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REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY

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Report of the International Law Commission covering the work of its third session, 16 May-27 July 1951

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Chapter I

INTRODUCTION

ORGANIZATION OF THE THIRD SESSION

1. The International Law Commission, established n pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its third session at Geneva, Switzerland, from 16 May to 27 July 1951.

2. The Commission consists of the following members:

Name	*Nationality*
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr James Leslie Brierly	United Kingdom of Great Britain and Northern Ireland
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khouri	Syria
Mr Vladimir M. Koretsky	Union of Soviet Socialist Republics
Sir Benegal Narsing Rau	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

3. With the exception of Messrs. Vladimir M. Koretsky and Jaroslav Zourek and Sir Benegal Narsing Rau, who were unable to attend, all the members of the Commission were present at the third session. Faris Bey el-Khouri attended meetings of the Commission as from 30 May, and Mr. Manley O. Hudson as from 31 May 1951.

4. The Commission elected, for a term of one year, the following officers:

Chairman:	Mr. James Leslie Brierly;
First Vice-Chairman:	Mr. Shuhsi Hsu;
Second Vice-Chairman:	Mr. J. M. Yepes;
Rapporteur:	Mr. Roberto Córdova.

5. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

Agenda

6. The Commission adopted an agenda for the third session consisting of the following items:

(1) General Assembly resolution 484 (V) of 12 December 1950: review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly.

(2) Preparation of a draft code of offences against the peace and security of mankind:

(*a*) Report by Mr. Spiropoulos;

(*b*) General Assembly resolution 488 (V) of 12 December 1950: formulation of the Nürnberg principles.

(3) General Assembly resolution 378 B (V) of 17 November 1950: duties of States in the event of the outbreak of hostilities.

(4) Law of treaties:

(*a*) Report by Mr. Brierly;

(*b*) General Assembly resolution 478 (V) of 16 November 1950: reservations to multilateral conventions.

(5) Arbitral procedure: report by Mr. Scelle.

(6) Régime of the high seas: report by Mr. François.

(7) Date and place of the fourth session.

(8) Economic and Social Council resolution 319 B III (XI) of 11 August 1950 requesting the International Law Commission to prepare the necessary draft international convention or conventions for the elimination of statelessness.

(9) Co-operation with other bodies.

(10) General Assembly resolution 494 (V) of 20 November 1950: development of a twenty-year programme for achieving peace through the United Nations.

(11) Other General Assembly resolutions relating to the report of the International Law Commission on its second session:

(*a*) General Assembly resolution 485 (V) of 12 December 1950: amendment to article 13 of the Statute of the International Law Commission;

(*b*) General Assembly resolution 486 (V) of 12 December 1950: extension of the term of office of the present members of the International Law Commission;

(*c*) General Assembly resolution 487 (V) of 12 December 1950: ways and means for making the evidence of customary international law more readily available;

(*d*) General Assembly resolution 489 (V) of 12 December 1950: international criminal jurisdiction.

7. In the course of its third session, the Commission held fifty-three meetings. It considered all the items in the foregoing agenda, with the exception of that of arbitral procedure (item 5). On this subject, the Commission had before it a "Second Report on Arbitration Procedure (A/CN.4/46), presented by Mr. Scelle, special rapporteur, who submitted therein a "Second Preliminary Draft on Arbitration Procedure". This report was held over for consideration at the next session.

Matters for the consideration of the General Assembly

8. The Commission completed its study on the following items:

(1) Reservations to multilateral conventions (item 4 (*b*));

(2) Question of defining aggression (item 3); and

(3) Preparation of a draft code of offences against the peace and security of mankind (item 2).

The reports of the Commission on these three items are contained respectively in chapters II, III and IV of the present document and are submitted to the General Assembly for its consideration.

9. With regard to item 1 of the agenda, review by the International Law Commission of its Statute, the Commission concluded only the first phase of its work on the subject. Its report on this item, which may be found in chapter V of the present document, is submitted to the General Assembly for its consideration. The Commission will further pursue the review of its Statute at its next session, in the light of the action of the General Assembly upon the recommendation of the Commission as contained in the said chapter.

Matters for the information of the General Assembly

10. On the basis of the reports of its respective special rapporteurs, the Commission undertook further consideration of the following items:

(1) Law of treaties (item 4 (*a*)); and

(2) Régime of the high seas (item 6).

The progress in the work done by the Commission on these items is related respectively in chapters VI and VII of the present document for the information of the General Assembly.

11. In addition to the aforementioned subjects, the Commission gave consideration to the other items of its agenda and took certain decisions in connexion therewith. These are contained in chapter VIII of the present document.

Chapter II

RESERVATIONS TO MULTILATERAL CONVENTIONS

12. By resolutions 478 (V), adopted on 16 November 1950, the General Assembly, *inter alia*,

"*Invites* the International Law Commission:

"(*a*) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

"(*b*) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee."

13. In pursuance of this resolution, the International Law Commission, in the course of its third session, gave priority to a study of the question of reservations to multilateral conventions and considered it at its 100th to 106th, 125th to 128th, and 133rd meetings, inclusive. The Commission had before it a "Report on Reservations to Multilateral Conventions" (A/CN.4/41) submitted by Mr. Brierly, special rapporteur on the topic of the law of treaties, as well as memoranda presented by Messrs. Amado (A/CN.4/L.9 and Corr.1) and Scelle (A/CN.4/L.14). In addition, the Commission studied the Official Records of the fifth session of the General Assembly relating to the item, and took account of the views contained therein.

14. It will be recalled that the Commission had, during its first session (1949), selected the law of treaties as one of the topics of international law for codification and had given it priority. In the course of its study of this topic during its second session (1950), the Commission had, on the basis of a report by Mr. Brierly (A/CN.4/23), embarked upon a preliminary discussion of the question of reservations to treaties. There was then a large measure of agreement on general principles and particularly on the point that "a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which might arise in the making of multilateral treaties was felt to require further consideration".[1]

15. By the same resolution referred to in paragraph 12 above, the General Assembly also requested the International Court of Justice to give an advisory opinion on the following questions:

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

"I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

"II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

"(*a*) The parties which object to the reservation?

"(*b*) Those which accept it?

"III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

"(*a*) By a signatory which has not yet ratified?

"(*b*) By a State entitled to sign or accede but which has not yet done so?"

16. On 28 May 1951, the International Court of Justice, by 7 votes to 5, gave an advisory opinion in which the questions referred to it are answered as follows:[2]

"The Court is of opinion,

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

"On Question I:

"that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

"On Question II:

"(*a*) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

"(*b*) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

"On Question III:

"(*a*) that an objection to a reservation made by a signatory State which has not yet ratified the Con-

[1] A/1316, *Official Records of the General Assembly, Second Session, Supplement No. 12*, para. 164.

[2] Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, pp. 29 and 30.

vention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

"(*b*) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect".

The advisory opinion of the Court was accompanied by two dissenting opinions of four judges and one judge respectively. The International Law Commission has studied these opinions with care.

17. The Commission notes that the task entrusted to it by the General Assembly differs from that of the Court in two important respects. In the first place, the Commission has been invited to study the question of reservations to multilateral conventions in general, especially as regards multilateral conventions of which the Secretary-General of the United Nations is the depositary, whereas the questions submitted to the Court related solely to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The Court underlined the nature of its task in the following words:

"All three questions are expressly limited by the terms of the resolution of the General Assembly to the Convention on the Prevention and Punishment of the Crime of Genocide, and the same resolution invites the International Law Commission to study the general question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law. The question thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention."[3]

Moreover, in seeking to determine what kind of reservations might be made to the Convention on Genocide and what kind of objections might be taken to such reservations, the Court said:

"The solution of these problems must be found in the special characteristics of the Genocide Convention. The origin and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties."[4]

In the second place, the Commission has been asked to study the question "both from the point of view of codification and from that of the progressive development of international law", while the Court gave its advisory opinion on the basis of its interpretation of the existing law. The Commission therefore feels that it is at liberty to suggest the practice which it considers the most convenient for States to adopt for the future.

18. According to the practice of the League of Nations, a reservation to a multilateral convention, to be valid, had to be accepted by all the contracting parties. This practice was reviewed and endorsed by the Committee of Experts for the Progressive Codification of International Law of the League of Nations which stated in a report:[5]

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void".

The report of the Committee of Experts was considered by the Council of the League of Nations on 15 and 17 June 1927. On the latter date, the Council adopted a resolution in which it, *inter alia*, directed the report "to be circulated to the Members of the League" and requested:

"The Secretary-General to be guided by the principles of the report regarding the necessity for acceptance by all the Contracting States, when dealing in future with reservations made after the close of a Conference at which a convention is concluded, subject, of course, to any special decisions taken by the Conference itself."[6]

In accordance with this resolution, the Secretary-General circulated the report to the Members of the League of Nations on 13 July 1927.[7] It appears that the principles of the report were observed by the Secretariat of the League of Nations and became an established practice thereof.[8]

19. The Secretary-General of the United Nations has followed substantially the practice of the League of Nations. In his report to the fifth session of the General Assembly, the Secretary-General stated his practice in the following terms:[9]

"5. In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitely accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. If the convention is already in force, the consent, express or implied, is thus required of all States which have become parties up to the date on which the reservation is offered. Should the convention not yet have entered into force, an instrument of ratification or accession offered with a reservation can be accepted in definitive

[3] Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 20.

[4] *Ibid.*, p. 23.

[5] *League of Nations Official Journal*, 8th Year, No. 7, p. 880.

[6] *League of Nations Official Journal*, Minutes of the 45th session of the Council, pp. 770-772 and 800-801.

[7] League of Nations document C.357.M.130.1927.V.

[8] Hudson, *International Legislation*, Vol. I, p. L, note 3.

[9] A/1372, paras. 5 and 6.

deposit only with the consent of all States which have ratified or acceded by the date of entry into force.

"6. Thus, the Secretary-General, on receipt of a signature or instrument of ratification or accession, subject to a reservation, to a convention not yet in force, has formally notified the reservation to all States which may become parties to the convention. In so doing, he has also asked those States which have ratified or acceded to the convention to inform him of their attitude towards the reservation, at the same time advising them that, unless they notify him of objections thereto prior to a certain date—normally the date of entry into force of the convention—it would be his understanding that they had accepted the reservation. States ratifying or acceding without express objection, subsequent to notice of a reservation, are advised of the Secretary-General's assumption that they have agreed to the reservation. If the convention were already in force when the reservation was received, the procedure would not differ substantially, except that a reasonable time for the receipt of objections would be allowed before tacit consent could properly be assumed."

The report further states: [10]

"46. The rule adhered to by the Secretary-General as depositary may accordingly be stated in the following manner:

"A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded."

20. Because of its constitutional structure, the established practice of the International Labour Organisation, as described in the Written Statement dated 12 January 1951 of the Organisation submitted to the International Court of Justice in the case of reservations to the Convention on Genocide,[11] excludes the possibility of reservations to international labour conventions. However, the texts of these conventions frequently take account of the special conditions prevailing in particular countries by making such exceptional provisions for them as will admit of their proceeding to ratification; indeed, this course is enjoined on the General Conference by article 19 (3) and other articles of the Constitution of the Organisation.

21. The Organization of American States follows a different system, as described in the Written Statement dated 14 December 1950 of the Pan-American Union, submitted to the International Court of Justice in the case of Reservations to the Convention on Genocide.[12] A resolution, approved on 23 December 1938, of the Eighth International Conference of Amercan States, held at Lima, Peru, provided that:

"In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan-American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan-American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States." [13]

Thus the tender of a reservation to a convention may delay the deposit by the reserving State of its ratification until inquiry can be made as to the attitude of the other signatory States with respect to the proposed reservation, and until the State offering the reservation has an opportunity to consider any observations made by other States. It does not preclude the reserving State, in spite of the fact that its reservation has been objected to by one or more signatory States, from proceeding to deposit its ratification definitively, if it so desires, and thereby becoming a party to the convention. It merely prevents the entry into force of the convention as between the reserving State and the objecting State. The legal position has been defined by the Governing Board of the Pan-American Union in a resolution adopted on 4 May 1932, as follows: [14]

"With respect to the juridical status of treaties ratified with reservations, which have not been accepted, the Governing Board of the Pan-American Union understands that:

"1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

"2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.

"3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations."

22. The Commission recognizes that the members of a regional or continental organization may be in a special position, by reason of their common historical traditions and of their close cultural bonds, which have no counterpart in the relations of the general body of States. The members of the Organization of American States have adopted a procedure which they regard as suited to their needs. This procedure, as described in

[10] *Ibid.*, para. 46.

[11] I.C.J. document Distr. 51/10, pp. 212-278.

[12] *Ibid.*, pp. 11-16.

[13] Final Act of the Eighth International Conference of American States, Resolution XXIX, para. 2.

[14] I.C.J. document Distr. 51/10, p. 13.

the preceding paragraph, is designed to ensure the greatest number of ratifications. Yet an examination of the history of the conventions adopted by the Conferences of American States over the past twenty-five years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party *vis-à-vis* non-objecting States. In some multilateral conventions, the securing of universality may be the more important consideration; and when this is the case, it is always possible for States to adopt the procedure followed by the Pan-American Union by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and the uniform application of the convention are more important considerations than its universality, and the Commission believes that this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are of a law-making type in which each State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Pan-American Union practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former. The Commission, therefore, does not recommend that this practice should be applied to multilateral conventions in general, when the parties themselves have failed to indicate their intention.[15]

23. The International Court of Justice, in its advisory opinion of 28 May 1951 quoted in paragraph 16 above, adopted, with regard to reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, the criterion of the compatibility of a reservation with the "object and purpose" of the Convention. Thus, in its answer to question I, the Court held "that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention".[16] It was left to each State party to the Convention to apply the criterion of compatibility. "Each State which is a party to the Convention," according to the Court, "is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint."[17] In its answer to question II, the Court held that a party to the Convention on Genocide "can in fact" consider that the reserving State is or is not a party to the Convention, accordingly as that party considers the reservation to be compatible or incompatible with the object and purpose of the Convention.

24. The Commission believes that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose. Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively. If State A tenders a reservation which State B regards as compatible and State C regards as incompatible with the object and purpose of the convention, there is no objective test by which the difference may be resolved; even when it is possible to refer the difference of views to judicial decision, this might not be resorted to and, in any case, would involve delay. So long as the application of the criterion of compatibility remains a matter of subjective discretion, some of the parties being willing to accept a reservation and others not, the status of a reserving State in relation to the convention must remain uncertain. And where a convention confers jurisdiction on the International Court of Justice over disputes concerning the interpretation or application of its provisions, and such jurisdiction is invoked by a party, difficulty might arise in determining which are the parties to the convention entitled to intervene under Article 63 of the Court's Statute. Moreover, where, as frequently happens, the entry into force or the termination of a convention depends on the number of ratifications or denunciations deposited, even the status of the convention itself may be thrown into doubt.

25. The Commission has been asked to pay special attention to multilateral conventions of which the Secretary-General of the United Nations is the depositary, and it believes that these considerations have a special pertinence to such conventions. The Secretary-General is already the depositary of more than a hundred such conventions, and he may be expected to become the

[15] Mr. Yepes declared that he deeply regretted having to vote against this paragraph for the following reasons, which he had explained at length during the Commission's discussions:

(1) If the so-called Pan-American system of making reservations could be successfully applied to a complex of States closely linked together and in intimate relations such as the Organization of American States, it could *a fortiori* be applied to a much vaster organization more loosely linked together such as the United Nations, whose universal character makes it less exacting in this respect than a purely regional organization such as the Organization of American States.

(2) As the Pan-American system was, in his opinion, used in practice by the majority of the Members of the United Nations, it could be regarded as the existing law in the matter and, for that reason, should have been adopted by the Commission.

[16] I.C.J. Reports 1951, p. 29.

[17] *Ibid.*, p. 26.

depositary of many more. The Commission is impressed with the compexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to their reservations. Situations may arise in which he would have to take a position, at least provisionally, concerning a difference of view as to the effect of a reservation tendered, and he would be expected to keep account of the manifold bilateral relationships into which such a rule would tend to split a multilateral convention.

26. When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. The very fact of its being open in this way indicates that it deals with some subject of wide international concern regarding which it is desirable to reform or amend existing laws. On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect, to insert into a convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations *inter se*. If a State is permitted to become a party to a multilateral convention while maintaining a reservation over the objection of any party to the convention, the latter may well feel that the consideration which prompted it to participate in the convention has been so far impaired by the reservation that it no longer wishes to remain bound by it.

27. It is always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the draftsmen of a convention text at the time it is being drawn up; in the view of the Commission, this is likely to produce the greatest satisfaction in the long run. Various provisions might be adopted, depending, in some measure at least, on the relative emphasis to be placed on maintaining the integrity of the text, or on facilitating the widest possible acceptance of it, even in varied terms.

(1) In some cases, it may be desirable that the text of a convention should exclude all possibility of reservations, as was done in the European Broadcasting Convention, Copenhagen, 1948; this is particularly desirable in the case of international constitutional instruments.

(2) If some reservations are to be permitted, the precise text of the permissible reservations may be set out, as was done in the General Act of 26 September 1928 for the Pacific Settlement of International Disputes; or their scope may be limited by requiring them to relate only to particular parts of the text, as provided in the Convention on Road Traffic, Geneva, 1949.

(3) If the text places no limit on the admissibility of reservations, and if there is no established organizational procedure for dealing with reservations, the text should establish a procedure in respect of the tendering of reservations and their effect. Especially, it is important to make clear what States are to be qualified to make objections to reservations, within what time an objection is to be made in order to be admissible, and what the consequences of an objection are to be. Such a procedure should therefore cover, in particular, the following points:

(*a*) How and when reservations may be tendered;

(*b*) Notifications to be made by the depositary as regards reservations and objections thereto;

(*c*) Categories of States entitled to object to reservations, and the manner in which their consent thereto may be given;

(*d*) Time limits within which objections are to be made;

(*e*) Effect of the maintenance of an objection on the participation in the convention of the reserving State.

28. The Commission believes that multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory. Any rule may in some cases lead to arbitrary results. Hence, the Commission feels that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases. On the whole, the Commission believes that, subject to certain modifications as explained in paragraphs 29 and 30 below, such a rule is to be found in the practice hitherto followed by the Secretary-General of the United Nations. The Commission's views are formulated in some rules of practice, contained in paragraph 34 below.

29. The tender of a reservation constitutes, in substance, in so far as relations with the reserving State are concerned, a proposal of a new agreement, the terms of which would differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned. The question arises, however, which are the States which can be said to be concerned. In the practice of the Secretary-General of the United Nations, described in paragraph 19 above, only States which have ratified or otherwise accepted the convention are such States. Where a convention is subject to ratification or acceptance, the objection to a reservation, taken by a signatory State which has not ratified or otherwise accepted the convention, does not have the effect of excluding the reserving State from becoming

a party to it. In the view of the Commission, however, the concern of a mere signatory State should also be taken into account; for, at the time the reservation is tendered, a signatory State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification. In this connexion, it has been suggested that a mere signatory to a convention should have the right of objecting only to reservations tendered before the convention has entered into force. Such a differentiation between reservations tendered before and those tendered after the entry into force of a convention would, however, be invidious where the entry into force of the convention is brought about as the result of the deposit of the ratiffcations of a very limited number of States, as in the case of the four Geneva Red Cross Conventions of 12 August 1949, to which more than sixty States are signatories, but which, it is provided, "shall come into force six months after not less than two instruments of ratification have been deposited". In such a case, a very few States might, by the tender and acceptance of reservations amongst themselves, so modify the terms of the convention that signatories, representing possibly the preponderant number of negotiating States, would find themselves confronted with a virtually new convention.

30. The Commission does not contemplate that a signatory State would advance an objection to a reservation from motives unrelated to its merits. Yet, in order to guard against any possible abuse by a signatory State of its right to object to a reservation and to forestall the possibility of a reserving State being indefinitely prevented from becoming a party to a convention by a State which itself refrains from assuming the obligations of a party, the Commission suggests that, while the objection by a mere signatory to a reservation should have the effect of excluding a reserving State, a time limit beyond which such effect would not endure should be prescribed. Taking into consideration the normal administrative and constitutional procedures of most governments in respect of the ratification of treaties and conventions, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could effect its ratification or acceptance of a convention. Accordingly, the Commission is of the opinion that if, upon the lapse of twelve months from the date a signatory State makes an objection to a reservation to a multilateral convention, it has not effected its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party to the convention.

31. In some instances conventions are open to accession and not open to signature; an example is the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. Such conventions, which are exceptional, present special problems with respect to reservations. As their number is somewhat limited, the Commission considers it unnecessary to formulate any practice applying to them.

32. The Commission is of the opinion that a duly accepted reservation to a multilateral convention limits the effect of the convention in the relations between the reserving State and the other States which have become or which may become parties to the convention.

Conclusions

33. The Commission suggests that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them.

34. The Commission suggests that, in the absence of contrary provisions in any multilateral convention and of any organizational procedure applicable, the following practice should be adopted with regard to reservations to multilateral conventions, especially those of which the Secretary-General of the United Nations is the depositary:

(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

(*a*) A reservation made by a State at the time of signature should have no effect unless it is repeated or

incorporated by reference in the later ratification or acceptance by that State;

(*b*) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a peroid of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.

Chapter III

QUESTION OF DEFINING AGGRESSION[18]

35. The General Assembly, on 17 November 1950, adopted resolution 378 B (V) which reads as follows:

"*The General Assembly*,

"*Considering* that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission, a subsidiary organ of the United Nations,

"*Decides* to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."

36. The foregoing resolution was adopted in connexion with the agenda item "Duties of States in the event of the outbreak of hostilities". The proposal of the Union of Soviet Socialist Republics,[19] referred to in this resolution, was originally submitted to the First Committee of the General Assembly. It provided that the General Assembly "considering it necessary ... to define the concept of aggression as accurately as possible", declares, *inter alia*, that "in an international conflict that State shall be declared the attacker which first commits" one of the acts enumerated in the proposal.

37. In pursuance of the resolution of the General Assembly, the International Law Commission, at its 92nd to 96th, 108th, 109th, 127th to 129th, and 133rd meetings, considered the question raised by the aforementioned proposal of the USSR and, in that connexion, studied the records of the First Committee relating thereto.

38. The Commission first considered its terms of reference under the resolution in the light of the relevant discussions in the First Committee. Some members of the Commission were of the opinion that this resolution merely meant that the Commission should take the Soviet proposal and the discussions thereon in the First Committee into consideration when preparing the draft code of offences against the peace and security of mankind. The majority of the Commission, however, held the view that the Commission had been requested by the General Assembly to make an attempt to define aggression and to submit a report on the result of its efforts.

39. The Commission had before it a report entitled "The Possibility and Desirability of a Definition of Aggression", presented by Mr. Spiropoulos, special rapporteur on the draft code of offences against the peace and security of mankind (A/CN.4/44, chapter II). After a survey of previous attempts to define aggression, the special rapporteur stated that "whenever governments are called upon to decide on the existence or non-existence of 'aggression under international law', they base their judgment on criteria derived from the 'natural', so to speak, notion of aggression ... and not on legal constructions". Analysing this notion of aggression, he stated that it was composed of both objective and subjective elements, namely, the fact that a State had committed an act of violence and was the first to do so and the fact that his violence was committed with an aggressive intention (*animus aggressionis*). But what kind of violence, direct or indirect, or what degree of violence constituted aggression could not be determined *a priori*. It depended on the circumstances in the particulat case. He came to the conclusion that this "natural notion" of aggression is a "concept *per se*", which "is not susceptible of definition". "A 'legal' definition of aggression would be an artificial construction", which could never be comprehensive enough to comprise all imaginable cases of aggression, since the methods of aggression are in a constant process of evolution.

40. Two other members of the Commission, Mr. Amado and Mr. Alfaro, submitted memoranda on the question. Mr. Amado stated in his memorandum (A/CN.4/L.6 and Corr. 1) that a definition of aggression based on an enumeration of aggressive acts could not be satisfactory, as such an enumeration could not be complete and any omission would be dangerous. He suggested that the Commission might adopt a general and flexible formula laying down that:

[18] Mr. Hudson voted against this chapter of the report on the ground that in resolution 378 B (V), the General Assembly did not request the Commission to formulate a definition of aggression.

[19] A/C.1/108.

"Any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations [is] an aggressive war."

Such a formula could, in his opinion, be applied to any factual situation and might be used by the competent organs of the United Nations without restricting their necessary freedom of action.

41. Mr. Alfaro, in his memorandum (A/CN.4/L.8), also advocated an abstract definition of aggression. On the basis of an examination of previous attempts to define aggression he expressed the view that the failure to find a satisfactory formula was due to the fact that these definitions had been based on the idea of an enumeration of various acts constituting aggression. In his opinion, a satisfactory result could be achieved only if the enumerative method which had proved unsuccessful were abandoned in favour of an effort to establish an abstract definition. He presented, in conclusion, a formula for such a definition (quoted in paragraph 46 below).

42. On the other hand, Mr. Yepes submitted a proposal (A/CN.4/L.7) for the determination of the aggressor based on the enumerative method. This proposal, however, was subsequently superseded by another (A/CN.4/L.12) by the same author which defined aggression in general terms as follows:

"For the purposes of Article 39 of the United Nations Charter an act of aggression shall be understood to mean any direct or indirect use of violence (force) by a State or group of States against the territorial integrity or political independence of another State or group of States.

"Violence (force) exercised by irregular bands organized within the territory of a State or outside its territory wiht the active or passive complicity of that State shall be considered as aggression within the meaning of the preceding paragraph.

"The use of violence (force) in the exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter or in the execution of a decision duly adopted by a competent organ of the United Nations shall not be held to constitute an act of aggression.

"No political, economic, military or other consideration may serve as an excuse or justiffcation for an act of aggression."

43. Another proposal (A/CN.4/L.11 and Corr.1) was submitted by Mr. Hsu in which particular stress was laid on indirect aggression. This draft was worded as follows:

"Aggression, which is a crime under international law, is the hostile act of a State against another State, committed by (*a*) the employment of armed force other than in self-defence or the implementation of United Nations enforcement action; or (*b*) the arming of organized bands or of third States, hostile to the victim State, for offensive purposes; or (*c*) the fomenting of civil strife in the victim State in the interest of some foreign State; or (*d*) any other illegal resort to force, openly or otherwise."

44. Finally, Mr. Córdova, with a view to including in the draft code of offences against the peace and security of mankind a provision which would make aggression and the threat of aggression offences under the code, submitted the following draft (A/CN.4/L.10):

"Aggression is the direct or indirect employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations.

"The threat of aggression should also be deemed to be a crime under this article."

45. The Commission considered the question whether it should follow the enumerative method or try to draft a definition of aggression in general terms. The sense of the Commission was that it was undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive. Furthermore, it was thought inadvisable unduly to limit the freedom of judgment of the competent organs of the United Nations by a rigid and necessarily incomplete list of acts constituting aggression. It was therefore decided that the only practical course was to aim at a general and abstract definition.

46. Undertaking to define aggression in general terms, the Commission took as a basis of discussion the text submitted by Mr. Alfaro in his memorandum (A/CN.4/L.8) as it was the broadest general definition before the Commission. Mr. Alfaro's draft read as follows:

"Aggression is the use of force by one State or group of States, or by any government or group of governments, against the territory and people of other States or governments, in any manner, by any methods, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations."

47. The Commission gave consideration to the question whether indirect aggression should be comprehended in the definition. It was felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as the fomenting of civil strife by one State in another, the arming by a State of organized bands for offensive purposes directed against another State, and the sending of "volunteers" to engage in hostilities against another State. In this connexion account was taken of resolution 380 (V), adopted by the General Assembly on 17 November 1950, which states, *inter alia*, that the General Assembly

"*Solemnly* reaffirms that, whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world."

48. Opinion was divided on the question whether, in addition to the employment of force, the threat to use force should also constitute aggression. Some members of the Commission considered that threat of force amounted only to a threat of aggression, while others contended that it should be covered by the definition in view of the fact that threat of force had been used for aggressive purposes. The Commission finally decided to amend the definition proposed by Mr. Alfaro by including threat of force in the definition.

49. The Commission also adopted other drafting changes in the draft definition of Mr. Alfaro. This definition, as finally amended, read as follows:

"Aggression is the threat or use of force by a State or government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

50. Some members of the Commission, however, considered this definition unsatisfactory on the ground that, in their opinion, it did not comprehend all conceivable acts of aggression and that it might prove to be dangerously restrictive of the necessary freedom of action of the organs of the United Nations, if they were called upon in the future to apply the definition to specific cases. Some other members maintained that it did not include one or another element which they deemed essential.

51. When submitted to the final vote, the definition was rejected by 7 votes to 3, with one abstention, the vote being taken by roll-call at the request of one member, as follows:

In favour: Messrs. Alfaro, Córdova and François

Against: Messrs. Amado, Brierly, Hsu, el-Khouri, Sandström, Spiropoulos and Yepes

Abstaining: Mr. Hudson

Absent: Mr. Scelle.

52. Mr. Alfaro thereupon proposed that the Commission should not abandon its efforts to define aggression but should make further attempts on the basis of each of the texts submitted by other members. This proposal was rejected by a roll-call of 6 to 4, with one abstention, as follows:

In favour: Messrs. Alfaro, Córdova, Hsu and Yepes

Against: Messrs. Amado, Brierly, François, Hudson, el-Khouri and Sandström

Abstaining: Mr. Spiropoulos

Absent: Mr. Scelle.

53. The matter was later reconsidered at the request of Mr. Scelle who in a memorandum (A/CN.4/L.19 and Corr.1) submitted a general definition of aggression and proposed that aggression should be explicity declared to be an offence against the peace and security of mankind. Mr. Scelle's definition read as follows:

"Aggression is an offence against the peace and security of mankind. This offence consists in any resort to force contrary to the provisions of the Charter of the United Nations, for the purpose of modifying the state of positive international law in force or resulting in the disturbance of public order."

This proposal was discussed in connexion with the preparation of the draft code of offences against the peace and security of mankind. Proposals were made by other members to a similar effect. The Commission decided to include among the offences defined in the draft code any act of aggression and any threat of aggression.

The following paragraphs were therefore inserted in article 2 of the draft code:

"The following acts are offences against the peace and security of mankind:

"(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

"(2) Any threat by the authoritirs of a State to resort to an act of aggression against another State."

Chapter IV

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Introduction

54. By resolution 177 (II) of 21 November 1947, the General Assembly decided:

"To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly,"

and directed the Commission to

"(*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

"(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above."

In 1950, the International Law Commission reported to the General Assembly its formulation under sub-

paragraph (*a*) of resolution 177 (II). By resolution 488 (V) of 12 December 1950, the General Assembly invited the governments of Member States to express their observations on the formulation, and requested the Commission:

> "In preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by governments."

55. The preparation of a draft code of offences against the peace and security of mankind was given preliminary consideration by the Commission at its first session, in 1949, when the Commission appointed Mr. Spiropoulos special rapporteur on the subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to governments inquiring what offences, apart from those recognized in the Charter and judgment of the Nürnberg Tribunal, should be included in the draft code.

56. At its second session, in 1950, Mr. Spiropoulos presented his report (A/CN.4/25) to the Commission, which took it as a basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and Add.2) to its questionnaire. In the light of the deliberations of the Commission, a drafting committee, composed of Messrs. Alfaro, Hudson and Spiroupolus, prepared a provisional text (A/CN.4/R.6) which was referred by the Commission without discussion to Mr. Spiropoulos, who was requested to continue the work on the subject and to submit a new report to the Commission at its third session.

57. At the third session, in 1951, Mr. Spiropoulos submitted a second report (A/CN.4/44) containing a new draft of a code and also a digest of the observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. The Commission also had before it the observations received from governments (A/CN.4/45 and Corr.1, A/CN.4/45/Add.1 and Add.2) on this formulation. Taking into account the observations referred to above, the Commission considered the subject at its 89th to 92nd, 106th to 111th, 129th and 133rd meetings, and adopted a draft Code of Offences against the Peace and Security of Mankind as set forth herein below.

52. In submitting this draft code to the General Assembly, the Commission wishes to present the following observations as to some general questions which arose in the course of the preparation of the text:

(*a*) The Commission first considered the meaning of the term "offences against the peace and security of mankind", contained in resolution 177 (II). The view of the Commission was that the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security. For these reasons, the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters; nor does it include such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc.

(*b*) The Commission thereafter discussed the meaning of the phrase "indicating clearly the place to be accorded to" the Nürnberg principles. The sense of the Commission was that this phrase should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code. The Commission felt that the phrase did not preclude it from suggesting modification or development of these principles for the purpose of their incorporation in the draft code. It was not thought necessary to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft code. Only a general reference to the corresponding Nürnberg principles was deemed practicable.

(*c*) The Commission decided to deal with the criminal responsibility of individuals only. It may be recalled in this connexion that the Nürnberg Tribunal stated in its judgment: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

(*d*) The Commission has not considered itself called upon to propose methods by which a code may be given binding force. It has therefore refrained from drafting an instrument for implementing the code. The offences set forth are characterized in article 1 as international crimes. Hence, the Commission has envisaged the possibility of an international tribunal for the trial and punishment of persons committing such offences. The Commission has taken note of the action of the General Assembly in setting up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court. Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts. Such a measure would doubtless be considered in drafting the instrument by which the code would be put into force.

Text of the draft Code

59. The draft Code of Offences against the Peace and Security of Mankind, as adopted by the Commission, reads as follows:

Article 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international

law, for which the responsible individuals shall be punishable.

This article is based upon the principle of individual responsibility for crimes under international law. This principle is recognized by the Charter and judgment of the Nürnberg Tribunal, and in the Commission's formulation of the Nürnberg principles it is stated as follows: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

Article 2

The following acts are offences against the peace and security of mankind:

(2) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

In laying down that any act of aggression is an offence against the peace and security of mankind, this paragraph is in consonance with resolution 380 (V), adopted by the General Assembly on 17 November 1950, in which the General Assembly solemnly reaffirms that any aggression "is the gravest of all crimes against peace and security throughout the world".

The paragraph also incorporates, in substance, that part of article 6, paragraph (*a*), of the Charter of the Nürnberg Tribunal, which defines as "crimes against peace", *inter alia*, the "initiation or waging of a war of aggression".

While every act of aggression constitutes a crime under paragraph (1), no attempt is made to enumerate such acts exhaustively. It is expressly provided that the employment of armed force in the circumstances specified in the paragraph is an act of aggression. It is, however, possible that aggression can be committed also by other acts, including some of those referred to in other paragraphs of article 2.

Provisions against the use of force have been included in many international instruments, such as the Covenant of the League of Nations, the Treaty for the Renunciation of War of 27 August 1928, the Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro, 10 October 1933, the Act of Chapultepec of 8 March 1945, the Pact of the Arab League of 22 March 1945, the Inter-American Treaty of Reciprocal Assistance of 2 September 1947, and the Charter of the Organization of American States, signed at Bogotá, 30 April 1948.

The use of force is prohibited by Article 2, paragraph 4, of the Charter of the United Nations, which binds all Members to "refrain in their international relations from ... the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". The same prohibition is contained in the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, which, in article 9, provides that "every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from ... the use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

This paragraph is based upon the consideration that not only acts of aggression but also the threat of aggression present a grave danger to the peace and security of mankind and should be regarded as an international crime.

Article 2, paragraph 4, of the Charter of the United Nations prescribes that all Members shall "refrain in their international relations from the threat ... of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". Similarly, the draft Declaration on Rights and Duties of States, prepared by the International Law Commission, provides, in article 9, that "every State has the duty ... to refrain from the threat ... of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(3) The preparation by the authorities of a State for the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

In prohibiting the preparation for the employment of armed force (except under certain specified conditions) this paragraph incorporates in substance that part of article 6, paragraph (*a*), of the Charter of the Nürnberg Tribunal which defines as "crimes against peace", *inter alia*, "planning" and "preparation" of "a war of aggression. ..." As used in this paragraph the term "preparation" includes "planning". It is considered that "planning" is punishable only if it results in preparatory acts and thus becomes an element in the preparation for the employment of armed force.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(4) The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose.

The offence defined in this paragraph can be committed only by the members of the armed bands, and they are individually responsible. A criminal responsibility of the authorities of a State under international law may, however, arise under the provisions of paragraph (12) of the present article.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

In its resolution 380 (V) of 17 November 1950 the General Assembly declared that "fomenting civil strife in the interest of a foreign Power" was aggression.

The draft Declaration on Rights and Duties of States prepared by the International Law Commission provides, in article 4: "Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

Article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937 contained a prohibition of the encou agement by a State of terrorist activities directed against another State.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

It may be recalled that the League of Nations' Committee on Arbitration and Security considered the failure to observe conventional restrictions such as those mentioned in this paragraph as raising, under many circumstances, a presumption of aggression. (Memorandum on articles 10, 11 and 16 of the Covenant, submitted by Mr. Rutgers. League of Nations document C.A.S. 10, 6 February 1928.)

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international régime.

Annexation of territory in violation of international law constitutes a distinct offence, because it presents a particularly lasting danger to the peace and security of mankind. The Covenant of the League of Nations, in article 10, provided that "the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League". The Charter of the United Nations, in Article 2, paragraph 4, stipulates that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any State..." Illegal annexation may also be achieved without overt threat or use of force, or by one or more of the acts defined in the other paragraphs of the present article. For this reason the paragraph is not limited to annexation of territory achieved by the threat or use of force.

The term "territory under an international régime" envisages territories under the International Trusteeship System of the United Nations as well as those under any other form of international régime.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group.

The text of this paragraph follows the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

This paragraph corresponds substantially to article 6, paragraph (*c*), of the Charter of the Nürnberg Tribunal, which defines "crimes against humanity". It has, however, been deemed necessary to prohibit also inhuman acts on cultural grounds, since such acts are no less detrimental to the peace and security of mankind than those provided for in the said Charter. There is another variation from the Nürnberg provision. While, according to the Charter of the Nürnberg Tribunal, any of the inhuman acts constitutes a crime under international law only if it is committed in execution of or in connexion with any crime against peace or war crime as defined in that Charter, this paragraph characterizes as crimes under international law inhuman acts when these acts are committed in execution of or in connexion with other offences defined in the present article.

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(11) Acts in violation of the laws or customs of war.

This paragraph corresponds to article 6, paragraph (*b*), of the Charter of the Nürnberg Tribunal. Unlike the latter, it does not include an enumeration of acts which are in violation of the laws or customs of war, since no exhaustive enumeration has been deemed practicable.

The question was considered whether every violation of the laws or customs of war should be regarded as a crime under the code or whether only acts of a certain gravity should be characterized as such crimes. The first alternative was adopted.

This paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the existence of a state of war is recognized by none of them.

The United Nations Educational, Scientific and Cultural Organization has urged that wanton destruction, during an armed conflict, of historical monuments, historical documents, works of art or any other cultural objects should be punishable under international law (letter of 17 March 1950 from the Director-General of UNESCO to the International Law Commission transmitting a "Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict", document 5C/PRG/6 Annex I/UNESCO/MUS/Conf.1/20 (rev.), 8 March 1950). It is understood that such destruction comes within the purview of the present paragraph. Indeed, to some extent, it is forbidden by article 56 of the regulations annexed to the Fourth Hague Convention of 1907 respecting the laws and customs of war on land, and by article 5 of the Ninth Hague Convention of 1907 respecting bombardment by naval forces in time of war.

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(12) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or

(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article.

The notion of conspiracy is found in article 6, paragrph (*a*), of the Charter of the Nürnberg Tribunal and the notion of complicity in the last paragraph of the same article. The notion of conspiracy in the said Charter is limited to the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances", while the present paragraph provides for the application of the notion to all offences against the peace and security of mankind.

The notions of incitement and of attempt are found in the Convention on Genocide as well as in certain national enactments on war crimes.

In including "complicity in the commission of any of the offences defined in the preceding paragraphs" among the acts which are offences against the peace and security of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries.

Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code.

This article incorporates, with modifications, article 7 of the Charter of the Nürnberg Tribunal, which article provides: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Principle III of the Commission's formulation of the Nürnberg principles reads: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."

The last phrase of article 7 of the Nürnberg Charter "or mitigating punishment" was not retained in the above-quoted principle as the question of mitigating punishment was deemed to be a matter for the competent court to decide.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.

Principle IV of the Commission's formulation of the Nürnberg principles, on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter, states: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

The observations on prineiple IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article, which is based on a clear enunciation by the Nürnberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.

Article 5

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

This article provides for the punishment of the offences defined in the Code. Such a provision is considered desirable in view of the generally accepted principle *nulla poena sine lege*. However, as it is not deemed practicable to perscribe a definite penalty for each offences, it is left to the competent tribunal to determine the penalty, taking into consideration the gravity of the offence committed.

Chapter V

REVIEW BY THE COMMISSION OF ITS STATUTE

60. By resolution 484 (V), adopted on 12 December 1950, the General Assembly,

"*Considering* that it is of the greatest importance that the work of the International Law Commission should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results.

"*Having regard* to certain doubts which have been expressed whether such conditions exist at the present time,

"*Requests* the International Law Commission to review its Statute with the object of making recommendations to the General Assembly at its sixth session concerning revisions of the Statute which may appear desirable, in the light of experience, for the promotion of the Commission's work."

In compliance with this request, the International Law Commission has devoted its 83rd, 96th, 97th, 112th, 113th, 129th and 133rd meetings to such a review of its Statute.

61. By way of introduction, it may be said that the members of the Commission fully share the view that the work of the Commission "should be carried on in the conditions most likely to enable the Commission to achieve rapid and positive results". It is hardly necessary for the Commission to observe that with reference to some of the matters falling within its competence—particularly some of the topics selected for codification—quick and positive results may be most difficult of achievement. Those matters require extensive research into the practice of States, the relevant materials need to be carefully weighed and evaluated, successive drafts must be discussed, and reflection concerning them cannot be unduly hurried. Expedition of the work of the Commission is a constant desideratum with its members. Yet hopes for "rapid results" are to be indulged only with appreciation of the magnitude of the task of developing or codifying international law in a satisfactory manner.

68. It is understandable that the record of the Commission over the past three years has engendered "cer-

tain doubts whether such conditions exist" as are "most likely to enable the Commission to achieve rapid and positive results" in the progressive development of international law and its codification. It may be useful to describe briefly the conditions which "exist at the present time".

63. The members of the Commission elected in 1948 are, without exception, men engaged in professional activities. Some of them, indeed a majority, have responsibilities as permanent officials of their governments; some of them are professors of international law in universities; some of them are engaged in the private practice of law. The Statute of the Commission does not require its members to abandon their other responsibilities, and article 13, both in its original and in its amended text, has the effect of negativing that course.

64. Over the past three years, the Commission has held one session each year. The Statute does not limit the number of sessions to be held each year. Yet more frequent sessions would necessitate a larger budget, and some members of the Commission would have difficulty in absenting themselves from the performance of other duties. For this latter reason the Commission has felt itself compelled to hold its sessions in the late spring or early summer months. The session held in 1949 continued from 12 April to 9 June; in 1950, from 5 June to 29 July; in 1951, from 16 May to 27 July—the average length of the three sessions being nine weeks. This means that the members attending the sessions have devoted, counting their travel-time, about three months each year to the work of the Commission.

65. In the intervals between sessions, some members of the Commission serving as rapporteurs are called upon to devote a considerable part of their time to the work of the Commission, receiving therefor a modest honorarium. In some cases, the amount of time which such members may be able to give to the work of the Commission may be so limited as to restrict the range of their researches.

66. During each of its three sessions, the Commission has devoted much of its time, in fact more than half of it, to dealing with special assignments made by the General Assembly; the Assembly has requested the Commission to give priority to some of these. The Commission has endeavoured to comply with all of the assignments promptly. Such compliance may have had some effect in retarding the Commission's work on the topics selected for codification, with the approval of the General Assembly.

67. The Commission's review of its experience has led it to recommend to the General Assemblt that in the interest of "the promotion of the Commission's work" its members to be elected in 1953 should be placed in a position which would enable them to devote their full time to the work of the Commission, and that its statute should be amended to provide, in line with Article 16, paragraph 1, of the Statute of the International Court of Justice, that no member of the Commission may exercise any political or administrative function, or engage in any other occupation of a professional nature. It is thought by a majority of the members of the Commission that the adoption of this recommendation would open a more favourable prospect for promoting and expediting its work.

68. The Commission appreciates that, apart from the increased financial outlay, the adoption of this recommendation may involve some difficulties in the recruitment of members. It is thought that to facilitate recruitment a longer term of office would need to be envisaged, possibly a term of six or nine years; article 10 of the Statute now fixes a term of three years, but the General Assembly by resolution 486 (V) of 12 December 1950 has extended the term of office of the present members by two years. For the same reason, a change might also be considered in the provision in article 12 of the present Statute that, unless a contrary decision is taken after consultation with the Secretary-General, "the Commission shall sit at the Headquarters of the United Nations". Most of the present members of the Commission have a preference for Geneva over New York.

69. Taking note of the fact that a proposal for a full-time Commission made in 1947 by the Committee on the Progressive Development of International Law and its Codification[20] was not adopted, the Commission has given careful consideration to the possibility of presenting to the General Assembly some alternative to setting up the Commission on a full-time basis, as a method for expediting its work. An alternative was suggested to the Sixth Committee by the United Kingdom delegation in 1950, namely, that some of the members of the Commission should be elected on a full-time basis. The Commission is unable to advance this alternative. It seems objectionable both because it would create an invidious distinction between the members, and because it would present insuperable difficulties in the nomination of candidates in the election; a candidate could hardly express his willingness to serve if elected, at a time when he could not know in advance whether he would be placed in the full-time or in the part-time category. Moreover, the proposed alternative might present difficulties in the application of the provision of article 8 of the Statute that "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". Nor has any other alternative been found which the Commission would wish to present to the General Assembly.

70. The recommendation of a full-time Commission is placed before the General Assembly, at this time, in general terms only. If it should meet with the approval of the General Assembly in principle, the Commission would be prepared to draft—if so requested—the consequent amendments which might be introduced into its Statute. To this end, the Commission has appointed Mr. Córdova special rapporteur on this subject, to report to it at its next session. As the amendments

[20] A/AC.10/51, para. 5 (*d*).

would not have effect during the term of office of the present members which expires in 1953, they might be drafted by the Commission and considered by the General Assembly in 1952 so that they could be made applicable to the members to be elected in 1953.

71. Apart from the recommendation that, at the time of the next election of its members, the Commission should be placed on a full-time basis, the Commission has reviewed the present Statute with a view to clarification of some of its provisions, and to the introduction of greater flexibility in the procedures prescribed. It will be recalled that some difference of opinion arose at the Commission's first session in 1949 as to the proper application of article 18, paragraph 2, of the Statute; this was explained in paragraphs 9-12 of the report covering that session.[21] Yet on the whole the Commission is unable to say that either lack of clarity in the statutory provisions, or inflexibility of the procedures prescribed, has interfered with its achievement of "rapid and positive results". For this reason, the Commission refrains, at the present time, from submitting detailed suggestions of desirable amendments; these can be more conveniently advanced when the Commission is apprised of the General Assembly's attitude toward its fundamental recommendation as to a full-time Commission.

[21] A/925, *Official Records of the General Assembly, Fourth Session, Supplement No. 10.*

Chapter VI

LAW OF TREATIES

72. The Commission, at its first session in 1949, selected the law of treaties as one of the topics of international law for codification and gave it priority. It elected Mr. Brierly as special rapporteur on this subject. In pursuance of article 19, paragraph 2, of its Statute, the Commission also requested governments to furnish it with the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the subject.

73. At the second session in 1950, Mr. Brierly submitted to the Commission a report on the law of treaties (A/CN.4/23) which contained a draft convention on the subject. The Commission had also received replies from some governments to its questionnaire and took account of them. The Commission undertook a preliminary discussion of certain parts of the report and expressed certain tentative views thereon for the guidance of the special rapporteur.

74. At the third session of the Commission, Mr. Brierly presented a second report on the law of treaties (A/CN.4/43). In this report, the special rapporteur submitted a number of draft articles, together with comments, intended to replace certain articles which he had proposed in the draft convention contained in his report to the previous session.

75. In the course of eight meetings (namely the 84th to 88th, and 98th to 100th meetings), the Commission considered these draft articles as well as some others contained in the first report of the special rapporteur. Various amendments were adopted and tentative texts were provisionally agreed upon (A/CN.4/L.28). These texts were referred to the special rapporteur who was requested to present to the Commission, at its fourth session, a final draft, together with a commentary thereon. The special rapporteur was also requested to do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission.

Chapter VII

REGIME OF THE HIGH SEAS

76. At its first session, held in 1949, the Commission included in the provisional list of topics selected for codification the régime of the high seas. After deciding that this topic, along with others, should be given priority, it elected Mr. François as special rapporteur on this question.

77. Mr. François' first report on the subject (A/CN.4/17) was examined at the second session of the Commission, in 1950. The Commission also had before it the replies from some governments to a questionnaire it had circulated (A/CN.4/19, part I, C). The special rapporteur was requested to formulate concrete proposals on various subjects coming under the régime of the high seas. At the third session, Mr. François submitted a second report on these subjects (A/CN.4/42). It was examined by the Commission at its 113th to 125th and 130th to 134th meetings.

78. The Commission first examined the chapters of the report dealing with the continental shelf and various related subjects, namely, conservation of the resources of the sea, sedentary fisheries and contiguous zones. It decided to give to its drafts the publicity referred to in article 16, paragraph (*g*) of its Statute, in particular to communicate them to governments so that

the latter could submit their comments as envisaged in paragraph (*h*) of the same article. The texts of the draft articles and commentaries thereon are reproduced in the Annex to the present report.[22]

79. On the question of nationality of ships, the Commission approved the principle underlying the special rapporteur's conclusions, namely, that States are not entirely at liberty to lay down conditions governing the nationality of ships as they think fit, but must observe certain general rules of international law on the subject. The Commission gave a first reading to concrete provisions proposed by the rapporteur.

80. With regard to penal jurisdiction in matters of collision on the high seas, the Commission decided that it was desirable to lay down a rule governing this subject, since the need for such a rule had become apparent.

81. After approving the rapporteur's proposal of including, in the codification of the régime of the high seas, rules relating to the safety of life at sea, the Commission instructed the special rapporteur to continue his researches.

82. The Commission examined the right of warships to approach foreign merchant vessels on the high seas. The special rapporteur had recognized the right of approach only where a warship has serious grounds for believing that a foreign merchant vessel is engaged in piracy, or where acts of interference are justified under powers conferred by treaty. The general treaties on the slave trade permit the right of approach only in special zones and in respect of ships below a certain tonnage. The Commission considers that, in the interests of stamping out the slave trade, the right of approach should be put on the same footing as in the case of piracy, and hence should be permissible without regard to zone or tonnage.

83. After examining the chapter of the report on submarine telegraph cables, the Commission asked the special rapporteur to deal with the subject in a general way, without going into details.

84. On the subject of hot pursuit, the Commission adopted on a first reading the conclusions proposed by the special rapporteur to supplement the rules drawn up by the Codification Conference held at The Hague in 1930.

[22] Mr. Scelle stated that he had abstained from participation in the voting on the articles concerning the continental shelf and related subjects, as he was opposed to the notion of the continental shelf on the ground that it affected the freedom of the seas.

Chapter VIII

OTHER DECISIONS OF THE COMMISSION

Initiation of work on additional topics selected for codification

85. The Commission decided to initiate work on the topic of "nationality, including statelessness", which it had selected for codification at its first session. Mr. Hudson was appointed special rapporteur on this subject. In this connexion, it will be recalled that, in response to a request by the Economic and Social Council contained in its resolution 304 D (XI) of 17 July 1950, the Commission had, at its second session, decided to study the question of nationality of married women in the course of its work on the topic of "nationality, including statelessness".[23] At its third session, the Commission was apprised of Economic and Social Council resolution 319 B III (XI) of 11 August 1950 requesting it to "prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness". This matter lies within the framework of the topic of "nationality, including statelessness".

86. The Commission further decided to initiate work on the topic "régime of territorial waters", which it had, at its first session, selected for codification and to which it had, at its second session, given priority pursuant to a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949. Mr. François was appointed special rapporteur on this topic.

87. The Secretariat was requested to assist the special rapporteurs in their preparatory work on the aforementioned topics.

Extension of the term of office of the present members of the Commission

88. The Commission took note of General Assembly resolution 486 (V) of 12 December 1950 extending the term of office of the present members of the Commission by two years, making a total period of five years from their election in 1948.

Development of a twenty-year programme for achieving peace through the United Nations

89. The Commission took note of General Assembly resolution 494 (V) of 20 November 1950 and, pursuant to paragraph 2 thereof, gave consideration to point 10 of the "Memorandum of points for consideration in the development of a twenty-year programme for achieving peace through the United Nations",[24] submitted by the Secretary-General. As will be seen

[23] A/1316, *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, paragraph 20.

[24] A/1304.

from the present report as well as from its previous reports to the General Assembly, the Commission is making every effort to speed up its work for the progressive development and codification of international law.

Co-operation with other bodies

90. The Commission again gave consideration to the question of co-operation with other bodies envisaged in articles 25 and 26 of its Statute. It was highly gratified by the willingness expressed by many international and national organizations specially interested in international law to co-operate with the Commission in its work. Indeed, such co-operation has already been of great aid to the Commission; reports and studies supplied to the Commission by a number of such organizations have been of great value in the course of the Commission's work, particularly that on the régime of the high seas. It has become apparent that in the future the Commission will need to rely even to a greater extent on the contributions which are being made by non-official groups.

Date and place of the fourth session

91. The Commission decided to hold its fourth session in Geneva, Switzerland. This session, which will last some ten weeks, will begin about 1 June 1952, the exact date being left to the discretion of the Chairman of the Commission in consultation with the Secretary-General.

Annex

DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS

Part I. Continental shelf

Article 1

As here used, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil.

1. This article explains the sense in which the term "continental shelf" is used for present purposes. It departs from the geological concept of that term. The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of the problem.

2. There was yet another reason why the Commission decided not to adopt the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in respect of submarine areas where the depth of the sea would nevertheless permit exploitation of the subsoil in the same way as if there were a continental shelf, could not justify the application of a discriminatory legal system to these "shallow waters".

3. The Commission considered whether it ought to use the term "continental shelf" or whether it would not be preferable, in accordance with an opinion expressed in some scientific works, to refer to such areas merely as "submarine areas". It was decided to retain the term "continental shelf" because it is in current use and because the term "submarine areas" used alone would give no indication of the nature of the submarine areas in question.

4. The word "continental" in the term "continental shelf" as here used does not refer exclusively to continents. It may apply also to islands to which such submarine areas are contiguous.

5. With regard to the delimitation of the continental shelf the Commission emphasizes the limit expressed in the following words in article 1: "...where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil". It follows that areas in which exploitation is not technically possible by reason of the depth of the waters are excluded from the continental shelf here referred to.

6. The Commission considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seems likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 metres would at present be sufficient for all practical needs. This depth also coincides with that at which the continental shelf, in the geological sense, generally comes to an end and the continental slope begins, falling steeply to a great depth. The Commission felt, however, that such a limit would have the disadvantage of instability. Technical developments in the near future might make it possible to exploit resources of the sea-bed at a depth of over 200 metres. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 metres but capable of being exploited by means of installations erected in neighbouring areas where the depth does not exceed this limit. Hence the Commission decided not to specify a depth-limit of 200 metres in article 1. The Commission points out that it is not intended in any way to restrict exploitation of the subsoil of the sea by means of tunnels driven from the main land.

7. The Commission considered the possibility of fixing both minimum and maximum limits for the continental shelf in terms of distance from the coast. It could find no practical need for either, and it preferred to confine itself to the limit laid down in article 1.

8. It was noted that claims have been made up to as much as 200 miles; but as a general rule the depth of the waters at that distance from the coast does not admit of the exploitation of the natural resources of the subsoil. In the opinion of the Commission, fishing activities and the conservation of the resources of the sea should be dealt with separately from the continental shelf (see part II below).

9. The continental shelf referred to in this article is limited to submarine areas outside territorial waters. Submarine areas beneath territorial waters are, like the water above them, subject to the sovereignty of the coastal State.

10. The text of the article emphasizes that the continental shelf includes only the sea-bed and subsoil of submarine areas, and not the waters covering them (see article 3).

Article 2

The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.

1. In this article the Commission accepts the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose stated. The article excludes control and jurisdiction independently of the exploration and exploitation of the resources of the sea-bed and subsoil.

2. In some circles it is thought that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal States, but to agencies of the international community generally. In present circumstances, however, such internationalization would meet with insurmountable practical difficulties, and it would not ensure the effective exploitation of the natural resources which is necessary to meet the needs of mankind. Continental shelves exist in many parts of the world; exploitation will have to be undertaken in very diverse conditions, and it seems impracticable at present to rely upon international agencies to conduct the exploitation.

3. The Commission is aware that exploration and exploitation of the sea-bed and subsoil, which involve the exercise of control and jurisdiction by the coastal State, may to a limited extent affect the freedom of the seas. particularly in respect of navigation. Exploration and exploitation are permitted because they meet the needs of the international community. Nevertheless, it is evident that the interests of shipping must be safeguarded, and it is to that end that the Commission has formulated article 6.

4. It would seem to serve no purpose to refer to the sea-bed and subsoil of the submarine areas in question as *res nullius*, capable of being acquired by the first occupier. That conception might lead to chaos, and it would disregard the fact that in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which the submarine areas are contiguous.

5. The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine areas in question would be practically impossible; nor should recourse be had to a fictional occupation. The right of the coastal State under article 2 is also independent of any formal assertion of that right by the State.

6. The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2. Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community.

7. Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters.

Article 3

The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas.

Article 4

The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the airspace above the superjacent waters.

The object of articles 3 and 4 to make it perfectly clear that the control and jurisdiction which may be exercised over the continental shelf for the limited purposes stated in article 2 may not be extended to the superjacent waters and the airspace above them. While some States have connected the control of fisheries and the conservation of the resources of the waters with their claims to the continental shelf, it is thought that these matters should be dealt with independently (see part II below).

Article 5

Subject to the right of a coastal State to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the exercise by such coastal State of control and jurisdiction over the continental shelf may not exclude the establishment or maintenance of submarine cables.

1. It must be recognized that in exercising control and jurisdiction under article 2, a coastal State may adopt measures reasonably connected with the exploration and exploitation of the subsoil, but it may not exclude the laying of submarine cables by non-nationals.

2. The Commission considered whether this provision should be extended to pipelines. If it were decided to lay pipelines on the continental shelf of another country, the question would be complicated by the fact that pumping stations would have to be installed at certain points, and these might hamper the exploitation of the subsoil more than cables. Since the question does not appear to have any practical importance at the present time, and there is no certainty that it will ever arise, it was not thought necessary to insert a special provision to this effect.

Article 6

(1) The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing. Due notice must be given of any installations constructed, and due means of warning of the presence of such installations must be maintained.

(2) Such installations shall not have the status of islands for the purpose of delimiting territorial waters, but to reasonable distances safety zones may be established around such installations, where the measures necessary for their protection may be taken.

1. It is evident that navigation and fishing on the high seas may be hampered to some extent by the presence of installations required for the exploration and exploitation of the subsoil. The possibility of interference with navigation and fishing on the high seas could only be entirely avoided if the subsoil could be exploited by means of installations situated on the coast or in territorial waters; in most cases, however, such exploitation would not be practicable. Navigation and fishing must be considered as primary interests, so that the exploitation of the subsoil could not be permitted if it resulted in substantial interference with them. For example, in narrow channels essential for navigation, the claims of navigation should have priority over those of exploitation.

2. Interested parties, i.e., not only governments but also groups interested in navigation and fishing, should be duly notified of the construction of installations, so that these may be marked on charts. Wherever possible, notification should be given in advance. In any case, the installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.).

3. The responsibility for giving notification and warning, referred to in the last sentence of paragraph (1) of this article, is not restricted to installations set up on regular sea lanes It is a general duty devolving on States regardless of the place where such installations are situated.

4. While an installation could not be regarded as an island or elevation of the sea-bed with territorial waters of its own, the coastal State might establish narrow safety zones encircling it. The Commission felt that a radius of 500 metres would generally be sufficient, though it was not considered advisable to specify any definite figure.

Article 7

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.

1. Where the same continental shelf is contiguous to the territories of two or more adjacent States, the drawing of boundaries may be necessary in the area of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States, and no general rule exists for such boundaries. It is proposed therefore that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*. The term "arbitration" is used in the widest sense, and includes possible recourse to the International Court of Justice.

2. Where the territories of two States are separated by an arm of the sea, the boundary between their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration.

Part II. Related subjects

Resources of the sea

Article 1

States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert; if the nationals of only one State are thus engaged in a given area, that State may take such measures in the area. If any part of an area is situated within 100 miles of the territorial waters of a coastal State, that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area. In no circumstances, however, may an area be closed to nationals of other States wishing to engage in fishing activities.

Article 2

Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves.

1. The question of conservation of the resources of the sea has been coupled with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to be quite distinct, and for this reason they have been separately dealt with.

2. Protection of marine fauna against extermination is called for in the interests of safeguarding the world's food supply. The States whose nationals carry on fishing in a particular area have therefore a special responsibility, and they should agree among them as to the regulations to be applied in that area. Where nationals of only one State are thus engaged in an area, the responsibility rests with that State. However, the exercise of the right to prescribe conservatory measures should not exclude newcomers from participation in fishing in any area. Where a fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even though its nationals do not fish in the area.

3. This system might prove ineffective if the interested States were unable to reach agreement. The best way of overcoming the difficulty would be to set up a permanent body which, in the event of disagreement, would be competent to submit rules which the States would be required to observe in respect of fishing activities by their nationals in the waters in question. This matter would seem to lie within the general competence of the United Nations Food and Agriculture Organization.

4. The pollution of waters of the high seas presents special problems, not only with regard to the conservation of the resources of the sea but also with regard to the protection of other interests. The Commission noted that the Economic and Social Council has taken an initiative in this matter (resolution 298 C (XI), of 12 July 1950).

5. The Commission discussed a proposal that a coastal State should be empowered to lay down conservatory regulations to be applied in a zone contiguous to its territorial waters, pending the establishment of the body referred to in paragraph 3. Such regulations would as far as possible have to be drawn up in agreement with the other States interested in the fishing grounds in question. They would make no distinction between the nationals of the various States, including the coastal State. Any disputes arising out of the application of the rules would have to be submitted to arbitration. The figure of 200 sea miles was suggested as the breadth of the zone. In view of the fact that there was an equality of votes concerning the desirability of this proposal, the Commission decided to mention it in its report without sponsoring it.

Sedentary fisheries

Article 3

The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas.

1. The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas, in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g., stakes embedded in the sea-floor. This distinction justifies a division of the two problems.

2. Sedentary fisheries can give rise to legal difficulties only where such fisheries are situated beyond the outer limit of territorial waters.

3. Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, have been regarded by some coastal States as under their occupation and as forming part of their territory. Yet this has rarely given rise to complications. The Commission has avoided referring to such areas as "occupied" or "constituting property". It considers, however, that the special position of such areas justifies special rights being recognized as pertaining to coastal States whose nationals have been carrying on fishing there over a long period.

4. The special rights which the coastal State may exercise in such areas must be strictly limited to such rights as are essential to achieve the ends in respect of which they are recognized. Except for the regulation of sedentary fisheries, the waters covering the sea-bed where the fishing grounds are located remain subject to the régime of the high seas. The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal State, should continue to apply.

CONTIGUOUS ZONES

Article 4

On the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to prevent the infringement, within its territory or territorial waters, of its customs, fiscal or sanitary regulations. Such control may not be exercised more than twelve miles from the coast.

1. International law does not prohibit States from exercising a measure of protective or preventive jurisdiction for certain purposes over a belt of the high seas contiguous to its territorial waters, without extending the seaward limits of those waters.

2. Many States have adopted the principle of a high sea zone contiguous to territorial waters, where the coastal State exercises control for customs and fiscal purposes, to prevent the infringement of the relevant laws within its territory or territorial waters. In the Commission's view it would be impossible to challenge the right of States to establish such a zone. However, there may be doubt as to the extent of the zone. To ensure as far as possible the necessary uniformity, the Commission is in favour of fixing the breadth of the zone at twelve nautical miles measured from the coast, as proposed by the Preparatory Committee of The Hague Codification Conference (1930). It may be, however, that in view of the technical developments which have increased the speed of vessels, this figure is insufficient. A further point is that until such time as there is unanimity in regard to the breadth of territorial waters, the zone should invariably be measured from the coast and not from the outer limit of territorial waters. The States which have claimed extensive territorial waters have in fact less need of a contiguous zone than those which have been more modest in their delimitation.

3. Although the number of States which claim a contiguous zone for the purpose of sanitary regulations is fairly small, the Commission believes that, in view of the connexion between customs and sanitary regulations, the contiguous zone of twelve miles should be recognized for the purposes of sanitary control as well.

4. The proposed contiguous zones are not intended for purposes of security or of exclusive fishing rights. In 1930, the Preparatory Committee of the Codification Conference found that the replies from governments offered no prospect of reaching agreement to extend beyond territorial waters the exclusive rights of coastal States in the matter of fishing. The Commission considers that in that respect the position has not changed.

5. The recognition of special rights to the coastal State in a zone contiguous to its territorial waters for customs, fiscal and sanitary purposes would not affect the legal status of the airspace above such a zone. Air traffic control may necessitate the establishment of an air zone over which a coastal State may exercise control. This problem does not, however, come within the régime of the high seas.