, he would not go into it in detail, though he recognized the value of the opinions expressed by other delegations. He would like, however, to inform the Committee of certain provisions of Guatemalan law concerning the law of the sea.

33. An Act of June 1934 concerning the administration and policing of the ports of the Republic gave port authorities jurisdiction over merchant ships of all nationalities sailing in Guatemala's territorial waters, the term being understood as extending "up to twelve miles" from low-water mark. The Act had been replaced in 1939 by regulations which had not altered the breadth of the territorial sea. In June 1940 the Government had promulgated a decree which provided, in article 1, that enemy submarines would not be allowed access to the Republic's territorial waters, which extended twelve miles from low-water mark and included the historic Bay of Amatique. The Decree had been ratified by the Legislative Assembly in April 1941; like the regulations of 1939, it was still in effect. The Civil Code of 1947 introduced a new factor: it specified that the breadth of the maritime zone belonging to the national domain was determined in accordance with international law. Under the Penal Code of 1936, offences committed in territorial waters fell within the competence of national courts in certain specific cases, subject to the provisions of international treaties. Lastly, the Act of 1948 concerning civil aviation provided that Guatemala exercised exclusive sovereignty over the air space above its territory and territorial waters. All the above-mentioned texts clearly indicated that Guatemalan law set the breadth of the territorial sea as twelve miles, which was in keeping both with international law and with article 3 of the draft.

34. An Act of 1949 concerning oilfields provided that all oilfields situated within the Republic's land and maritime frontiers, including the continental shelf, belonged to the nation.

35. In the words of the Constitution of 1 March 1956 (article 3), "the domain of the nation shall include its territory, soil, subsoil, territorial sea, continental shelf and air space, and shall extend to the natural resources and wealth existing therein, without prejudice to free maritime and air navigation in accordance with the law and the provisions of international treaties and conventions". His delegation was happy to say that the provisions of that Constitution relating to the continental shelf were perfectly compatible with the corresponding provisions of the International Law Commission's draft.

36. Guatemalan legislation contained no provisions regarding the contiguous zone. He could therefore be quite objective in stating that States whose territorial sea extended twelve miles were at a disadvantage in that regard. As, according to the draft of the International Law Commission, the contiguous zone could not exceed twelve miles, those States had no contiguous zone.

37. In 1955, at the first regular meeting of the Organization of Central American States, the Ministers of Foreign Affairs of the Central American States had declared it their intention to defend the territorial, economic and cultural heritage of the Central American States, including the continental shelf and the territorial and epicontinental seas. The Guatemalan Government would remain faithful to that principle, but it knew that the best way of observing it was by acting in a spirit of international co-operation.

38. His delegation was among those that had proposed a conference of plenipotentiaries. It believed that such a conference would be useful, especially if the preparations for it were adequate and if it took account not only of the legal but also of the technical, biological, economic and political aspects of the law of the sea. If the conference did not succeed in drawing up a convention that would be acceptable to a large number of States, it would be able to contribute to the codification and progressive development of international law by adopting other kinds of instruments. If no agreement could be reached on certain points, the error committed at The Hague Conference should be avoided and a convention should be concluded on the points of agreement.

39. Mr. CARMONA (Venezuela) joined in the tribute paid to the International Law Commission, its Special Rapporteur and its Chairman.

40. The matters discussed were of paramount importance not only from the economic point of view but also from the point of view of national security. They were closely linked with the international political situation, but it was the technical aspects of the questions that offered the greatest possibility for understanding and collaboration. Maritime problems had caused difficulty even on the American continent where there was close co-operation between States. As chairman of the research group at the tenth Inter-American Conference at Caracas, he had had first-hand experience of the difficulty of reconciling ideas and interests, even at the regional level. The Conference at Ciudad Trujillo, following the Caracas conference, had unanimously recognized the rights of coastal States in respect of the continental shelf. It had also recognized the special right of coastal States to take steps to conserve the natural resources of the high seas without having the exclusive right of exploitation of the living

resources of the high seas. Except on certain minor points, the American States had reached compromise solutions which formed the basis for a new set of rules of international law in a number of fields which previously had been the subject of doubt or controversy.

41. His delegation supported in principle the proposal for a specialized conference at which all States would be represented.

42. The draft prepared by the International Law Commission, which could be called the Code of International Maritime Law, comprised four main parts: the territorial sea, the high seas, fishing rights, and the continental shelf. His delegation would merely make a few general observations and would reserve its right to express its views on the technical questions at the proposed conference. Venezuela had already had occasion to declare its views at the Third Meeting of the Inter-American Council of Jurists and at the Conference at Ciudad Trujillo.

43. Most American States quite reasonably wished to extend the breadth of the territorial sea. The difficulty was to establish a limit acceptable to all. The traditional three-mile limit was based on an antiquated notion which was no longer in keeping with present-day realities and needs. The development of the law should keep pace with technical progress, and that was particularly true of a concept such as the territorial sea, which played so vital a part in the defence of sovereignty and the protection of economic interests. For those reasons the Venezuelan Act of 25 July 1956 had established the breadth of the territorial sea at twelve miles. In adopting the Act, the Venezuelan Parliament had wished not only to give expression to a national aspiration but to conform to the ideas expressed by the International Law Commission in its more recent reports, and to a trend which today was universal. The Venezuelan nation could not accept any derogation of the principles expressed in the territorial sea Act of 25 July 1956. Venezuelan law was on the whole consistent with the Commission's draft with regard to the establishment of baselines. The latter should, however, be determined not by geographical factors alone, but also in the light of the circumstances peculiar to each case.

44. Venezuela had the utmost respect for the principle of freedom of navigation on the high seas, but that freedom was subject to restriction arising out of considerations of national security and international agreements. Venezuela could not accept the Commission's proposal that the limit of the territorial sea should be determined by the median line method; the particular circumstances of each region and each State had to be taken into account.

45. The same was true of bays. The concept of historic bays and historic rights was unacceptable, as its adoption would sanction acquired advantages that were not justified in all cases. Article 13 of the draft raised the difficult question of what was meant by an "estuary".

46. His delegation could not accept the principle of equidistance for the delimitation of the territorial sea (article 14).

47. Venezuela supported all the proposals concerning the duty to render assistance at sea, and the repression of the slave trade and piracy, the latter being interpreted according to its present-day meaning in international law.

48. With regard to the question of the living resources of the high seas, Venezuelan law recognized the right of the State to establish protected zones of the high seas without regard to the conditions established by the International Law Commission. It was not a question of determining whether there were historic rights or who had or had not fished off a country's coast. The Conference at Ciudad Trujillo had engaged in heated debate on the subject and had reached the conclusion that the coastal State had a right to establish rules. While, no doubt, that right did not imply that foreign fishermen could be excluded, there was no basis whatever for the doctrine of historic rights.

49. With regard to the continental shelf, his delegation was gratified to note that the International Law Commission had adopted the principles which were embodied in the recent Venezuelan Act. Venezuela had stated at Ciudad Trujillo that it could not agree to a foreign State establishing pipelines and high-voltage power cables on the Venezuelan continental shelf without its authorization. That policy seemed to be accepted in America, and it should be extended to the world generally, for the coastal State should have the right to protect itself in such matters.

50. The provisions relating to compulsory arbitration and the compulsory jurisdiction of the International Court of Justice were more far-reaching than the principles accepted by many Members of the United Nations. It would suffice to mention the methods for the peaceful settlement of international disputes already well developed.

51. Mr. CARDIN (Canada) thought that the report produced by the International Law Commission and its Rapporteur provided a satisfactory basis upon which to build universally acceptable rules of law in a field where, in recent years, unilateral action by States and the international disputation following from it had become all too frequent.

52. The Canadian Government supported the draft resolution (A/C.6/L.385) providing for the convening of an international conference.

53. Although it would take a good deal of work to prepare such a conference, the Canadian Government would like to see it held as soon as possible, preferably in 1957. The Canadian Government was greatly concerned that the absence of generally accepted rules adapted to the technological advances of the past fifty years had led to an increasing tendency on the part of States to take unilateral action to protect what they considered to be their valid national interests. That had resulted in conflicts, and it was high time to re-examine the rules of international law with a view to reaching agreement on provisions which would be generally accepted.

54. Canada, like many other maritime States, had for many years observed the rule of the three-mile limit. But, for some time, States had been extending their jurisdictional rights beyond the limits of the territorial sea in respect of such matters as customs control. In the last decade, States had claimed proprietary rights to resources of the subsoil and sea-bed of the continental shelf. More recently, the attention of States had been focused on the living resources of the sea off their shores. Thus the concept that a State's jurisdiction for all purposes should end at three miles was steadily losing ground, and was therefore no longer in accord with what many States regarded as their essen-

tial needs. A rule of law that no longer met the needs which it was supposed to regulate could not long be maintained. Consequently it was necessary to look for arrangements which would meet the essential needs of coastal States, while at the same time recognizing that the principle of the freedom of the seas was of common benefit to all countries. The problem was to reconcile the special interest of coastal States in off-shore areas contiguous to their coasts with the general interest in the freedom of the seas.

55. Canada could not agree with the position taken by some delegations that the breadth of their territorial sea should be left to individual States to determine in accordance with their special interests. That was precisely the attitude which had brought about the uncertainty in international law on the subject, and which could ultimately result in a chaotic situation where no State would be certain of its rights. It was essential, therefore, to strive for international agreement on a uniform practice.

56. The Canadian delegation believed that the three-mile limit was not adequate for the enforcement of customs, fiscal and sanitary regulations, nor for the protection and regulation of fisheries. That could be achieved if the breadth of the territorial sea were extended to twelve miles. That would allow complete fisheries, customs, fiscal and sanitary control and regulation within that limit. However, the general extension of the breadth of the territorial sea could have

important consequences for the freedom of sea and air navigation.

57. An alternative approach which would not have those consequences would be to agree on a contiguous zone of twelve miles, as recommended by the International Law Commission, but with the modification that it cover fisheries as well. However, to be acceptable to Canada, the rights over fisheries in that zone would have to be as complete as in the territorial sea. Recognition of such a zone would partially solve conservation problems by placing under the control of coastal States the fishery resources on which local populations depended. It would help greatly in the solution of administrative problems connected with fisheries, by allowing the coastal State to regulate the fishing activities of its nationals without the complications resulting from an international fishery. Similarly, it would solve the problems of customs, fiscal and sanitary regulations, which could be expected to assume greater and greater importance.

58. The divergence of views revealed in the course of the discussion in the Sixth Committee concerning the extent of the rights and duties of States with regard to the sea showed that all States, if they were to avoid a chaotic situation, must approach the proposed conference in a spirit of conciliation and must be prepared to accept compromises.

The meeting rose at 1 p.m.