SOME COMMENTS ON GIDEL'S VIEWS.

During the years 1949, 1950, and 1951, the United Nations International Law Commission intensively studied and discussed the question of the continental shelf and "related subjects." At its third session in 1951 the Commission adopted draft articles on the following subjects relevant to the present discussion:—the continental shelf, resources of the sea, sedentary fisheries, and contiguous zones. The paper which is the subject of these comments was read to the International Bar Association in 1952 at its Madrid Conference. Accordingly, Gidel referred to the 1951 provisional draft articles, and to some extent his position was apparently influenced by the views which those articles reflect. However, in its fifth session (1953) the Commission re-examined the provisional (1951) draft articles in the light of comments on them by governments, views expressed by writers and learned societies, and the Commission's own study and discussion of the problems bearing on those topics. As a result of this re-examination fresh draft articles were adopted by the Commission in 1953. The object of this commentary is to select some five of the topics discussed by Gidel, to examine them in the light of the 1953 draft articles and, possibly, to make certain suggestions for development of juristic thought in this field.

I. *The "natural resources" of the continental shelf.*

At the outset Gidel made a clear distinction between those resources which fall within a discussion of the continental shelf doctrine and those which do not. These latter are the *biological* resources of the sea and are concerned with the volume of the waters. Insofar as they are susceptible of State control, or of international law doctrines, their classification in international law falls outside the continental shelf doctrine but within such related subjects as territorial waters, contiguous zones, etc. In the 1951 provisional draft articles the mineral resources of the seabed and subsoil would appear to be those which alone fell within the term "natural resources" of the continental shelf; and it is suggested that when Gidel was writing of the resources of the seabed (as distinct from the resources of the subsoil) of the continental shelf, he had in mind only such special cases as the winning of tin-bearing (or other mineral-bearing) muds from the seabed of the high seas; such as the tin-dredging industry off the coast of Sumatra. The view Gidel presented suggests that he would classify the resources of the sedentary fisheries to be found in various parts of the world as biological

resources of the sea, and, as properly belonging to the volume of the sea, he would deem them to fall outside the continental shelf doctrine. This would have been in agreement with the 1951 provisional draft articles, which dealt with sedentary fisheries in a separate article from those relating to the continental shelf and, indeed, under a distinct heading. However, at its 1953 session the International Law Commission revised this view. It did not think it necessary to retain the separate heading and article on sedentary fisheries. Instead, it retained the term "natural resources" in Article 2 of the 1951 provisional draft articles, and rejected a proposal that in the 1953 draft of Article 2 the words "natural resources" should be replaced by the words "mineral resources." Furthermore, the Commission gave the words "natural resources" a wider interpretation than it had in 1951, extending them to include sedentary fisheries. In its commentary on this change the Commission explained that it had come to the conclusion "that the product of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted."[1] The Commission, however, did not bring within this rubric such bottom fish as plaice and flounder.

Creatures of the sessile benthos may be regarded as "fixtures" or "fructus." The principle underlying this view would appear to be analogous with that in *Duchess of Sutherland v. Watson.*[3] This was an action for taking mussels from mussel-scalps (banks). These banks, situated between high and low-water marks, had been the subject of a grant by the Crown to the plaintiff of an exclusive right. In this case Lord Neave took the view that mussels, once they have fastened to the seabed, do so *animo remanendi,* and therefore become *partes soli.* The fact that the spat of sessile fauna float about until they settle down is surely no more of an objection to their becoming *partes soli* than the ownership of plants grown from wind-borne seeds.

Marine biologists, zoologists, and zoographers have made a broad classification of the marine population on the basis of common habits of locomotion, and more importantly (for our point of view) on mode of life and ecological distribution.[3] This classification is quite apart

[1] Report of the International Law Commission covering the work of its fifth session (1 June - 14 August 1953), U.N. General Assembly, 8th Sess., Official Records, Supp. No. 9 (A/2456), para. 70; reprinted in (1954) 48 AM. J. INT. L. (OFFICIAL DOCUMENTS) 1-70.

[2] (1868) 6 Macpherson (S.C.) 199.

[3] See, for example, SVERDRUP, JOHNSON & FLEMING, THE OCEANS 280-287, and HESSE, ALLEE & SCHMIDT, ECOLOGICAL AND ANIMAL GEOGRAPHY cc. xii and xiii.

from those based on natural phylogenetic or taxonomic relationships. It is founded on the primary biotic divisions. The primary biotic divisions are the benthic and the pelagic. The ecological groups into which the population of the sea is divided are the benthos (*Greek,* deep, or deep-sea), the nekton (*Greek,* swimming), and the plankton (*Greek,* wanderer). Just as the benthic division is the sea bottom, so the benthos is the group comprising those animals whose "way of life", feeding, etc., bring them to inhabit that division. Plaice, flounder, and other "bottom fish", because their means of locomotion is swimming, are classified as nekton, not benthos.

Marine zoographers subdivide the benthic division into the littoral and deep-sea systems, and the boundary between these two is usually taken at the depth of the maximum penetration of light (necessary for the maintenance and sustenance of at least abundant life) which is theoretically taken to be approximately 200 metres of depth. This coincides with both the geographical and the legal "continental edge." In the littoral benthic system are found the main benthic animals. These are classified into: (1) sessile benthos, such as sponges, mussels, oysters, corals, seaweeds, etc.; (2) creeping fauna, such as crabs, lobsters, green-snail, some bivalves, etc.; (3) burrowing forms, including most of the worms, clams and, among other echinoderms, bêche-de-mer. May it be possible for lawyers to follow the lead of the marine zoographers and regard the benthic organisms (both flora and fauna) as being "natural resources" of the seabed of the littoral benthic system, i.e., of the continental shelf? If merely the sessile animals come within the legal concept, then such benthic creatures as those of the crawling and burrowing classes would be excluded. Yet in some parts of the world fisheries for chank, green-snail, trochus, and bêche-de-mer are all regarded as capable of becoming the subject of coastal states' sovereign rights. The Australian proclamations and legislation relating to the continental shelf assume that more than merely sessile benthos are included within the term "natural resources" of the continental shelf. The Pearl Fisheries Act[4] is an exercise of extra-territorial legislative power over trochus, bêche-de-mer, and green snail, in addition to pearl shell.

II. *Definition of the continental shelf.*

Article 1 of the 1951 provisional draft articles adopted the criterion of exploitability as defining the extent of the continental shelf subject

[4] Pearl Fisheries Act 1952-1953 (No. 8 of 1952 and Nos. 4 and 38 of 1953); note the title of the Act, the definition of "pearling" in sec. 5 (1), the reference to pearling in sec. 5 (2), etc.

to State power. It was there defined as " . . outside the area of territorial waters, where the depth of the superjacent waters admits the exploitation of the natural resources of the seabed and subsoil." It was with this definition that Gidel found difficulty. By and large he favoured the 200-metre bathymetric contour line as setting the outer limit of the juristic continental shelf. This is now the criterion in Article 1 of the 1953 draft articles. The 100-fathom bathymetric contour line employed in the Australian legislation, as giving a fixed and certain definition to the "continental edge", is some small distance within the 200-metre contour line.[5]

III. *Rights for which the continental shelf is apt.*

The 1945 Truman Proclamation[6] sought to subject the "natural resources" of the continental shelf contiguous to the coasts of the United States to "its jurisdiction and control." Within the British Commonwealth, and among certain states for whose foreign policy Great Britain is responsible, instruments extending jurisdiction over a contiguous continental shelf declare, or proclaim, state authority in various formulae by (a) asserting an "exclusive jurisdiction and control" over the contiguous submarine areas in that form of words or by a variation having a similar intendment;[7] (b) proclaiming that the "boundaries of the territory" are "extended" to include the contiguous continental shelf or "submarine area";[8] (c) proclaiming that a

[5] Pearl Fisheries Act, sec. 5, subsecs. (2) and (5). 100 fathoms correspond to 182 metres 90 centimetres; 200 metres correspond to 109.36 fathoms or 656 feet.

[6] Proclamation of the President *With respect to the Natural Resources of the Subsoil and the Sea Bed of the Continental Shelf* of 28 September 1945, Proclamation 2667, 59 STAT. (U.S.) 884, reprinted in (1946) 40 AM. J. INT. L. (OFFICIAL DOCUMENTS) 45-48.

[7] Each of the Arab States under United Kingdom protection promulgated a proclamation entitled *Proclamation with respect to the Seabed and Subsoil of the high seas of the Persian Gulf.* These were:—Abu Dhabi, 10 June 1949; Ajman, 20 June 1949; Bahrain, 5 June 1949; Dubai, 14 June 1949; Kuwait, 12 June 1949; Qatar, 8 June 1949; Ras al Khaimah, 17 June 1949; Sharjaih, 16 June 1949; and Umm al Taiwain, 20 June 1949.

[8] *Australia*: Petroleum (Prospecting and Mining) Ordinance (1951) of Papua and New Guinea, sec. 15 (3).

Pakistan: Declaration by the Governor-General of 9 March 1950.

The following were made under the COLONIAL BOUNDARIES ACT 1895, 58 & 59 VICT. c. 34:—

Bahamas: Bahamas (Alteration of Boundaries) Order in Council, No. 2514 of 26 November 1948.

British Honduras: British Honduras (Alteration of Boundaries) Order in Council, [1950] Statutory Instruments No. 1649.

Brunei: Brunei (Alteration of Boundaries) Order in Council of 24 June 1954, [1954] Statutory Instruments No. 839.

"submarine area" is "annexed";[9] (d) declaring "sovereign rights" "for the purpose of exploring and exploiting natural resources" of the "contiguous" and "adjacent" continental shelves.[10] These verbal formulae all emanate (except for Australia's proclamation and that of Pakistan) from one source, namely Her Majesty's Government in the United Kingdom. Again, all the proclamations under classes (b) and (c) above declare, or constitute (as the case may be), sovereignty over the contiguous continental shelf. It has been argued that an instrument declaring a right to "exercise jurisdiction and control" relates to nothing more than a kind of *profit à prendre* as it were. But declarations by states of a "privilege" (in the Hohfeldian sense)[11] to exercise jurisdiction and control always relate, in the present type of situation, to an exclusive privilege. It is the exclusiveness (whether this be expressed or latent) of the privilege, together with the extended operation for which the words "natural resources" are apt (what is there in, or on, the continental shelf which is not, or may not become, "natural resources"?) which leads to the conclusion that any assertion to the effect that a declaration of "jurisdiction and control" is less than a declaration of sovereignty, is a mere exercise in logomachy. Thus it is that Gidel points to the barren and profitless nature of an attempt to distinguish between these verbal labels; this, even when "sovereignty" is expressly limited by the international law doctrine of the freedom of the seas. But when a legal doctrine, or rule, accords a privilege, strict limits to that privilege may be set by a narrow definition of its object. And this is so no matter what that privilege is called, "sovereignty", "sovereign rights", or "jurisdiction and control."

Gidel pointed to a *tertium quid.* He suggested that doctrine should formulate a "right of 'control and jurisdiction' over the natural resources of the continental shelf limited to their exploration and exploitation." In Article 2 of the 1951 provisional draft, state power over the contiguous continental shelf was seen as being "control and

Falkland Islands: Falkland Islands (Continental Shelf) Order in Council, [1950] Statutory Instruments No. 2100.

Jamaica: Jamaica (Alteration of Boundaries) Order in Council, [1948] Statutory Instruments No. 2574.

North Borneo: North Borneo (Alteration of Boundaries) Order in Council of 24 June 1954, [1954] Statutory Instruments No. 838.

9 Trinidad and Tobago: Trinidad and Tobago Submarine Areas of the Gulf of Paria (Annexation) Order, [1942] S.R. & O. 919.

10 Australia: Proclamations of the Governor-General, [1953] Commonwealth of Australia Gazette 2563.

11 Although a "power" in the municipal law of the state, it is a "privilege" accorded to that state in international law.

jurisdiction for the purpose of exploring it and exploiting its natural resources." This contained the limitations which Gidel considered desirable. They permit only the minimum encroachment on the freedom of the seas. Article 2 of the 1953 draft is similar in scope to that of 1951, since it provides that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources." The definition of the object of this state power remains the same through both these drafts. The only change which may appear to have significance is the change from "control and jurisdiction" to "sovereign rights."

On this change the Commission reported:[12] "The Commission does not consider the change thus effected to be of fundamental importance . . . in adopting the Article in its present formulation the Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considered to be of decisive importance, namely, safeguarding the principle of the full freedom of the superjacent sea and the air-space above it." The reason for the change was to make clear the completeness of the powers of the coastal state over the limited and specific named objects—exploration and exploitation of the natural resources. Such a privilege is intended to include full jurisdiction, in particular over the suppression of crime and the regulation of civil status (where necessary). Gidel saw the necessity of not permitting the coastal state the enjoyment of a "pattern of State powers integrated into a complex whole" (Gidel's "faisceau des compétences étatiques"), but only particular powers specialised for the purposes of exploring and exploiting the natural resources of the continental shelf. This same view underlies both the Commission's drafts.

Thus the limitation of the ambit of the power remains. Power is specialised and is limited to particular purposes. In addition, Article 3 of the 1951 and 1953 drafts remains the same. It makes a formal reservation of the superjacent waters from the exercise of the privilege. But Article 3, if taken alone, can effect only a formal compromise in the conflict of interests involved in contradictions between the freedom of the high seas on the one hand, and the continental shelf doctrine on the other. Certain controls of the exploration and exploitation of the continental shelf must incidentally, but unavoidably, affect the use of the waters above the shelf. The erection of platforms and artificial islands may require the diversion of ocean traffic into speci-

[12] A/CN. 4/L 45/Add. 1, paras. 11, 12; and see also A/CN. 4/76. 42, paras. 75, 76.

fied sea routes or lanes. The conduct of a sedentary fishery may require the coastal state (for the safety of the fishermen) to prohibit ocean-going vessels from travelling through certain sea areas, or again, to provide specified lanes. Thus the freedom of vessels on the high seas is affected and regulated; but it is not prohibited. To give a power to regulate preserves the freedom of the seas, even while modifying its actual ambit, and, at the same time, permits the admission of the continental shelf doctrine to the ranks of international law categories. The effect of Article 2 is to limit state activities *vis-à-vis* the continental shelf and its superjacent waters to effecting the objects therein strictly defined; so long as a state's conservation and licensing laws have a necessary connection with and are directly referable to those objects, they are valid. Once a coastal state acts beyond those objects, then its activity comes into conflict with the freedom of the seas. It is therefore invalid in international law. The Australian proclamations and legislation are in accordance with this view.

IV. *Is the continental shelf doctrine de lege lata or de lege ferenda?*

As his paper was presented to open a discussion on the continental shelf, it would appear that Gidel restricted himself to a conventional type of analysis. First, he studied the topic from the standpoint of characterising it as falling under the rubric of "droit coutumier." This characterisation he rejected. He then turned to a separate head, namely, "general principles of law." Following the International Law Commission's commentary on the 1951 provisional draft articles, he considered that the doctrine could successfully be characterised as "a general principle of law."

Article 38, paragraph 1, of the Statute of the International Court of Justice provides:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply—
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilised nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified

publicists of the various nations, as subsidiary means for the determination of rules of law."

The preliminary question is whether the unilateral acts of states which have promulgated instruments declaring their privileges over the contiguous and adjacent continental shelves have established an "international custom as evidence of a general practice accepted as law" relative to the continental shelf. At the outset, it is submitted that the text of Head b. contains only a limited concept. In the French text the words used in this Head are:—"b. la coutume internationale comme preuve d'une pratique générale acceptée comme étant le droit." The limited meaning which may be given to the notion of custom, at least in the context of the continental shelf doctrine, may be brought into relief by pointing to the distinction between the French terms "droit coutumier" and "droit commun." And, in contradistinction to "droit coutumier" the latter may be taken to include "general principles of law" whose basis is not a (fictitious) implied agreement. Gidel, no doubt bearing in mind the strong voluntarist, or consensual, strain in international law thinking, permitted the restrictive meaning of custom to be applied. It is significant that in discussing the question of whether an international custom had been established he was content to use the phrase "droit coutumier."

(1) *The effect of unilateral acts.*

It is submitted that in establishing the existence of a customary rule, length of time is not *per se* important. This is proportionate to the degree of change in existing international law, and the importance of the states adopting the new principle in their international practice.[13] Because international law did not, before 1942, expressly prohibit the exercise of "sovereign rights" over the seabed and subsoil

[13] In The Scotia, (1872) 14 Wall. 170 at 187, 20 L. Ed. 822 at 826, the United States Supreme Court stated:—"Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation." In this case the first "positive prescription" (the promulgation of regulations as to collisions at sea by the United Kingdom) was in 1863; the decision was given in 1872. The Court applied, as an international custom, a rule which had only come into existence in the intervening nine years through the unilateral adoption, in the domestic legislation of maritime nations, of the collision regulations first promulgated by the United Kingdom. For a general discussion of this question see Lauterpacht, *Sovereignty over Submarine Areas*, (1950) 27 BRIT. Y.B. INT. L. 376 at 393 ff., and M. W. MOUTON, THE CONTINENTAL SHELF (1952) 276.

outside territorial waters,[14] it is submitted that the continental shelf doctrine, as formulated in the Commission's draft articles of 1953, does not amend to any great degree those canons and precepts of the international law of the sea which existed before the rise of this doctrine. But the draft articles do effect a considerable degree of change in the manner in which the canons and precepts exemplifying the freedom of the seas may be deployed in concrete cases. Moreover, the fact that the two leading maritime nations, Great Britain and the United States, have adopted the doctrine is of special significance, particularly since both states are firmly wedded to the principle of the freedom of the seas.

Gidel appears to take the view that the unilateral acts of states in the present context had not, by 1952, established a "droit coutumier." This was in accord with the International Law Commission's commentary on the 1951 provisional draft articles.[15] But the commentary on the 1953 draft articles is more ambiguous:— "In particular, it is not possible to base the principle of the sovereign rights of the coastal state exclusively on recent practice, for there is no question in the present case, of giving the authority of a legal rule to a unilateral practice resting wholly on the will of the states concerned. However, that practice itself is considered by the Commission to be supported by considerations of legal principle and convenience."[16]

Although the first sentence in this quotation would appear to reject categorically any question of the recognition of a "droit coutumier", the second would appear to admit the elements, the raw material, for recognising a rule of customary international law. Whether custom is regarded as "a law-creating fact",[17] or as evidence of a legal norm, the considerations of "practice", "legal principle", and "convenience" are the very factors which go to make up a customary rule. However, it is here that the difficulty which is implicit in Gidel's text is reached. "Customary law" is an indeterminate term, and, of course, it is quite valid to give it the restricting stipulative definition of "droit coutumier." In one sense, and in the sense in which it is

[14] See, for example, Annakumaru Pillai v. Muthupayal, (1903) 27 Indian Reports, Madras Series, 551. For a brief survey of the appropriation of sedentary fisheries by Ceylon, Tunis, Ireland, Venezuela, Panama, Australia, and in the Persian Gulf, see J.P.A. François, *Second Report on the High Seas*, for the International Law Commission, U.N. Document A/CN. 4/42, 51-62; François considered that coastal states could regulate sedentary fisheries unilaterally.

[15] Para. 6 of the Commentary to Art. 2.

[16] A/2456, 14, para. 73.

[17] H. Kelsen, Principles of International Law (1952) 307 ff.

usually taken, it means little more than usage, long established practice. In another sense it may approach the concept of a "common law", an activity reflecting general principles of law. If it is given this latter meaning, then the second sentence of the quotation would appear to contrast with the first. It is, possibly, too soon to state unequivocably and dogmatically that the principles, to which the 1953 draft articles sought to give expression, have become part of international law in the formula there expressed, just as it is unnecessarily restrictive to aver that the continental shelf doctrine is entirely *de lege ferenda.*[18]

(2) *The general principles of law.*

That a narrow and restrictive view may be taken on the development of custom is, of course, not so much because the term itself requires a contractual basis, but because a strongly supported theory of international law has given this interpretation to custom. It is submitted that it is because of this difficulty that Gidel restricted his study of custom to the terminology "droit coutumier." De Visscher adumbrates the operation of this theory when he writes:— "La doctrine volontariste voit dans la coutume internationale le produit d'un accord tacite de volontés entre Etats. Cette représentation manifestement fictive procède d'une vue erronée de l'action du pouvoir sur la formation du droit coutumier. Au lieu d'envisager une pratique dans les étapes du processus historique de son développement, on la reconstitue après coup pour la projeter, toute formée, dans le plan des représentations contractuelles. Rien n'est plus propre à fausser la perspective réelle du développement coutumier."[19] The basis of a "voluntarist" or "consensual" theory of international law would appear to rest on a social contract theory. If, in international law, the assumptions of a social contract are granted, its conclusions have consistency, even attractiveness. But as Stone has shown, it is necessary to look beyond the fictions of traditional theories to the "stuff of the substratum of international law."[20] Any social contract theory in relation to international law starts from the fiction that a sovereign state

[18] See, for example, the views of Lord Asquith of Bishopstone in the Abu Dhabi Oil Arbitration Award, reported in (1952) 1 INT. & COMP. L.Q. 247, at 257-258. For an expression of the contrary view see Lauterpacht, *loc. cit.* 376-377 and 431.

[19] CHARLES DE VISSCHER (formerly a judge of the International Court of Justice), THEORIES ET REALITES EN DROIT INTERNATIONAL PUBLIC (1953) 182; for the development of this writer's view of customary law indicated in the quotation see especially 182-192.

[20] JULIUS STONE, LEGAL CONTROL OF INTERNATIONAL CONFLICT (1954) 38.

may be regarded as having attributes similar to those of the free-willing individual in 17th and 18th century political thought.[21] Yet a "state" is a complex. It is the meeting point of multitudes of interests deemed significant by its human members. In the international sphere it has the supervision of and responsibility for human communications[22] and relations generally across the frontier, and the protection, on behalf of its members, of many of their interests which spread beyond its borders. In the context of the contemporary need for the orderly and regulated use and development of available natural resources such a voluntarist view fails to take into consideration the vitality of interests pressing for recognition in the growth of the law.[23]

The "processus historique" in the development of the continental shelf doctrine arises, in the context of the continental shelf, from the "felt need" of our time that the increasing pressure of world population, and the demand for the natural resources, should not give rise to social control through competitive conflicts, but rather through legal regulation; and, further, that this legal control should underwrite an even-handed distributive justice by maintaining the balance between the interests underlying the freedom of the seas and those underlying the continental shelf doctrine. However, the interpretation which may be given to the concept of custom is controversial, and in order to avoid controversy, Gidel, as we have seen, has permitted that term to be given the narrow meaning in characterising the continental shelf practices of states. Although, given this meaning of custom, Gidel appears to have rejected the idea that a coastal state may acquire a privilege over a contiguous continental shelf by virtue of a customary rule, he did suggest the possibility of the privilege being valid in international law by reason of being subsumed under the rubric of "general principles of law."

The "source" of legal decision in Head c. of Article 38.1, in Lauterpacht's view, imports into international law principles analogous to the Roman *jus gentium* as distinct from treaties and rules of customary law.[24] Lauterpacht considered that this Head "sounded the death knell of positivism." But as Stone[25] has pointed out, it rein-

21 See KELSEN, *op. cit.* 316-317.

22 On "humanity-wide communication" and the operation of state power in relation thereto in the mid-twentieth century see STONE, *op. cit.* Introduction xli-xliv.

23 On the role of the play of interests in international law and the need for "a sociology of international law" see STONE, *op. cit.* 37-47.

24 H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933) 67-71, and STONE, *op. cit.* 137.

25 STONE, *op. cit.* 145.

forces positivism "by the appearance of a new instrument for eking out the inadequate content of positivist law, helping to reconcile the boisterous political realities of positivism with its comparative barrenness as a spring of juristic life."

And, no doubt, Gidel was bearing in mind the creative potential of this Head for bringing the continental shelf doctrine within the framework of international law when he wrote:— "But does the problem really relate to 'general principles of law'? What is in issue is not merely the verification of certain physical facts and requirements which, in the face of the continuous growth of world population and of the continuous depletion of world resources, make desirable the elevation of the common precepts of convenience and even-handed dealing to the level of 'general principles of law'."

(3) *Towards a "droit international commun"?*

On the efficacy of Head c. Hudson writes,[26] "In the jurisprudence of the Court this provision (i.e., Art. 38.l.c.) looms less large than in the literature it has inspired." But it is suggested that it has influenced the thought and action of the Court, and, in dissenting or separate opinions, individual judges have referred to it. It is understandable that out of caution the Court may not have specifically referred to Head c. nor specifically indicated the particular rule forming the basis of decision, which in any particular case may be deemed the relevant "general principle of the law."[27] But on many occasions the Court referred to, and proceeded upon, "principles of international law", or "generally accepted principles of international law" or "principles taken from general international law." It may be said that it has "endeavoured to give effect to what has been called the *common law* applicable to international affairs, but it has drawn no distinction between common law and customary law, nor between either and 'general principles of law'."[28]

Possibly, the restraints upon a writer whose paper commenced a discussion, and who confined himself to placing before his audience the issues involved, may have caused Gidel to restrain himself from developing further along the lines of thought which may be seen to

26 Manley O. Hudson, The Permanent Court of International Justice 1920-1942 (1943) 611-612.

27 In the Case of the Société Commerciale de Belgique, P.C.I.J. Series A/B, No. 78 (1939), the Court applied a general principle of res judicata.

28 Hudson, *op. cit.* 612; and note de Visscher, *op. cit.* at 427—"Cette observation est confirmée par le nombre assez élevé de cas dans lesquels, sans référence à l'article 38 du Statut, ni démonstration de ce qu'elle avançait, la Cour a simplement affirmé l'existence d'un principe général."

be inherent in his presentation. It is now open to someone following the lead of Gidel's reasoning to suggest a third head under which the continental shelf doctrine may be characterised.

In contradistinction to the view that Heads b., c., and d. are to be taken distributively, it is submitted that the validity of the continental shelf doctrine can be founded upon a combination of Heads b. and c., with Head d. employed in a subsidiary and evidentiary capacity, its function being to testify as to the opinion of eminent judges and writers on the formulation of the rule and the consistency of the precepts so formulated with other rules and principles of international law. It is not, of course, suggested that in every decision these Heads should be taken in combination. Where decision requires one and no more of these Heads, then, of course, it is not within the submission to say that the other Heads should be consulted. Where any one Head, owing possibly to a traditionally restrictive interpretation of its terms, or because of the complexity of the fact situation for decision, cannot cover the instant case, then the other Heads may be called in, not as alternatives, but as supports. When these Heads are taken together something different from a "droit coutumier" comes into existence. This is a "droit commun" in its classic sense, a body of practice, not founded on a fictitious implied agreement, but on broad principles of law, and the "precepts of convenience and equity."[29]

Since, as has already been suggested, length of time is not fatal to the establishment of a custom, and because the importance of the states concerned (relative to their interest) should be taken into account, the factor of practice should not be disregarded. The continental shelf doctrine is not necessarily excluded from this rubric. In addition that doctrine may be supported under the Head of "general principles of law." Accordingly, it is submitted, the continental shelf doctrine may be successfully characterised under the rubric "droit international commun."

In considering whether the doctrine is still in the stage of *lex ferenda,* or has already become *lex lata,* it is not enough to review state practice, count the states concerned, and assess the strength of their interest. Nor does it suffice to review the history of diplomatic protest relevant to the doctrine, or the absence of protest, and then dispose, once and for all, of the problem of customary international law. These factors are important. By themselves they are not enough. Nor need we then, as if we had finished with that point, turn to the problem of "general principles of law" as if this posed a separate and distinct

[29] Gidel, at p.103 *supra.*

line of enquiry. All these factors, it is submitted, must be taken together. Possibly the most felicitous summing up of the position, as it stands at this moment, is the solution suggested by Francois:— "Les réponses de quelques Etats font preuve d'une certaine hésitation au sujet de la question *lex lata* ou *lex ferenda.* A mon avis, il faudrait faire une distinction. *Le principe* de la 'souveraineté' de l'Etat côtier sur le plateau continental, tout en maintenant la liberté de la mer surjacente pourrait être considéré déjà maintenant comme *lex lata* comme principe général de droit, mais toutes les questions de détail se trouvent encore dans la phase de *lex ferenda.*"[30]

V. *The doctrine of "Abus des droits."*

The weakness of the continental shelf doctrine lies, in the main, in the points of its conflict with the freedom of the seas. The number of these points of possible conflict, and the seriousness of that conflict itself, are reduced when the doctrine is regarded as ascribing a privilege, in international law, to the coastal state, and, further, when that privilege is limited to the specific and particular objects contained within its definition. It has the effect of reducing both the seriousness and number of conflicts between the interests constituting the substratum of these rubrics. But even this method of strictly limiting the objects of the privilege may not eliminate these conflicts. Conflicts may arise mainly in connection with such pursuits (under the protection of the freedom of the seas) as trawling on the one hand and, on the other, controlling activities on the surface waters by coastal states which, for example, provide for the promulgation and enforcement of conservation laws relating to the natural resources of the continental shelf, or direct ocean traffic into sea-lanes, or control the erection of artificial islands and installations built on the surface of the shelf.

To prevent the exercise of privileges in such a way as to harm or inhibit, without justification, the exercise of other privileges, it is submitted that some such doctrine as "abus des droits" could profitably be applied in this area of conflict.[31] This doctrine is to hand as "a

[30] (1952) Report of the Forty-fifth Conference (Lucerne) of the International Law Association 145.

[31] For a discussion of the doctrine of abuse of rights in international law see LAUTERPACHT, *op. cit.* c. xiv. Generally on this topic Lauterpacht writes, "The doctrine of abuse of rights plays a relatively small part in municipal law, not because the law ignores it, but because it has crystallised its typical manifestations in concrete rules and prohibitions. In international law, where the process of express or judicial law-making is still in a rudimentary stage, the law of torts is confined to very general principles, and the part which the doctrine of abuse of rights is called upon to play is therefore particularly important. It is one of the basic elements of the international law of torts" (at 298).

general principle of law." Its function is seen as operating as a buffer in those contexts where conflicts between the freedom of the seas and the continental shelf doctrine are most likely to arise. Its purpose is to protect interests exercising either one or the other of these concepts (depending on the concrete situation where this "buffer" is to be applied) from each other.

The doctrine of abus des droits has been applied in the international sphere by the Permanent Court of International Justice,[32] as well as by other courts and tribunals.[33] The application of this concept extends beyond liability for fault; nor is it limited to the malicious exercise of rights. It may also be applied, as a rule of policy, to protect interests which are considered socially or morally more important. The process becomes one of balancing interests. In Article 6, paragraph (1), of the 1953 draft articles the International Law Commission stated:—
"(1) The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production."

No similar expression of such a view is to be found in the 1951 draft article; accordingly this new, and it is submitted most significant, declaration of the Commission's view was not available to Gidel. It will be noted that the paragraph does not seek to prohibit any kind of interference, but only *unjustifiable* interference. To lay down that the exploration and exploitation of the continental shelf must never interfere with navigation and fishing would, in many cases, render merely nominal the coastal state's sovereign rights. It is here that an assessment of the relative importance of the interests involved is necessary.

"Interference, even if substantial, with navigation and fishing, might, in some cases, be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf."[34]

The Commission considers that disputes as to the reasonableness, the justification, of measures adopted by coastal States should be set-

[32] For example, in the Case concerning certain German interests in Polish Upper Silesia, P.C.I.J. Series A. No. 7 (1926), and The Free Zones of Upper Savoy and the District of Gex, P.C.I.J. Series A, No. 22 (1929), and P.C.I.J. Series A/B, No. 46 (1932).

[33] For example, the decisions of the United States Supreme Court in cases between States of the Union involving interference with, or diversion of, the flow of interstate rivers, the disposal of sewage, etc.; and those of the Swiss Federal Court in disputes between cantons.

[34] A/CN. 4/L. 45/Add. 1, para. 20; and see A/2456, para. 77.

tled in accordance with draft Article 8. This article is seen as controlling the settlement of all disputes arising out of the continental shelf doctrine.[35]

Similarly, considerations of reasonableness and justification apply in the case of the erection of installations, and the establishment of safety zones around these installations.[36] The privileges accorded by the continental shelf doctrine are therefore seen as subject to the overriding prohibition of unjustifiable interference with the freedom of the seas. It is submitted that consideration should be given to a reciprocal application of the doctrine of abus des droits to states exercising the freedom of the seas. In certain situations policy, and the consideration of the socially more valuable interests, may require the protection of the coastal state's privileges over its continental shelf against unjustifiable interference by other States which might otherwise be in a position to claim that their acts of unjustifiable interference are protected by the freedom of the seas. In such a way a maximum use and enjoyment of the resources of both the volume of the seas, and of the seabed and subsoil, can peaceably be assured for the future.

L. F. E. GOLDIE.

APPENDIX

Comparative Tables of the 1951 draft Articles and the 1953 draft Articles of the International Law Commission.

1951	1953
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.	As used in these articles, the term "continental shelf" refers to the sea bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

[35] A/2456, para. 77.
[36] A/2456, para. 78.

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.

The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

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.

The rights of the coastal state over the continental shelf do 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 rights of the coastal state over the continental shelf do not affect the legal status of the airspace above the superjacent waters.

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.

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal state may not prevent the establishment or maintenance of submarine cables.

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. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production.
2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal state is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources and to establish safety zones at a reasonable distance around such installations and to take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal state, do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal state.

4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or on recognised sea lanes essential to international navigation.

Article 7

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in this 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 states whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such states is, in the absence of agreement between those states or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

2. Where the same continental shelf is contiguous to the territories of two adjacent states, the boundary of the continental shelf appertaining to such states is; in the absence of agreement between those states or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.

Article 8

Any disputes which may arise between states concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties.