Center for the Study of Democratic Institutions

Memorandum

To: Staff and Participants

Date: March 11, 1968

From: Elisabeth Mann Borgese

Subject: Conference on the Law of the Seas

Enclosed is a summary of the discussions of the planning session on the Law of the Seas, February 24-26, 1968. A full transcript of the discussions will follow as soon as it is ready.

Summary of Discussions
Planning Session on the Law of the Seas
February 24, 25, 26, 1968

I.

The Center launched its project on the deep seas with a three-day planning session on February 24-26, attended by a group of ambassadors from the United Nations -- most of them members of the Ad Hoc Committee, and by a group of distinguished scientists and scholars from various countries, West and East.

Summing up the work of the conference, it may be best to list first the major issues as they were raised by the discussion, and then summarize the conclusions and recommendations.

1. "The seabed and the ocean floor and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction" is not a clearly defined concept. According to existing international law, "national jurisdiction" extends (a) to the "territorial waters" which may vary from a limit of three to a limit of two hundred miles from the shoreline, according to the claims of various nations and, (b) to the continental shelf as established by the Geneva Convention of 1958: i.e., the submarine extension of the coast down to a depth limit of two hundred meters, or beyond if exploitation is practical. Where the oceans are shallow, the continental shelf -- subject to national jurisdiction and exploitation -- may extend for hundreds of miles. The criterion of exploitability, furthermore, is elastic -- establishing a "rubber frontier," defined, not by legal norms but by

technological progress. The most developed nations may claim most of the ocean floor. So, what, actually, is the submarine area "beyond the limits of national jurisdiction?"

As though this difficulty were not enough, the scientists pointed to another one: for all practical purposes, it is impossible to separate the use of the ocean floor and the seabed from that of the superjacent waters. The ecology of the ocean space does not permit such a distinction. What is done at the bottom will affect the superjacent waters -- just as activities on the earth will affect the atmosphere and vice versa. Problems of pollution, for instance, cannot be isolated.

Thus the use of the extranational submarine areas in the interest of mankind is inextricably linked with the use of the waters, with the problems of the traditional freedom of the seas, with fishery, conservation, with navigation -- and any treaty or other international arrangement must take account of this.

2. The concept of "the reservation exclusively for peaceful purposes" of this area however defined, is borrowed from the Outer-Space Treaty, which, generally, has set one of the most relevant and pertinent precedents for the conception of an ocean-space treaty; and it is curious to note the "feed-back" action between the two. For while the Outer-Space Treaty has borrowed some of the major underlying concepts, and even some details (for instance: the treatment and status of astronauts, called, most beautifully, "envoys of mankind" or the registration and ownership

of space vessels) from the traditional law of the seas, any implementation of the Maltese Proposition now would heavily borrow outer-space law to apply it to ocean-space. The concept of "the reservation exclusively for peaceful purposes" belongs to that category. But if the interpretation and enactment of the concept caused some difficulties in outer space, these difficulties are compounded in the case of ocean-space. As one member of the conference pointed out, there are already two interpretations of the concept. One is Ambassador Pardo's, which would prohibit the installation of any military hardware in the seabed beyond national jurisdiction however defined. The other is Senator Pell's which would prohibit the installation of atomic weapons and weapons of mass destruction on the seabed anywhere, including any parts thereof now under national jurisdiction. It resulted from the discussion that, even if one or the other of these interpretations were adopted, the problems involved would be far more complex than appears on the surface. Clearly, it involves the use of submarines and the establishment of test ranges for the use of submarines: and all this, in turn, is inextricably linked with the whole complex of the arms race versus disarmament and arms control. Is the Ad Hoc Committee competent to deal with problems of this sort? Ambassador Goldberg is on record in favor of such an approach. Others are not. They pointed out that the peaceful use of the seabed must not be confused with world peace. The disarmament problem does not belong to the Ad Hoc Committee, according to this point of view. It belongs to the Disarmament

Conference. If the use of the ocean floor has two aspects: an active and a preventive; or: a developmental and an inhibitive; or: an economic and a military; or: a positive and a negative -- the Ad Hoc Committee should concentrate on the first term of each of these pairs. Emphasis should be on economic cooperation and development, not on military controls, it was suggested.

Peaceful use and military use seem inextricably connected. Any scientific discovery may be used for military purposes; any military operation may have scientific by-products, and the instruments of work and exploration are the same. A new approach to the whole problem of disarmament and arms control may be necessary -- and may indeed be triggered off by the debate on the peaceful use of the seas, the common heritage of mankind.

3. The concept of the "common heritage of mankind" opens up another host of problems: of a juridical-philosophical nature, and of economic-social theory. "The common province of mankind," "the common property of mankind," "social property" are related terms, used in various other contexts. But what does it all mean? How is it to be spelled out, especially when it is charged with an explosive economic potential? Here, incidentally, lies one of the main differences between the problems of outer-space law and those of ocean-space law: the possibilities for the economic exploitation are remote in outer space; they are pressing in ocean space.

"Common heritage" or any of the above mentioned related

terms, may be construed to mean that everyone, nation or person, has free access to the exploration and exploitation of the common resources. But does this not mean, in practice, that free access is preempted by the rich and the powerful and the technologically developed? Another interpretation that was advanced was that it meant a common share in the revenues derived from the exploitation of the common property resources. Not as though this would make things any easier. For would it mean that ownership be vested in an international, extra-national, or supranational organization, however defined and however related to the U.N. -- an organization which would then assign rights to use to nations and enterprises, or to enterprises through nations? Would it mean that this organization, however defined, would be vested with territoriality, and, consequently, with sovereignty? Or does it mean that "ownership" or "common property" is vested in nobody, but that rights to use be assigned by the organization to nations and enterprises, so long as they use these rights "in the common interest of mankind?" The I.T.U.'s assigning bands of wave length to nations, without itself "owning" the "ether" would seem to set a precedent -- except that wave lengths are not (directly) economically productive whereas the use of the common ocean resources is. Would it mean that the "organization" would grant leases or licenses and extract fees or taxes?

The fact is that, not unlike the concept of "sovereignty," the concept of "ownership" or "property" is in crisis today, West,

East and in the middle. This is largely due to the progress of technology: wealth, today, is no longer created by reified ownership of land, water, or other resources and the implicit right to use or misuse them. Wealth is created by technology, by education, organization and design -- which is "owned" by no one. Ownership, in pre-capitalistic terms, was a "bundle of rights," "the right to use;" the Latin proprietas meant both "property" and "propriety" -- that is, property that had to be used properly. Is it perhaps in this sense that "the common property" or "common heritage" of mankind should be construed?

4. This common heritage has also been called a "trust" implying the notion of a "trustee." A "regime" is to be created "to act as trustee for all mankind," regulating and controlling all activities on extranational terrain, however, defined, concerned with the exploration and exploitation of extranational resources however defined.

Ambassador Pardo said:

> We do not believe that it would be wise to make the United Nations itself responsible for administering an international regime.... We say this not because we have any objections of principle, but for practical reasons.... I would only observe that it is hardly likely that those countries that have already developed a technical capability to exploit the ocean floor, would agree to an international regime if it were administered by a body where small countries, such as mine, had the same voting power as the United States or the Soviet Union.

The establishment of such a regime raises unprecedented problems: to be a "trustee of all mankind" in developing and administering

the common resources and redistributing the common wealth of the ocean, it must include free-enterprise nations and socialist nations, landlocked and maritime nations, capital exporting and capital importing nations, developed and developing nations. Not all of them, evidently, can participate in the administration, which, on the other hand, must somehow be responsible to all. Managerial efficiency must be combined with political responsibility, and a degree of "participational" democracy unprecedented at the international level must be designed. The establishment of the "regime" should strengthen the U.N., not weaken it by bypassing it. In other words: it must be under the "umbrella" of the U.N., so organized as to coordinate cooperation among all the specialized and intergovernmental organizations now dealing with one aspect or another of the ocean problem. At the same time, it must be open to all nations, whether members of the U.N. or not. And a new role must be assigned to corporations and enterprises, whether public or private, national or international: for they will be the protagonists in the drama of the development of the common resources of the oceans. The originality and imaginativeness of this organization must match the novelty of its function. It is obvious that such a "regime" cannot be designed over night.

II.

If action on the Maltese Proposition had to depend on a solution, by common agreement, of problems of this magnitude and complexity,

no action could be forthcoming in the near future. Existing technology would be adequate for the job of further and final erosion of the freedom of the seas, of the consumption and pollution of the common heritage of mankind; while, on the other hand, the uncertainty of jurisdiction would slow further technological progress and the orderly and rational development of the common resources. Some action, a beginning of action, therefore, must not be postponed beyond the 23rd General Assembly of the United Nations, which will begin next fall.

The Conference therefore recommended that the problem be divided tactically -- although, in substance, no such division is possible because all aspects are inextricably connected -- and approached from a short-term and a long-term angle. The short term would be the stage of initiation. The long term would be the stage of implementation. The initiating act would be the laying down of a set of principles and guide lines which would be the basis for a Declaration that could be adopted by the 23rd Assembly. If it is to draw a general consensus, such a Declaration should be as simple as possible. If controversial elements, issues, and contentions likely to engender debate were to be introduced, a whole year might be wasted: which would not be in the interest of mankind.

A certain number of guide lines are implicit in the U.N. Resolution adopted last December. Others are explicit in Ambassador Pardo's speech. They should be given substance and form,

and might provide the basis for the Ad Hoc Committee's deliberations.

The kind of principles that should be included would be:

1. The principle that the seabed and ocean floor, however defined, and the subsoil thereof, are the common heritage of mankind and should be used, explored and exploited, for the common interest of mankind.

2. The delimitation of the continental shelf should be left in suspense, and the Declaration should content itself with a statement of the principle of nonrecognition of any further claim to the sovereignty on the seabed and ocean floor: a moratorium, so to speak, coupled with a statement that the Geneva Convention will have to be reviewed if not revised -- a matter which cannot come up before 1969. It is likely that such a revision would limit the criterion of exploitability by that of adjacency: i.e., it would add a horizontal limitation (distance from the shore line) to the depth limitation. The distance from the shore line might be limited to 30 km, which is the algebraic mean of the extensions of all continental shelves all over the world. Until such a revision, however, the Declaration must stick to the freezing of the status quo, and to the nonrecognition of further claims.

3. In spite of the difficulties that emerged from the discussions, there was general agreement that the Declaration

must assert the principle of the peaceful use of the seabed and the ocean floor, even if it is difficult to see how the principle could be enacted and enforced. Pending a Treaty, nations should voluntarily refrain from installing atomic missile sites or other weapons of mass destruction on the ocean floor and from using military personnel for scientific research on the ocean floor. It may be necessary, however, to limit the Declaration to the statement that the peaceful use of the ocean floor and the seabed must conform to the principles and the Charter of the United Nations and to international law, as a means to ensure the traditional freedom of the seas.

4. Some indication should be given -- if not very specific -- of the concept of trusteeship of the common ocean resources. This cannot be spelled out in the Declaration but it could be mentioned as a principle. To stop at the concept of "common heritage" without going into the necessity of their development by an appropriate body for the benefit of mankind, would leave the Declaration too incomplete. The encouragement of scientific research and the universal diffusion of the results of such research; the concern with pollution and conservation might be other topics to be hinted at under this point.

5. As an interim measure, and pending the adoption of a Treaty, the Declaration might recommend that, in any bilateral or multi-lateral contracts for the exploitation of ocean resources, the U.N. might be included as a party in order to establish the

interest of the world as a whole, or insofar, at least, as the U.N. represents it.

A declaration of this kind, embodying these principles, would have an excellent chance of being adopted by the 23rd General Assembly. This would open the gates to the long-range approach: the "spelling out" of the principles enunciated in the Declaration, their embodiment in a Treaty open to all Nations, their implementation in a Regime. This process cannot reasonably be expected to be completed before the 'seventies. It requires coordination of all efforts, governmental and nongovernmental; it requires research, and patient negotiation.

III.

One school of thought holds that, once the principles are agreed upon, their institutionalization in a "regime" will not cause grave difficulties; another, that a "model" devised during the early stage of planning and research, might serve to focus this research, which, without a model, tends to be open-ended and bottomless; that a "model" in other words, is a useful instrument to clarify issues; that the existence of a "model" or "strawman," as one of the conferees called it, might therefore facilitate the Ad Hoc Committee's work on the short-range, initiating job of drafting the Declaration, and, at the same time, shorten the period that is bound to pass between the "stage of initiation" and the "stage of implementation."

Such a "model" cannot be built by governments or their

official representatives in official meetings. What would be created by such people under such circumstances would not be a working model. It would be a Treaty -- and the time is not ripe.

A model must be created by private institutions acting in a private capacity; but lest it become a model for a castle on the moon, it should be elaborated and constantly tested by political leaders (acting personally and individually) and experts, by representatives of scientific groups, corporations and undertakings playing a role in the development of the seas. This model will change during this process and approximate the form the Treaty may assume in due time.

A model of this sort was submitted to the Conference, and the discussion on its main points was started during the final session.

To stimulate discussion we shall here summarize its main points.

The Treaty would be open to all nations.

The Treaty would clarify and spell out the principles enunciated in the Declaration.

The Treaty would set up the Regime and define its relations to the various organs of the United Nations and specialized agencies.

The Regime must provide for a new kind of voluntary cooperation to develop the common ocean resources and redistribute the common wealth. To this end, it must be enabled to levy taxes on ocean produce, to make loans, to receive grants, to make

development plans, to coordinate the activities of States and undertakings, to make grants and loans to States and undertakings and to encourage research and the universal diffusion of its results.

The States parties to the Treaty shall appoint a Commission of X members (probably not more than 17). The model provides that these members be chosen on the basis of their competence only, to act as individuals, not responsible to any State, in the interest of the world community as a whole. The governing body of WHO, for example, is appointed in this manner, but a number of States are pressing for a change, making the members of the governing body responsible to the States by which they are appointed. Analogously, the members of the Maritime Commission might be made responsible to the appointing member States. The Commission might in this case resemble the Security Council, with a group of permanent members -- probably the technologically most developed States, and a rotating group of nonpermanent members. It also might be stipulated that the Commission can act only on the basis of unanimity, or of a majority including the votes of all Permanent Members. Whether this is the best way of doing business, is questionable. And since business is what the commission should do, the WHO precedent might be sounder than that of the Security Council. However, the difference may turn out to be more theoretical than practical: for if the Regime serves the interest of its members and if world tension has been reduced,

the Commission will function well, no matter whether its members are responsible to the States or to the Organization. If, on the other hand, tensions are high and the world situation is such that the Regime cannot do its job, the members of the Commission will yield to the pressures of the great powers, no matter whether they are officially responsible to them or not.

In appointing the members of the Commission, at any rate, due consideration should be given to a fair balance between free enterprise and socialist nations and between developed and developing nations. Any State party to the Treaty but not represented on the Commission may appoint an ad hoc member to the Commission whenever its own vital interests are directly concerned. The number of ad hoc members, however, should be limited. The Commission should elect its own chairman.

To embody the principle of Trusteeship, the Commission should be responsible to an Assembly which should reflect, on the basis of fair geographic distribution, the real political, economic, and scientific forces and interests. Although this Maritime Assembly cannot be the General Assembly of the U.N. -- for the reasons stated by Ambassador Pardo -- it could emanate from it. It should be created under articles 59, 60 and 68 of the U.N. Charter and article XI of the UNESCO Constitution, and articles VII, VIII and IX of the FAO Constitution.

The Maritime Assembly, thus established, should consist of three chambers, of 81 members each:

(a) the first to be elected by the General Assembly of the U.N. with the proviso

-- that nine members be elected for each of the nine regions of the world (North America; the Socialist countries of Eastern Europe; Western Europe; Latin America; Africa south of the Sahara; the Far East; the Middle East; Southeast Asia; India and Pakistan);

-- that every representative in the U.N. General Assembly be automatically a candidate for election to the Maritime Assembly except those representing States not parties to the Ocean Treaty and not wishing to be represented in the Maritime Assembly; and that additional candidates -- up to a total of 27 for each Region be nominated by national Parliaments or Governments or Regional Parliaments or intergovernmental organizations, including any who may be members of the Ocean Treaty but not of the United Nations.

(b) the second chamber, representing international corporations, labor organizations, producers and consumers, to be elected as follows:

-- one-third by the Social and Economic Council, on the basis of nominations made by the organizations themselves;

-- one-third by the General Assembly of FAO, on the same basis; and

-- one-third by the General Assembly of ILO, on the same basis;

(c) the third chamber, representing scientists, to be elected by the General Assembly of UNESCO, on the basis of nominations by universities, national and international science organizations and foundations.

Each Chamber to elect its own President; the Assembly as a whole to elect its own President and make its own rules of procedure.

A majority vote of two chambers, including the chamber of regions, needed for the adoption of any decision or recommendation.

The right to propose decisions, recommendations, and opinions, to be shared equally by all three chambers of the Assembly and by the Commission.

Decisions and Recommendations passed by the Commission to become effective when adopted by two chambers of the Assembly including the Chamber of regions; Decisions and Recommendations adopted by the Assembly to become effective when passed by the Commission. By a three-fourth majority vote the Commission may return decisions and recommendations to the Assembly where they may not be taken up again before the lapse of a two-year period.

The structure of this model maritime assembly is suggested by the Center's more comprehensive studies on international organization. It by-passes the one-nation-one-vote difficulty of the U.N. Assembly, not by returning to some feudal system in which rich nations should have more voting strength than poor

nations, but by incorporating certain principles of recent theories of federalism which transcend the traditional principle of territorial-political representation and add a social and economic dimension to the concept of federalism.

This structure would assign a new role to nongovernmental organizations and corporations.

It should be noted that the Assembly would have more than purely consultative powers but somewhat less than fully legislative powers. Real decision-making power would still be vested in the Government-appointed Commission.

If these basic principles were agreed upon, the rest of the "regime" would fall more easily into place.

To embody the principle of co-ordination of all U.N. organs and intergovernmental agencies now working on one aspect or another of the ocean problem, a Maritime Planning Agency should be established: half of its members to be appointed by the Commission, the other half to be elected by the Assembly, with the members of the Inter-Agency Board of the U.N. Development Programme and the President of the World Bank as members ex officio.

A Secretariat for Ocean Mining, a Secretariat for Fisheries; a Secretariat for Deep-Sea Oil Extraction, and any other Secretariats to be established, the chiefs of which should be elected by the Maritime Assembly;

A Maritime Court to be established by agreement among the

States parties to the Treaty; the Code of Procedure for the Court to be appended to the Treaty; States, international organizations, undertakings, and persons to have a standing before the Court; litigations between States to be referred to the International Court of Justice by agreement between the Maritime Court, the International Court of Justice, and the States concerned.

A Commission on Maritime Law to be appointed to review and clarify all existing maritime law; in case of inconsistency, the Treaty to supersede;

A List, specifying and describing the common ocean resources, to be appended to the Treaty;

A Protocol on transitional measures to be appended to the Treaty;

The Treaty shall contain nothing abrogating the sovereign equality of member States. Since its jurisdiction extends exclusively over extranational areas and activities, beyond the limits of present national jurisdictions, it creates new sovereignty rather than detracting from any extant one.

The declaration that the ocean space and ocean resources beyond the present limits of national jurisdictions are to be considered the common heritage or province or property of mankind is not to be construed in the sense that it vests territoriality in the Regime but in the sense that the Regime assigns and regulates the right to use such space and resources, such assignments to be made to States or to public or private national or international corporations or undertakings, of individualist

or collectivist economy, subordinated in each and all cases to the interest of the common good.

The Center will, during the coming months and years, pursue its work both on the short-range and the long-range aspects of the problem: both on the stage of initiation and the stage of implementation; on the guide lines for the Declaration and on the "model" for the Treaty.

----- Elisabeth Mann Borgese