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Summary record of the 375th meeting

Topic:
Other topics

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gime of the territorial sea" and "Scheme of the present report" be inserted after paragraphs 1, 8 and 15 respectively, while Mr. EDMONDS suggested that paragraph 17 be inserted after paragraph 1, before the first subheading.

It was agreed that it should be left to the Rapporteur to decide the final layout of the introduction, in the light of the various comments and suggestions made.

40. The CHAIRMAN proposed that, in paragraph 7, a suitable reference be made to the fact that, in considering the regime of the high seas at its seventh session, the Commission had taken into account the report of the International Technical Conference on the Conservation of the Living Resources of the Sea ("the Rome Conference").

It was so agreed.

41. Sir Gerald FITZMAURICE, referring to paragraphs 19 and 20, conceded that, with the law of the sea, it was probably difficult to maintain a clear distinction between the codification and the progressive development of international law, but felt that was much less true of other items on the Commission's programme of work. Such being the case, paragraph 20 was worded in an unnecessarily general way.

42. Mr. EDMONDS felt that the first sentence of paragraph 20, which stated that "the Commission has become more and more convinced that the very clear distinction established in the Statute between these two activities cannot be maintained in practice", was in any case too categorical. The words "cannot be maintained in practice" should be replaced by "is difficult to maintain".

43. Mr. FRANÇOIS, Rapporteur, accepted that amendment, to which could be added the words "especially as regards the law of the sea", in order to meet the point made by Sir Gerald Fitzmaurice.

44. Mr. ZOUREK felt that, in view of the Commission's insistence in previous reports that rules or articles approved by it expressed the existing law, the last sentence of paragraph 20, which stated that the Commission had abandoned the attempt to distinguish between articles which came within the category of codification and those which came within the category of progressive development, should also be toned down.

45. Mr. SANDSTRÖM agreed with Mr. Zourek. The last sentence of paragraph 21, which stated that "in general the rules adopted by the Commission will not have the desired effect unless they are confirmed by a convention", was open to the same objection, that it went too far.

46. Mr. FRANÇOIS, Rapporteur, recalled that the idea of a clear distinction between the codification and the progressive development of international law had been most warmly defended within the Commission by Sir Hersch Lauterpacht, but that the Commission as a whole had been increasingly reluctant to follow him in that direction and had finally abandoned the idea altogether. In the present report, he, as Rapporteur, had accordingly taken it on himself to omit all reference to whether a particular article was *lex lata* or *lex ferenda*,

even where such reference had appeared in the Commission's previous reports. Having done so, however, he felt it was imperative to explain why the Commission had changed its practice.

47. Sir Gerald FITZMAURICE agreed that the Commission should not attempt to indicate whether each article approved by it was *lex lata* or *lex ferenda*. It was going too far, however, to say that all attempts to distinguish between the codification and the progressive development of international law must be abandoned. There was a distinction between the two, although it might not always be possible to say exactly where it lay. The point which the Rapporteur wished to make appeared to be made adequately in the first part of paragraph 20, and the last sentence might well be deleted.

48. Mr. FRANÇOIS, Rapporteur, felt that at any rate the first part of that sentence must be retained, in order to show why the Commission had gone back on its previous practice.

49. Sir Gerald FITZMAURICE suggested that in that case, the first part of the sentence in question be amended to read: "At first the Commission tried to specify which articles were in the one category and which in the other, but has had to abandon the attempt."

50. Mr. PAL opposed the deletion of the second part of the last sentence in paragraph 20, since it was necessary in order to explain the first part.

It was agreed that the Rapporteur should re-draft paragraph 20 in the light of the various observations and suggestions which had been made.

The meeting rose at 6.10 p.m.

375th MEETING

Tuesday, 26 June 1956, at 10 a.m.

CONTENTS

	<i>Page</i>
Consideration of the Commission's draft report covering the work of its eighth session (<i>continued</i>)	
Chapter II: Law of the sea (<i>continued</i>)	
Introduction (A/CN.4/L.68/Add.1) (<i>continued</i>)	257
Part. II: The high seas (A/CN.4/L.68/Add.3)	
Article 1: Definition of the high seas	260
Article 2: Freedom of the high seas	261

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

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

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (continued)

Chapter II: Law of the sea (continued)

Introduction (A/CN.4/L.68/Add.1) (continued)

1. Referring to paragraphs 21¹ *et seq* the CHAIRMAN, speaking as a member of the Commission, doubted whether it was advisable to recommend that a diplomatic conference be convened for the purpose of concluding a convention on the law of the sea. It was true that such a recommendation would be in accordance with the Commission's Statute, but experience had shown that the vast majority of conventions were ratified by only a handful of States and even their ratifications were as often as not accompanied by reservations. In the case of a convention on the law of the sea, the reservations would most likely be such as to nullify the convention's whole effect.

2. The Commission should not overlook the new source of international law which was represented by the resolutions and declarations of the General Assembly and the other main international organs. Although they had no binding force, they had great moral force, and it should be borne in mind that even conventions were only binding on the States which ratified them. In his view, therefore, the Commission should confine itself to a recommendation to the effect that, if the General Assembly found it impracticable to take the necessary action itself to bring into force the provisions submitted to it by the Commission, it should convene a diplomatic conference for the purpose; in that way the Assembly would be able to instruct the conference to take whatever action seemed best designed to achieve the end in view.

3. Mr. SPIROPOULOS pointed out that, under articles 22 and 23 of its Statute, the Commission was obliged to recommend one of four alternative courses to the General Assembly. With regard to what the Chairman had said, the Commission could be quite sure that the General Assembly would never itself adopt or endorse the rules submitted to it by the Commission. The General Assembly had even been unwilling to adopt the Nuremberg principles, which had simply repeated the relevant parts of the United Nations Charter almost word for word. Every State would object to one article or other of the law of the sea, with the result that the text would have no chance of acceptance as a whole.

4. Mr. SALAMANCA said that he had no objection to paragraphs 21 and 22. The various items on the Commission's programme of work were also on the agenda of the Sixth Committee, and the responsibility for failure to codify international law in a field where the

General Assembly had previously decided it should be codified did not rest solely or mainly with the Commission, but with the General Assembly. He was by no means pessimistic, however, about the fate of the Commission's draft on the law of the sea. The General Assembly would certainly not be able to examine the draft in detail, and even if differences of opinion arose about certain parts of it, such differences could always be bridged provided the atmosphere was favourable, as he believed it would in fact be. Nor was he as pessimistic as the Chairman about the possibility of concluding a convention enjoying a wide measure of support. Even unratified conventions often played a useful role in clarifying the issues involved and laying down a norm of international conduct.

5. Mr. LIANG, Secretary to the Commission, recalled that although, in the report on its fifth session, the Commission had suggested various modes of action which the General Assembly might take on the Commission's preliminary drafts on fisheries, the contiguous zone and the continental shelf, the General Assembly itself had not spent much time weighing the comparative advantages of the courses proposed but had taken the action which had governed all the Commission's subsequent work on the whole subject of the law of the sea. There was further evidence to show that the General Assembly, although the Commission's parent body, was not, for various reasons, an ideal forum for the consideration and adoption of conventions of a technical nature. The only technical convention which the General Assembly had itself adopted was the Convention on the Prevention and Punishment of the Crime of Genocide, the previous history of which had placed it in a category apart. As had apparently been foreseen in the Statute itself, the General Assembly was not equipped for, and was most reluctant to undertake, the detailed examination of most of the drafts submitted to it by the International Law Commission; and that seemed particularly true of the draft on the law of the sea.

6. That draft clearly contained so many new elements that if it had to be regarded as coming within the sphere either of the codification or of the progressive development of international law, it must, by and large, be regarded as progressive development. That was the justification for the Rapporteur's proposal that the General Assembly be recommended to convene a conference to conclude a convention. The widespread interest in conservation of fisheries, and the realization of the General Assembly's inability to deal with that subject itself, had led to the convening of the Rome Conference. Similar factors, in his view, would most probably lead to the convening of a new conference to consider the Commission's draft on the law of the sea as a whole. But whether the outcome of that conference would be a convention or, as the Chairman had suggested, a resolution or declaration, was impossible to foretell.

7. In connexion with a suggestion by Mr. Sandström at the previous meeting,² he suggested that the last sentence of paragraph 21 be deleted altogether since its gist was

¹ Para. 21 reads as follows:

"21. In these circumstances the obvious way of giving practical effect to these provisions is to conclude a convention to bring them into force. This does not mean that if a convention is not concluded the Commission's efforts should be regarded as wasted. The mere formulation of certain rules by the Commission may contribute—regardless of whether they are embodied in a convention—to their acceptance as rules of positive law. But in general the rules adopted by the Commission will not have the desired effect unless they are confirmed by a convention."

² A/CN.4/SR.374, para. 50.

already expressed in the first sentence. The words "In these circumstances" at the beginning of the first sentences also appeared to be inappropriate.

8. Mr. SANDSTRÖM said he could certainly agree to the deletion of the last sentence of paragraph 21 but he did not understand Mr. Liang's difficulty over the words "In these circumstances". The following words, "the obvious way of giving practical effect to these provisions", might, however, be amended to read "the most suitable way of giving practical effect to those provisions".

9. Mr. SALAMANCA said that there were really only two alternatives before the General Assembly. If it did not see fit to convene a conference to carry the whole matter farther, it could, in theory, simply take note of the Commission's draft; but in practice, that would be tantamount to referring it back to the Commission for further consideration, since some delegations would undoubtedly argue that certain aspects of the matter needed further consideration. Further consideration by the Commission, however, would in his opinion be fruitless, since the Commission had completely exhausted the whole subject and had carried discussion of it as far as it possibly could in present circumstances. The whole value of paragraph 21 lay in the fact that it made that clear, at least by implication. It might be that its wording could be improved, but it was essential that the Commission should indicate plainly that it could do no more on the law of the sea; otherwise, there was a danger that it would find the whole question on its agenda again at its next session.

10. Mr. PAL agreed that, of the four alternative courses allowed to it by its Statute, only the third and fourth, namely to recommend that the General Assembly should recommend its members to conclude a convention or that it should itself convene a diplomatic conference for that purpose, were appropriate. But what action the General Assembly might take on the Commission's recommendation there was no need for the Commission to consider. Nor was it for the Commission to try to assess the value of its work in the event of the General Assembly's failing to do as it recommended. He accordingly proposed the deletion of the last three sentences of paragraph 21, retaining only the first sentence.

11. Mr. FRANÇOIS, Rapporteur, accepted that proposal. On the other hand, he felt that the words "In the circumstances" were entirely appropriate. The purpose of the preceding paragraph 20 was to make clear that the draft on the law of the sea was in the nature of the progressive development of international law rather than of its codification. It was precisely "in those circumstances" that the conclusion of a convention appeared to be the best way of bringing the draft into force. As Mr. Spiropoulos had said, there was no likelihood whatsoever of the General Assembly's adopting the Commission's draft, if only because its detailed examination would require the advice of a number of experts—on fisheries, on maritime law and so on—whose services had been available to the Commission but were not available to the Sixth Committee. The draft had taken eight years to elaborate and had been prepared with the assistance of all the necessary experts. It was for that

reason that he had stated in paragraph 23 that, in the Commission's view, the proposed diplomatic conference had been "adequately prepared" by the work the Commission had done; and it was for that reason too that he felt it would be quite impracticable for the Commission to recommend that the draft be discussed by the Sixth Committee. Another eventuality to be avoided was that the General Assembly, after a discussion which could not be more than superficial, should refer the draft back to the Commission, a decision which would serve no practical purpose.

12. The CHAIRMAN, speaking as a member of the Commission, said that his previous statement appeared to have been misunderstood. He fully agreed with the other members of the Commission that the General Assembly was not the appropriate body to deal with the technical, scientific and economic aspects of many of the questions covered by the law of the sea. As he understood it, the Assembly, after holding a general discussion on the Commission's draft, would either take a procedural decision to take no action or just to take note of the report or, as seemed more probable, to convene a general conference at which the delegations of States would include jurists, biologists and economists. He was accordingly in full agreement with the idea that the Commission should recommend in its report that, if the Assembly found it impracticable to discuss the question of the law of the sea in all its complex detail, it should refer the question to a diplomatic conference.

13. The question he had raised was quite a different one—namely, that of the desirability of stating categorically, as was done in the first sentence of paragraph 21, that the obvious and thus the only way of giving practical effect to the rules which the Commission had enunciated was to embody them in a convention. In the first place, he did not think that the Commission could specify the course which an international conference should adopt. The conference might, for example, wish to adopt a draft convention on the territorial sea, but only a resolution on the subject of the continental shelf. Furthermore, he found it impossible to accept the statement that a convention was the only solution. Such a contention was quite untrue. In current international practice, political assemblies made much greater use of other types of instrument than of conventions. Perhaps he took a rather optimistic view of the efficacy of resolutions adopted by international conferences, but at all events he felt that such resolutions were to be regarded as having a moral and quasi-legislative force and as constituting potential rules of international law.

14. Quite apart from the question of whether a convention was the only solution, he disagreed with the idea of postulating a single convention for the entire law of the sea. Had the Commission merely recommended a single draft convention on the territorial sea alone, the idea would have been relatively acceptable. But a single convention on piracy, collisions, the continental shelf, fisheries and straight baselines, to mention only a few questions, would be so heterogeneous in character as to be unacceptable to States.

15. Mr. AMADO said that he was fully satisfied with

paragraph 21 of the draft report as it stood. The task of the Commission was to develop or codify international law, and the only way in which binding force could be given to the rules that it enunciated was for them to be embodied in a convention. He was rather sceptical regarding the moral force of resolutions adopted by diplomatic conferences. Such a practice was admittedly quite common in Latin American conferences, but was usually employed as a means of enunciating general principles already enjoying wide acceptance. In the case of rules which had been formulated but not yet put into force, the only effective method was that of an international convention.

16. Sir Gerald FITZMAURICE said that the Chairman's point appeared to be that there was a difference between recommending that a conference be convened and recommending what the conference should do. He (Sir Gerald Fitzmaurice) was in agreement with that view. He could not see why a diplomatic conference should be bound to produce a convention. Conferences could take, and had taken, other action, such as the adoption of a resolution or another instrument of a certain utility. Perhaps the views of all the members of the Commission could be met if all but the first sentence of paragraph 21 were deleted and the words "to conclude a convention to bring them into force" in the first sentence were replaced by the words "to convene a diplomatic conference" or by the words "to conclude a convention or some other appropriate instrument". The first solution would also involve deleting the words "to conclude a convention" from the first sentence of paragraph 23.

17. Mr. KRYLOV agreed with Mr. Salamanca and Sir Gerald Fitzmaurice. The General Assembly and its Sixth Committee could not deal with all the complex aspects of the law of the sea, and the question, after general discussion by the Assembly, would have to be referred to a specialized conference. As a matter of fact, the convening of such a conference was explicitly referred to in the text adopted by the Commission, on the proposal of Mr. Spiropoulos,³ for the article on the breadth of the territorial sea. Paragraph 21 might be amended on the lines proposed by Sir Gerald Fitzmaurice, provided its main point were retained.

18. Mr. SANDSTRÖM agreed with Mr. Salamanca. As Mr. Spiropoulos had pointed out, however, under article 23 of the Commission's Statute the Commission could not recommend the convening of a conference except in order to conclude a convention.

19. Mr. LIANG, Secretary to the Commission, said that he could not quite follow Mr. Spiropoulos' argument that a conference could only be convened to conclude a convention. Article 23 of the Commission's Statute related to codification of international law and had much less bearing on the progressive development of international law. In his opinion, the Rapporteur was quite right in recommending that the rules enunciated by the Commission should be embodied in a draft convention and that the Assembly should, if it saw fit, refer the

question to a conference with a view to the conclusion of a convention. What the conference itself did was quite another matter. It had a variety of courses open to it. The Paris Conference of 1856 had, for instance, merely adopted a declaration against privateering and not a formal convention. The Commission could obviously not specify what the conference was to do, and he did not think that the General Assembly could do so either.

20. As for the question of whether there should be one or more conventions, he did not think that the Rapporteur, when drafting his text, had intended to imply that the whole question must necessarily be dealt with in a single instrument. It might well prove necessary to have one convention on fisheries, another on the continental shelf, and yet another on the territorial sea. Perhaps it would be better to change the words "a convention" in the first sentence of paragraph 21 to "a convention or conventions".

21. Mr. SPIROPOULOS said that he could not agree with the Secretary's interpretation of article 23 of the Commission's Statute. He did, however, agree with Sir Gerald Fitzmaurice and those who had expressed similar views before. Since there was no point in prolonging the discussion, he proposed that the Commission take a decision on the more important matters of principle and refer the text to the drafting committee for re-drafting.

22. Mr. SALAMANCA recalled that the General Assembly, in its various resolutions on the question, had requested the Commission to codify the entire law of the sea and to submit a single draft on the whole problem. Reference might be made in the Commission's report to the views of the General Assembly regarding the unity of the question.

23. Faris Bey el-KHOURI said that the Commission, in the paragraphs under discussion, was not attempting to tell the General Assembly what it should do but merely making recommendations in accordance with its Statute. It should accordingly submit that part of its report as it stood and leave it to the General Assembly to decide what action it wished to take. The amendments proposed by Sir Gerald Fitzmaurice were unobjectionable but were also unnecessary.

24. Mr. PAL wondered whether it was necessary to retain the last sentence in paragraph 23 which stated that "the Commission considers that such a Conference has been adequately prepared by the work the Commission has done". He was prepared to accept the first sentence of paragraph 21, the whole of paragraph 22 and paragraph 23 less the last sentence.

25. Mr. ZOUREK considered that the proposal to refer to "a convention or conventions" instead of "a convention" in the first sentence of paragraph 21 might be acceptable to the majority of the members of the Commission. Though it was no unusual practice for conferences to vote resolutions not carrying the same force as an international convention, he did not think it necessary to draw attention to that possibility.

26. He was not in favour of deleting the last sentence of paragraph 23, as Mr. Pal had just suggested. The

³ A/CN.4/SR.362, para. 66.

sentence made it clear that the Commission considered that the codification of the law of the sea had been so prepared that any diplomatic conference convened to discuss it would have all the necessary facts before it on which to base its decisions.

27. The CHAIRMAN urged that the Commission adopt Mr. Spiropoulos' proposal to decide major questions of principle and leave the re-drafting of the relevant portions of the report to the drafting committee. Were that proposal accepted he would indicate what, in his opinion, were the points on which a decision was required, without prejudice to the right of members to call for a decision on others.

It was so agreed.

28. The CHAIRMAN said that first of all, since there appeared to be no objections, he would assume that the Commission was agreed on the desirability of recommending that a diplomatic conference of plenipotentiaries be convened to deal with the law of the sea.

29. The second point was the reason for calling such a conference. Since it was hardly advisable to question the ability of the General Assembly to deal with the subject, he would propose that the Commission draw the Assembly's attention to the fact that many of the questions covered by the law of the sea possessed a variety of aspects, technical, scientific and economic, as well as legal, which were best dealt with by a specialized conference.

30. The third point, the purpose for which the conference should be convened, was a more delicate one, since it raised an important question of principle. If the Commission stated that the purpose of the conference was to conclude a convention as the sole effective means of bringing into force the rules which it had drafted, it would, in effect, be making a categorical pronouncement both on the manner in which international law was formed and acquired binding force, and on the extent to which various types of international instrument were binding on States. According to article 38 of the Statute of the International Court of Justice, international custom was as much a source of international law as international conventions, and resolutions adopted by international conference might well constitute in future an element of such international custom. The Commission would, therefore, be wise to avoid raising so delicate a problem. He accordingly proposed that it adopt Sir Gerald Fitzmaurice's suggestion⁴ and amend the first sentence of paragraph 2 on the following lines: "In these circumstances, the obvious way of giving practical effect to these provisions is to convene a diplomatic conference to adopt a convention or other appropriate instrument." The remainder of paragraph 21 would then be deleted, and the wording of subsequent paragraphs adjusted in accordance with the decision.

The Chairman's proposal was adopted.

31. The CHAIRMAN invited the members of the Commission to take a decision with regard to paragraph 26.⁵

⁴ See para. 16, above.

⁵ Para. 32 in final report (A/3159).

32. After some discussion, *it was agreed*, on the proposal of Mr. Edmonds, to delete the sentence "They do not pre-judge the rights of belligerents in time of war", at the end of sub-paragraph 1.

33. The CHAIRMAN then invited the Commission to take up part II of chapter II in its draft report (A/CN.4/L.68/Add.3).

Part II: The high seas

Article 1: Definition of the high seas

34. The CHAIRMAN considered that paragraph 2 of article 1 which read: "For the definition of the territorial seas see Part I, above", as inappropriate in an article and should be transferred to a footnote.

35. Mr. ZOUREK explained that paragraphs 2 and 3 had been added because the definition contained in the text of article 1 as adopted at the seventh session was a definition by exclusion and had been incomplete since internal waters had not been defined.

36. Sir Gerald FITZMAURICE suggested that the Chairman's point, which was purely one of form, could be met by the deletion of paragraph 2 and the insertion of the words "as defined in part I above" in parenthesis after the words "the territorial sea" in paragraph 1.

Sir Gerald Fitzmaurice's amendment was adopted.

37. In reply to a question by Mr. AMADO as to the meaning of the last sentence in the second paragraph of the comment, Mr. KRYLOV explained that it referred solely to the special cases mentioned in that paragraph.

38. Sir Gerald FITZMAURICE questioned whether the whole of the second paragraph in the comment, which was confusing and might have far-reaching implications, should be adopted without further discussion and definition.

39. Mr. FRANÇOIS, Rapporteur, shared Sir Gerald Fitzmaurice's doubts. He had inserted the paragraph at the request of one member but felt that as its subject was not of great importance it could be omitted.

40. Mr. ZOUREK observed that without that paragraph, article 1, which in certain cases could not apply for geographical reasons, would be too categorical.

41. Mr. KRYLOV, while agreeing with the Rapporteur that the paragraph was not vitally important, considered that it served a purpose in making clear the status of landlocked seas.

42. The CHAIRMAN saw no serious objection to retaining the paragraph.

43. Sir Gerald FITZMAURICE asked whether the statement contained in the third sentence of the paragraph was in fact correct. He was uncertain whether wide stretches of water communicating with the high seas by a narrow strait should be regarded as internal seas. The question required careful examination so as to establish what was the existing law on the subject.

44. Mr. FRANÇOIS, Rapporteur, pointed out that the rule set forth in the paragraph was to be found in textbooks of international law.

45. Mr. KRYLOV, agreeing with the Rapporteur, referred Sir Gerald Fitzmaurice to Oppenheim's *International Law*. The rule had been defended by the United Kingdom delegation to the Montreux Conference of 1936. When asking the Rapporteur to insert a passage on internal seas, he had had in mind such cases as the Sea of Azov which, together with its strait, lay entirely within Soviet territory.

46. Mr. PAL, pointing out that no mention of internal seas had been made elsewhere in the draft, expressed the hope that they were not being assimilated to internal waters.

47. The CHAIRMAN observed that, although the status of internal seas as such was not dealt with in the draft, the right of passage through internal seas was now referred to in the new text of article 5, in the part relating to the territorial sea.

48. Mr. SANDSTRÖM believed that, though the paragraph might not be strictly necessary, it could have value in clarifying the position of such waters as the Caspian and Black Seas.

49. Mr. SPIROPOULOS said that the legal status of internal waters and internal sea was identical. The distinction between lakes and internal seas was established according to whether the water was fresh or salt.

50. Mr. KRYLOV, observing that definitions generally created difficulties, said that he himself was uncertain as to the precise implication of the reference in certain treaties to the Caspian as the Russo-Iranian Sea.

51. Sir Gerald FITZMAURICE remarked that, according to the second paragraph in the comment, since there were two coastal States on the Caspian, that sea would count as high seas.

52. Mr. KRYLOV considered that conclusion to be highly controversial.

53. Faris Bey el-KHOURI asked what was the status of the Great Lakes on the border between Canada and the United States.

54. Sir Gerald FITZMAURICE observed that it might be deduced from the third sentence in the paragraph that rivers were "internal seas"—a further instance of the kind of confusion to which such a passage might give rise.

55. Mr. EDMONDS questioned the wisdom of retaining a statement which had raised doubts in the minds of certain members and which did not appear to be strictly necessary. He therefore formally proposed the deletion of the second paragraph in the comment.

Mr. Edmonds' proposal was rejected by 4 votes to 2, with 6 abstentions.

Article 2: Freedom of the high seas

56. Mr. ZOUREK, referring to the French text of article 2, considered it essential to insert the word "légitiment" after the word "prétendre"; otherwise there would be no limit to the claims which States might make.

57. Sir Gerald FITZMAURICE pointed out that there was a slight difference between the meanings of the French

word "prétendre" and the English word "purport". Though the English text already implied that no State could validly purport to subject any part of the high seas to its sovereignty he would have no objection to inserting the word "validly" if, with that change, the French text would be more acceptable.

58. Mr. KRYLOV did not think any modification necessary, since Mr. Zourek's point was already implicitly met in the text as it stood.

59. Mr. SANDSTRÖM, on grounds of redundancy, proposed the deletion of the word "proper" from the phrase "the law of the sea proper" at the end of the first paragraph of the comment.

It was so agreed.

60. Mr. SALAMANCA said the Commission should suspend judgment as to whether or not there was a freedom to conduct nuclear weapon tests on the high seas. In rejecting Mr. Pal's proposal,⁶ no decision had been taken on that point pending the publication of the findings of the scientific committee established by the General Assembly in its resolution 913 (X) concerning the effects of atomic radiation.

61. Mr. ZOUREK considered that the comment accurately reflected the course followed by the Commission and that no change was required.

62. Sir Gerald FITZMAURICE expressed strong objection to the passages contained in the second sentence of the second paragraph and the first sentence in the third paragraph because they might give the impression that the Commission was denying the existence of the freedom to conduct ordinary scientific research. In view of the decisions taken by the Commission at the present session, he failed to understand on what grounds the Rapporteur had omitted to mention that freedom.

63. Mr. KRYLOV endorsed Sir Gerald Fitzmaurice's objections.

64. Mr. SALAMANCA said that a clear distinction should be made in the comment between scientific research and nuclear weapon tests, because for political reasons the Commission had declined to make any express pronouncement on the latter.

65. Mr. FRANÇOIS, Rapporteur, pointed out that up to the present nuclear weapon tests had been considered part of scientific research.

66. Mr. SALAMANCA saw no reason why the Commission should not take into account the new development which had supervened in the form of a new committee to study the effects of atomic radiation.

67. The CHAIRMAN suggested that the freedom to carry out scientific research might be mentioned in the comment among the freedoms of the high seas, together with a statement that the Commission had made no express pronouncement as to whether or not States were entitled to conduct nuclear weapon tests on the high seas.

⁶ A/CN.4/SR.335, para. 36.

68. Mr. PAL considered it essential that the proviso contained in the third sentence of the first paragraph should apply specifically to nuclear weapon tests.

69. The CHAIRMAN said that that limitation was already made explicit in the text.

70. Mr. SANDSTRÖM suggested that Mr. Pal's pre-occupation might be met if the reference to the freedom to undertake scientific research were transposed from the third to the second paragraph.

71. Mr. FRANÇOIS, Rapporteur, had no objection to such an amendment.

72. Mr. PAL said that the modification would not give him entire satisfaction because it would still not be clear that the freedom to conduct scientific research was subject to the general principle enunciated in the third sentence of the first paragraph.

73. Mr. ZOUREK said that the difficulty was due to the position occupied in the text by the principle that States were "bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States". Perhaps that statement could be transferred so as to make clear that it governed the exercise of any of the freedoms of the high seas.

The Rapporteur was requested to make the modification suggested by Mr. Zourek.

The meeting rose at 1.10 p.m.

376th MEETING

Wednesday, 27 June 1956, at 10 a.m.

CONTENTS

	<i>Page</i>
Consideration of the Commission's draft report covering the work of its eighth session (<i>continued</i>)	
Chapter II: Law of the Sea	
Part II: The High Seas (A/CN.4/L.68/Add.3) (<i>continued</i>)	262
Article 3: Right of navigation	262
Article 4: Nationality of ships	262
Article 5: Status of ships	263
Article 6: Ships sailing under two flags	264
Article 7: Immunity of warships	264
Article 8: Immunity of other State ships	264
Article 9: Safety of navigation	264
Article 10: Penal jurisdiction in matters of collision	265
Article 11: Duty to render assistance	265
Article 12: Slave trade	265
Articles 13-20: Piracy	265
Article 21: Right of visit	266
Article 22: Right of hot pursuit	266
Article 23: Pollution of the high seas	266
Article 24: Right to fish	266

Chairman: Mr. Jaroslav ZOUREK,
First Vice-Chairman of the Commission;
Later: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS.

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the Sea

Part II. The High Seas (A/CN.4/L.68/Add.3) (continued)

In the absence of the Chairman, Mr. Zourek, first Vice-Chairman, took the chair.

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II, part II, of its draft report.

Article 3: Right of navigation

2. There were no observations on article 3 or the comment thereto.

Article 4: Nationality of ships

3. The CHAIRMAN, observing that article 4 had already been approved by the Commission, explained that the Drafting Committee had only made a slight change in paragraph 2. Since, according to paragraph 1, nationality was clearly linked with the right to fly a flag, the Drafting Committee had deemed it enough for paragraph 2 to refer solely to the right to fly a flag, which would be automatic proof of nationality.

4. Sir Gerald FITZMAURICE reaffirmed his view that the correct principle for the recognition of nationality was that of effective control. Consequently he would have preferred the third sentence in paragraph 1 to have read: "Nevertheless, for the national character of the ship to be recognized by other States, the flag State must be in a position to exercise effective control over the ship."

5. Mr. FRANÇOIS, Rapporteur, said that he had sought to meet Sir Gerald Fitzmaurice's point in the last sentence of the third paragraph of the comment.

6. Mr. EDMONDS questioned the use of the word "established" in paragraph 2; a ship's right to fly a flag was established not by documents, but by rules of law. He therefore proposed the substitution of the word "evidenced" for the word "established".

Mr. Edmonds' amendment was adopted.

7. Mr. FRANÇOIS, Rapporteur, said that he had sought to explain in the comment the considerable changes introduced by the Commission in the text of the article. He had also inserted, at the Commission's