REPORT OF THE FOURTEENTH SESSION HELD IN NEW DELHI

From 10th to 18th January, 1973

ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

ASIAN - AFRICAN

LEGAL

CONSULTATIVE COMMITTEE

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THE SECRETARIAT OF THE COMMITTEE
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I. INTRODUCTORY

Establishment and functions of the Committee

The Asian Legal Consultative Committee, as it was originally called, was constituted in November 1956 by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria to serve as an advisory body of legal experts and to facilitate and foster exchange of views and information on legal matters of common concern among the member governments. In response to a suggestion made by the then Prime Minister of India, the late Jawaharlal Nehru, which was accepted by all the then participating governments, the Committee's name was changed to that of *Asian-African Legal Consultative Committee* as from the year 1958, so as to include participation of countries in the African continent. The present membership of the Committee is as follows :-

Full members :- Arab Republic of Egypt, Bangladesh, Democratic People's Republic of Korea, The Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Kuwait, Malaysia, Nepal, Nigeria, Pakistan, Philippines, Republic of Korea, Sierra Leone, Singapore, Sri Lanka, Syrian Arab Republic, Tanzania, and Thailand.

Associate members :- Botswana, and Mauritius.

The Committee is governed in all matters by its Statutes and Statutory Rules. Its functions as set out in Article 3 of its Statutes are :-

"(a) To examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission; to examine the reports of the Commission and to make recommendations thereon to the governments of the participating countries;

(b) To consider legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to governments as may be thought fit:

(c) To exchange views and information on legal matters of common concern and to make recommendations thereon, if deemed necessary; and

(d) To communicate with the consent of the governments of the participating countries the points of view of the Committee on international legal problems referred to it, to the United Nations, other institutions and international organisations."

The Committee normally meets once annually by rotation in the countries participating in the Committee. Its first session was held in New Delhi (1957), second in Cairo (1958), third in Colombo (1960), fourth in Tokyo (1961), fifth in Rangoon (1962), sixth in Cairo (1964), seventh in Baghdad (1965), eighth in Bangkok (1966), ninth in New Delhi (1967), tenth in Karachi (1969), eleventh in Accra (1970), twelfth in Colombo (1971), thirteenth in Lagos (1972), and the fourteenth in New Delhi from 10th to 18th January, 1973.

Office-bearers of the Committee and its Secretariat

During the fourteenth session held in New Delhi, the Committee elected Dr. Nagendra Singh, the then Chief Election Commissioner of India (now a Judge of the International Court of Justice) and Hon'ble L.A.M. Brewah, Attorney-General and Minister for Justice of Sierra Leone respectively as the President and Vice-President of the Committee for the year 1973-74.

The Committee maintains its permanent Secretariat in New Delhi (India) for day-to-day work and for implementation of the decisions taken by the Committee at its sessions. The Committee functions in all matters through its Secretary-General who acts in consultation with the Liaison Officers appointed by each of the participating countries.

Co-operation with other organisations

The Committee maintains close relations with and receives published documentation from the United Nations, some of its organs such as the International Law Commission, the International Court of Justice, the U.N. High Commission for Refugees, the U.N. Conference on Trade and Development (UNCTAD), the U.N. Commission on International Trade Law (UNCITRAL) and the Food and Agricultural Organisation (FAO); the Organisation of African Unity (OAU), the League of Arab States, the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, and the Commonwealth Secretariat. The Committee has been co-operating with the United Nations in its Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law and as part of that programme it has sponsored a training scheme which may be availed of by officials of Asian and African governments.

The Committee is empowered under its Statutory Rules to admit at its sessions Observers from international and regional inter-governmental organisations. The International Law Commission is usually represented at the Committee's sessions by its President or one of the members of the Commission. The U.N. Secretary-General has also been represented at various sessions of the Committee.

The Committee sends Observers to the sessions of the International Law Commission in response to a standing invitation extended to it by the Commission. The United Nations also invites the Committee to be represented at all the conferences convoked by it for consideration of legal matters. The Committee was represented at the U.N. Conferences of Plenipotentiaries on Diplomatic Relations and the Law of Treaties. The Committee has been invited to be represented in the sessions of the Third Law of the Sea Conference. The Committee is also invited to be represented at the meetings of the UNCTAD, UNCITRAL and various inter-governmental organisations concerned in the field of law.

Immunities and privileges

The Committee, the representatives of the member States participating in its sessions, the Secretary-General of the Committee and the members of the Secretariat are accorded certain immunities and privileges in accordance with the provisions of of the Committee's Articles on Immunities and Privileges.

Membership and procedure

The membership of this Committee which falls into two categories, namely, Full Members and Associate Members, is open to Asian and African governments who accept the Statutes and Statutory Rules of the Committee. The procedure for membership as indicated in the Statutory Rules is for a government to address a note to the Secretary-General of the Committee, stating its acceptance of the Statutes and Statutory Rules.

Financial obligations

Each member government contributes towards the expenses of the Secretariat, whilst a part of the expenses for holding of the sessions are borne by the country in which the session is held. The contributions towards the expenses of the Secretariat of each member country at present vary between £ 900 (Sterling) and £ 1500 (Sterling) per annum depending upon the size and national income of the country. Associate members, however, pay a fixed fee of approximately £ 450 (Sterling) per annum.

Resume of work done by the Committee

During the past seventeen years of its existence the Committee has had to concern itself with all the three types of activities envisaged in clauses (a), (b) and (c) of Article 3 of its Statutes, namely examinations of questions that are under consideration by the U. N. International Law Commission; consideration of legal problems referred by member governments; and consideration of legal matters of common concern.

The topics on which the Committee has been able to make its final reports (recommendations) so far include "Diplomatic

Immunities and Privileges", "State Immunity in respect of Commercial Transactions", "Extradition of Fugitive Offenders", "Status of Aliens", "Dual or Multiple Nationality", "Legality of Nuclear Tests". "Arbitral Procedure", "Recognition and Enforcement of Judgements in Matrimonial Matters", "Reciprocal Enforcement of Foreign Judgements, Service of Process and Recording of Evidence both in Civil and Criminal Cases", "Free Legal Aid", "Relief against Double Taxation", "the 1966 Judgement of the International Court of Justice in *South-West Africa Cases*" and the "Law of Treaties".

The Committee had also finalised its recommendations on the subject of "Rights of Refugees" at its eighth session held in Bangkok (1966), but at the request of one of its member governments it has decided to reconsider its recommendations in the light of new developments in the field of international refugee law. The subject was accordingly given further consideration by the Committee at its tenth and eleventh sessions.

The subjects on which the Committee has made considerable progress are the "Law of International Rivers", "International Sale of Goods and related topics", and the "Law of Sea with particular reference to the peaceful uses of the sea-bed and the ocean floor lying beyond the limits of national jurisdiction." The Committee at its eleventh session had decided to include the Law of the Sea and the Sea-Bed as a priority item on the agenda of its twelfth session having regard to the recent developments in the field and the proposal for convening of a U. N. Conference of Plenipotentiaries to consider various aspects of this subject. In view of the paramount importance of the problems concerning the Law of the Sea to the countries of the Asian-African region, it was also decided to invite all such countries to participate in the discussions on the subject at the twelfth session. Thereafter, the subject was further considered on a priority basis at the thirteenth and fourteenth sessions of the Committee respectively held in Lagos (1972) and New Delhi (1973) and almost all the countries of the Asian-African region were invited to join in the deliberations on the subject at those sessions. The main object underlying this Committee's taking up the Law of the Sea has been to provide

a forum for mutual consultation and discussions among the Asian and African governments and to assist them in making concerted and systematic preparations for the then proposed Third Law of the Sea Conference.

The Committee at its fourteenth session also took up the question of Organisation of Legal Advisory Services in Foreign Offices for an exchange of views and information between the participating countries. The idea underlying this exchange of views has been to enable the member countries to acquaint themselves with the systems of legal advising on international legal affairs in each other's countries.

Some of the other topics which are pending consideration of the Committee include 'Diplomatic Protection and State Responsibility', 'State Succession', 'International Commercial Arbitration', 'International Legislation on Shipping' and 'Protection and Inviolability of Diplomatic Agents and other persons entitled to special protection under International Law'. The last mentioned topic had been placed on the agenda of the fourteenth session, but at the suggestion of some of the Delegations this matter has been deferred for consideration at some future session of the Committee.

Publications of the Committee

The full reports, including the verbatim record of discussions together with the recommendations of the Committee are made available only to the governments of the member States of the Committee. The Committee, however, brings out regularly shorter reports on its sessions for general circulation and sale. So far it has published reports on its first to thirteenth sessions. The Committee has also brought out five special reports on the following topics :—

1. The Legality of Nuclear Tests.
2. Reciprocal Recognition and Enforcement of Foreign Judgments.
3. The Rights of Refugees.

4. Relief against Double Taxation and Fiscal Evasion.
5. *The South West Africa Cases.*

The Secretariat of the Committee published in 1972 its compilation of the *Constitutions of African States* with the co-imprint of Oceana Publications Inc., New York. Earlier it had brought out its compilation of the *Constitutions of Asian States* in the year 1968. The proposed publications of the Committee include the following :—

(1) Digest of important decisions of the municipal courts of Asian and African countries on international legal questions.

(2) Digest of Treaties and Conventions registered with the U. N. Secretariat to which an Asian or African State is a party.

(3) Foreign Investment Laws and Regulations of Asian and African Countries.

(4) Laws and Regulations relating to Control of Import and Export Trade in Asian and African countries.

(5) Laws and Regulations relating to Control of Industry in Asian and African countries.

II. BUREAU OF THE CONFERENCE

President of the Session	Dr. Nagendra Singh Chief Election Commissioner of India. (Now Judge of the International Court of Justice, The Hague)
Vice-President	Hon'ble Mr. L. A. M. Brewah Attorney-General & Minister for Justice, Government of Sierra Leone.
Secretary-General	Mr. B. Sen Secretary-General, Asian-African Legal Consultative Committee.
Chief Conference Officer	Dr. S. P. Jagota Joint Secretary & Legal Adviser, Ministry of External Affairs, Government of India.

Sub-Committee (of the whole) on the Law of the Sea

Chairman	Mr. J. D. Ogundere Deputy Solicitor-General. Government of Nigeria.
Later	Mr. A. A. Adediran Solicitor-General, Government of Nigeria.
Rapporteur	Dr. S. P. Jagota Joint Secretary & Legal Adviser, Ministry of External Affairs, Government of India.

Standing Sub-Committee on the Law of International Rivers

Chairman	Mr. Eiichi Furukawa First Secretary, Embassy of Japan in India.
Rapporteur	Mr. Mohammed Moustafa Hassan Counsellor, Council of State, Arab Republic of Egypt.

Standing Sub-Committee on the International Sale of Goods

Chairman	Dr. K. Nishimura (Japan)
Rapporteur	Mr. K.B. Olukolu State Counsel, Government of Nigeria.

DELEGATES, OBSERVERS AND OTHER REPRESENTATIVES ATTENDING THE FOURTEENTH SESSION

A. DELEGATIONS OF MEMBER STATES

ARAB REPUBLIC OF EGYPT

Member (Leader of Delegation)	Hon'ble Mr. Abdel Aziz Elghamry President of the Court of Appeal.
Alternate Member	Mr. Safie Abdel Hameed Minister Plenipotentiary, Ministry of Foreign Affairs.
Alternate Member	Mr. Mohamed Moustafa Hassan Counsellor, Council of State, Arab Republic of Egypt.

BURMA

Not Represented

GHANA

Member (Leader of Delegation)	Dr. S.K.B. Asante Solicitor-General
Alternate Member	Mr. W.W.K. Vanderpuye Director, Legal & Consular Department, Ministry of Foreign Affairs.
Adviser	Mr. G. Nikoi State Attorney.
Adviser	Mr. E.W. Okyere Boakey First Secretary, Ghana High Commission.

INDIA

Member (Leader of Delegation)	Mr. Niren De Attorney-General of India.
	Dr. Nagendra Singh Chief Election Commissioner of India. (Now Judge-Elect, International Court of Justice, The Hague)
Alternate Member	Mr. V.C. Trivedi Secretary, Ministry of External Affairs.
Alternate Member	Dr. S.P. Jagota Joint Secretary & Legal Adviser, Ministry of External Affairs.
Alternate Member	Mr. P.B. Venkatasubramanian Joint Secretary & Legal Adviser, Ministry of Law.
Senior Adviser	Dr. N.K. Panikkar Director, Indian Institute of Oceanography, Panaji, Goa.
Senior Adviser	Captain F.L. Fraser Chief Hydrographer to the Government of India, Dehra Dun.
Senior Adviser	Mr. S.N. Gupta Joint Secretary, Ministry of Irrigation & Power.
Senior Adviser	Mr. N.N. Jha Director, United Nations Division, Ministry of External Affairs.
Special Adviser	Mr. G.A. Shah Joint Secretary (Retired) Ministry of Law.

Special Adviser	Mr. T. S. Rama Rao Professor and Head of the Department of International Law, University of Madras.
Special Adviser	Dr. Surya P. Sharma Dean and Head of the Law Department, University of Kurukshetra.
Special Adviser	Mr. M. K. Nawaz Director, Indian Society of International Law, New Delhi.
Adviser	Mr. V. N. Nagaraja Member, Indo-Bangladesh Joint Rivers Commission, Ministry of Irrigation & Power.
Adviser	Mr. M. C. Basu Senior Specialist, Planning Commission.
Adviser	Professor P. C. George Joint Commissioner for Fisheries, Ministry of Agriculture.
Adviser	Mr. S. M. S. Chadha Deputy Secretary (UN), Ministry of External Affairs.
Adviser	Mr. P. R. Sood Deputy Secretary (UN) Ministry of External Affairs.
Adviser	Dr. (Mrs.) K. Thakore Assistant Legal Adviser, Legal & Treaties Division, Ministry of External Affairs.

Adviser	Mr. G. S. Raju Assistant Legal Adviser, Legal & Treaties Division, Ministry of External Affairs.
Adviser	Mr. K. K. Chopra Assistant Legal Adviser, Legal & Treaties Division, Ministry of External Affairs.
Adviser	Mr. K. L. Sarma Assistant Legal Adviser, Ministry of External Affairs.
Adviser	Mrs. R. Lakshmanan Law Officer, Legal & Treaties Division, Ministry of External Affairs.
Adviser	Miss Sushma Malik Law Officer, Legal & Treaties Division. Ministry of External Affairs.
Adviser	Mr. I. C. Jain Law Officer, Legal & Treaties Division, Ministry of External Affairs.
Adviser	Mr. S. C. Jain Law Officer, Legal & Treaties Division, Ministry of External Affairs.

INDONESIA

Member (Leader of Delegation)	Mr. Achmad Djamirin Minister – Charge d' Affairs, Embassy of Indonesia, New Delhi.
Alternate Member	Mr. Enny Soeprapto Department of Foreign Affairs.

Adviser	Mr. Slamet First Secretary, Embassy of Indonesia, New Delhi.
Adviser	Mr. Witjaksono Department of Foreign Affairs.

IRAN

Member (Leader of Delegation)	H. E. Mr. E. Kazemi Ambassador, Ministry of Foreign Affairs.
Alternate Member	Mr. M. A. Kardan Embassy of Iran in India.

IRAQ

Member (Leader of Delegation)	H. E. Dr. Abdullah Salloum Al-Samarrai, Ambassador of Iraq in India.
Alternate Member	Mr. Saib Bafi Counsellor, Embassy of Iraq in India.
Adviser	Mr. Sabah Al-Rawi Embassy of Iraq in India.

JAPAN

Member (Leader of Delegation)	Dr. Kumao Nishimura
Alternate Member	Dr. Shigeru Oda Professor of International Law, Tohoku University.
Adviser	Mr. Naohiro Kumagai Head of Legal Affairs Division, Ministry of Foreign Affairs.

Adviser	Mr. Eiichi Furukawa First Secretary, Embassy of Japan in India.
Adviser	Mr. Ryuzo Kikuchi Legal Affairs Division, Ministry of Foreign Affairs.

JORDAN

Member (Leader of Delegation)	Mr. Saad Batainah Embassy of Jordan in India.

KENYA

Member (Leader of Delegation)	Mr. C. M. Mwashumbe Counsellor, Kenya High Commission, New Delhi.

KUWAIT

Member (Leader of Delegation)	Mr. Khaled H. Al-Khamees Embassy of Kuwait in India.

MALAYSIA

Member (Leader of Delegation)	Hon'ble Tan Sri Abdul Kadir bin Yusof Attorney-General & Minister of Legal Affairs.
Alternate Member	Mr. L. C. Vohrah Senior Federal Counsel.
Adviser	Mr. Ng Bak Hai High Commission for Malaysia, New Delhi.

NIGERIA

Member (Leader of Delegation)	Mr. A. A. Adediran Solicitor-General.
Alternate Member	Mr. J. D. Ogundere Deputy Solicitor-General.
Adviser	Mr. K. B. Olukolu State Counsel.

NEPAL

Member (Leader of Delegation)	Mr. Churamani Raj Sinha Malla Secretary, Ministry of Law and Justice.
Alternate Member	Mr. Narendra V. Shah Counsellor, Royal Nepalese Embassy in India.
Adviser	Mr. Kedar Nath Upadhya Under Secretary, Ministry of Law and Justice.

PAKISTAN — *Not Rpresented*

PHILIPPINES

Member (Leader of Delegation)	Hon'ble Estelito Mendoza Solicitor-General of the Philippines.
Member (Alternate Leader)	H. E. Mr. Romeo S. Busuego Ambassador of the Philippines to India.
Alternate Member	Mr. Romeo O. Fernandez First Secretary, Embassy of the Philippines in India

SIERRA LEONE

Member (Leader of Delegation)	Hon'ble Mr. L. A. M. Brewah Attorney-General and Minister for Justice.
Alternate Member	Mr. Ahmed M. Kamala State Counsel.
Adviser	Mr. Kai T. Kekura State Counsel.

SRI LANKA

Member (Leader of Delegation)	Dr. H. W. Thambiah, Q. C. Former Judge of the Supreme Court of Ceylon, and the Court of Appeal of Sierra Leone.
Adviser	Mr. R. Vandergart Assistant Secretary (Legal), Ministry of Defence and External Affairs.

SYRIA — *Not Represented*

THAILAND

Member (Leader of Delegation)	Dr. Sathit Sathirathaya Ministry of Foreign Affairs.
Alternate Member	Mr. Prapot Narintrangkun
Adviser	Mr. Thawee Manaschuang Counsellor, Embassy of Thailand in India.

B. DELEGATIONS OF ASSOCIATE MEMBER STATES

MAURITIUS

Associate Member	Mr. Louis Venchard, Q.C. Solicitor-General.

Adviser	Mr. J.G. Fokeer High Commission for Mauritius in India.

REPUBLIC OF KOREA

Associate Member	H.E. Ambassador Shinyong Lho Consul General for the Republic of Korea in India.
Adviser	Mr. Soo Gil Park Chief, Treaties Division, Ministry of Foreign Affairs.
Adviser	Mr. Chang Choon Lee Treaties Division, Ministry of Foreign Affairs.

C. OBSERVERS REPRESENTING ASIAN-AFRICAN STATES

AFGHANISTAN	H.E. Dr. Abdul Hakim Tabibi Ambassador of Afghanistan in India.
	Mr. Mohd. Mirza Sammah Second Secretary, Embassy of Afghanistan in India.
LIBYA	H.E. Mr. Ibrahim El Jerbi Ambassador of Libya in Pakistan.
LIBERIA	Hon'ble Winston A. Tubman Ministry of Foreign Affairs.
MONGOLIA	Mr. Tseren Ochir Counsellor, Mongolian Embassy, New Delhi.
MOROCCO	H.E. Mr. Younes Nekrouf Ambassador of Morocco in India.
	Mr. Ahmed Bourzaim Embassy of Morocco in India.

SAUDI ARABIA	Mr. Ibrahim M. Kabbani Embassy of Saudi Arabia in India.
SINGAPORE	Mr. Glenn Knight State Counsel, Attorney-General's Chambers.
SUDAN	Mr. Ibrahim M. Ahmed Second Secretary, Embassy of Sudan in India.
TANZANIA	Mr. E. E. E. Mtango
YEMEN	Mr. Mahmood Mohammed Jaffar Charge d' Affaires, Embassy of Yemen, New Delhi.
TURKEY	Mr. Yavuz Erguven First Secretary, Embassy of Turkey, New Delhi.

D. OBSERVERS REPRESENTING INTERNATIONAL ORGANISATIONS

INTERNATIONAL LAW COMMISSION	H.E. Dr. Abdul Hakim Tabibi Member, International Law Commission.
ARAB LEAGUE	Mr. Galal El-Rashidi Acting Chief Representative, Arab League Mission in India.
UNCITRAL	Mr. Kazuaki Sono Legal Officer.
UNIDROIT	Mr. Mario Matteucci Secretary-General.

E. OBSERVERS REPRESENTING OTHER STATES

AUSTRALIA	Mr. Gerard Brennan Special Assistant in International Law to the Attorney-General.

	Mr. I.E. Nicholson Deputy High Commissioner in New Delhi.
ARGENTINA	Mr. Jose Isaac Garcia Ghirelli Deputy Legal Adviser, Ministry of Foreign Affairs.
	Mr. Carlos Ernesto Aparicio Embassy of Argentina in New Delhi.
BRAZIL	H.E. Mr. Roberto Luiz Assumpcao de Araujo, Ambassador of Brazil in India.
	Mr. Sergio Lemgruber Embassy of Brazil in India.
BRITAIN	Miss Philippa Drew, British High Commission, New Delhi.
CANADA	Mr. L.H.J. Legault Permanent Mission to the United Nations in Geneva.
CHILE	Mrs. Carmen L. Mannakee Charge d' Affairs, Embassy of Chile in India.
	Mr. Hernan Tassara Embassy of Chile in India.
COLOMBIA	H.E. Mr. Fernando Navas de Brigard Ambassador of Colombia in India
	Mr Jorge E. Villamizar Embassy of Colombia in India.
FINLAND	Mr. Heikki Puurunen Embassy of Finland in India.

FEDERAL REPUBLIC OF GERMANY	Dr. Reinhart Ehni First Secretary, Embassy of Federal Republic of Germany, New Delhi.
GERMAN DEMOCRATIC REPUBLIC	Mr. Edgar Benkwitz Embassy of German Democratic Republic, New Delhi.
	Mr. Groh Embassy of German Democratic Republic, New Delhi.
ITALY	Dr. Herbert Ros Counsellor, Embassy of Italy in India.
MEXICO	Dr. Jorge Castaneda Permanent Representative of Mexico at the International Organisations in Geneva.
	Dr. Pedro Gonzalez-Rubio Charge d' Affairs of Mexico in India.
NETHERLANDS	H.E. Mr. A.F. Calkoen Ambassador of Netherlands in India.
	Dr. H.A.H. Schouten Embassy of Netherlands in India.
	Mr. M. Van Der Gaag Embassy of Netherlands in India.
NORWAY	Mr. Trygve Gjesdal Charge d' Affaires, Embassy of Norway in India.
	Mr. Tore H. Torreng Second Secretary, Embassy of Norway in India.

PERU	H. E. Dr. Rene Hooper-Lopez Ambassador of Peru in India.
	M. Hector Cabada Barrios Embassy of Peru in India.
SPAIN	Mr. J. G. Agullo Counsellor, Embassy of Spain in India.
U.S.A.	Mr. Barnard Oxman Assistant Legal Adviser, Department of State.
	Mr. Richard McCormack Embassy of U.S.A. in India.
U.S.S.R.	Mr. V. A. Romanov Counsellor of Legal & Treaties, Ministry of Foreign Affairs.
	Mr. Volkov Embassy of the U.S.S.R. in India.
YUGOSLAVIA	Mr. Dragoslav Pejic Minister - Counsellor, Embassy of Yugoslavia in India.

F. REPRESENTATIVES OF NON-GOVERNMENTAL ORGANISATION

LAW OF THE SEA INSTITUTE	Mr. Francis T. Christy, Jr., Director. Law of the Sea Institute, Rhode Island.

III. AGENDA OF THE FOURTEENTH SESSION

I. Organisational Matters :

1. Adoption of the Agenda.
2. Election of the President and Vice-President.
3. Admission of Observers to the Session.
4. Consideration of the Secretary-General's Report on Policy and Administrative Matters and the Committee's Programme of Work.
5. Dates and place for the Fifteenth Session of the Committee.

II. Matters arising out of the work of the International Law Commission under Article 3 (a) of the Statutes

Question of protection and inviolability of Diplomatic Agents and other persons entitled to Special Protection under International Law.

III. Matters referred to the Committee by the Governments of the Participating Countries under Article 3 (b) of the Statutes :

1. *Law of the Sea including Questions relating to Sea Bed and Ocean Floor (Referred by the Government of Indonesia).*
2. *Law of International Rivers (Referred by the Governments of Iraq and Pakistan).*

IV. Matters taken up by the Committee under Article 3 (c) of the Statutes :

1. *Organisation of Legal Advisory Services in Foreign Offices (Taken up by the Committee at the suggestion of the Government of India).*

2. *International Sale of Goods (Taken up by the Committee at the suggestion of the Governments of Ghana and India).*

IV. THE LAW OF THE SEA

(i) INTRODUCTORY NOTE

The subject "The Law of the Sea including questions relating to Sea-Bed and Ocean Floor" was referred to this Committee for consideration by the Government of Indonesia under Article 3 (b) of the Committee's Statutes. Having regard to the developments in the field and the Third Law of the Sea Conference which was then being mooted (to consider various aspects of the Law of the Sea), the Committee at its eleventh session decided to include the subject as a priority item on the agenda of its twelfth session.

In order to appreciate the background of the Committee's study of the subject, it may be recalled that the International Law Commission of the United Nations, soon after its establishment, took up the Law of the Sea as a priority topic for codification. The Commission after considering the subject at a number of its sessions drew up its conclusions in a set of draft articles which formed the basis of discussion at the First Law of the Sea Conference convoked by the United Nations iu 1958. That Conference succeeded in adopting four conventions on the subject, namely (i) the Convention on the Territorial Sea and the Contiguous Zone, (ii) the Convention on the High Seas, (iii) the Convention on Fishing and Conservation of Living Resources of the High Seas, and (iv) the Convention on the Continental Shelf. The question of the breadth of the territorial sea, however, remained unresolved due to wide divergence of views and another Conference of Plenipotentiaries convened in 1960 to consider the problem also failed to resolve the question as no proposal received the requisite two-thirds majority. Some of the other questions left unresolved by these two conferences were those relating to the regime of international straits and the special rights of coastal States, if any, on fishery resources of the sea.

Within a few years of the two U.N. Conferences on the Law of the Sea, it became apparent that the international

community would have to seriously tackle the problem of the breadth of the territorial sea as a number of States began taking unilateral action in this matter following upon the failure of the 1958 and 1960 U N Conferences to resolve this question. The technological advances made in the field of exploitation of the sea-bed also made it necessary to define with sufficient precision the extent of the national jurisdiction of coastal States in the sea-bed and to think in terms of exploration and exploitation of the natural resources of the sea and the sea-bed beyond the limits of the national jurisdiction for the common good of mankind. Moreover, the emergence of new nations in Africa during the 1960s brought home the necessity for re-examination of some of the issues and it became obvious that any new order of the Law of the Sea must adequately reflect their views.

Recognising the need for orderly development of the sea-bed and the ocean floor, the General Assembly by its resolution 2467 A (XXIII), adopted on the 21 December 1968, established a Special Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. During 1968-69, the Soviet Union and the United States of America consulted with a number of States regarding the possibility of holding of another international conference on the Law of the Sea to settle the outstanding issues on the subject, and the General Assembly by its resolution 2574 A (XXIV), adopted at its 1833rd plenary meeting, requested the U N Secretary-General to ascertain the views of member States regarding the desirability of convening a Conference on the Law of the Sea at an early date to review the regime of the high seas, the continental shelf, the territorial sea and the contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the sea-bed and the ocean floor which lay beyond the limits of national jurisdiction. The overwhelming support that this resolution received made it evident that the holding of a conference to settle the outstanding issues on the Law of the Sea was almost a matter of certainty and that the Asian and African States would have an important role to play in the formulation of the law on the subject and in the establishment of a new order of the sea.

It was at this stage that the Government of Indonesia proposed to the Committee that it should take up this subject at a very early date in order to assist the member States of the Committee to prepare for the proposed U N Conference and also to enable them to have an exchange of views on important issues prior to the holding of the Conference. Indonesia's proposal was placed before the Committee at its eleventh session held in Accra in January 1970 and the Committee resolved that, having regard to the paramount importance of the subject to the Asian-African States, it should take up the matter at its next regular session and that preparatory work should be proceeded forthwith. The Committee also decided that its activities with regard to the assistance to be given in preparation for the proposed U N Conference on the Law of the Sea as also affording of facilities for exchange of views should not be confined to member States of the Committee alone but should be offered to all Asian and African States following up the previous practice which it had adopted in connection with the preparation for the Law of Treaties Conference with such signal success.

The Secretariat of the Committee, in pursuance of the aforesaid decision, sent a communication to practically all the Asian and African Governments inviting them to participate in the discussions on the Law of the Sea which were to be held at the Colombo session of the Committee in January 1971. Alongwith the invitation a list of topics for discussion and a questionnaire was sent out to these governments inviting their views with regard to the topics which the proposed UN Conference should consider as also their comments on substantive issues raised in the questionnaire. In response to this invitation, twenty-five States including eighteen of the Members of the Committee participated in the Colombo session. In addition, Delegations representing the United States of America and five Latin American Governments attended the session in order to explain their viewpoints on various issues before the Colombo meeting of the Committee.

At the Colombo session the principal topics which were taken up for consideration were as follows :-

(1) Breadth of territorial sea;

(2) Rights of coastal states in respect of fisheries in areas beyond the territorial sea:

(3) Exploration and exploitation of the sea-bed including the question of national jurisdiction over the sea-bed, the concept of "trusteeship" over the continental margin, the type of regime to govern the sea-bed and ocean floor beyond the limits of national jurisdiction and the types of international machinery:

(4) Islands and the archipelago concept:

(5) International straits; and

(6) Preservation of marine environment.

Following the discussions in the plenary the Committee appointed a Sub-Committee consisting of all the participating member States of the Committee and a Working Group was established composed of the representatives of India, Indonesia, Japan, Kenya, Malaysia and Sri Lanka* for detailed study and preparation on the subject. It also appointed as its rapporteur Mr. Christopher W. Pinto of Sri Lanka. The proceedings of the Colombo session on the Law of the Sea and the working paper prepared by the rapporteur containing a list of various issues, a summary of the views expressed in the Committee on those issues and a questionnaire were made available to practically all the governments in the Asian-African region.

In the meantime replies were received by the United Nations from its member States to the UN Secretary-General's communication pursuant to resolution 2574 (XXIV) giving their views regarding the proposed Conference on the Law of the Sea and the subjects to be taken up at that Conference and a decision was taken to convoke the Conference to meet in 1973. The UN Sea-Bed Committee, established in December 1968, completed its formulation of the principles on the sea-bed and its resources which was adopted by the General Assembly in December 1970. The terms of reference of that Committee as well as its membership were enlarged to make it virtually a preparatory body for

*The Working Group was enlarged by the inclusion of Egypt at the Lagos session of the Committee.

the Third Law of the Sea Conference. The enlarged Sea-Bed Committee met during March 1971 and divided itself into three sub-committees. At that session, it succeeded in resolving various procedural issues and a beginning was made for consideration of substantive questions.

In accordance with the decision taken at the Colombo session of the Committee, the Working Group met in New Delhi towards the end of June 1971 to consider the working paper prepared by the rapporteur and the special working papers prepared by the other members of the Working Group on the questions of fisheries, archipelagos, international straits and international machinery for the proposed sea-bed area. The report of the Working Group was then considered by the Sub-Committee on the Law of the Sea which met in Geneva during July 1971 just before the commencement of the summer session of the UN Sea-Bed Committee.

The Sub-Committee recommended collection of further material by the Secretariat in preparation for the Lagos Session; and with regard to the assistance to be given to non-member Asian and African States it decided to make the following recommendations :

(i) Documentation prepared for the Committee on the subject of the Law of the Sea should be circulated to Asian and African States that were not yet members of the Committee in order to assist them in preparing for Conference on the Law of the Sea and that basic materials should be made available in French as well as in English;

(ii) Non-member countries in Asia and Africa be invited to attend the Lagos Session as observers following precedents established in regard to the Karachi Session (which had considered questions coming before the Conference on the Law of Treaties) and the Colombo Session.

The Sub-Committee also requested the Committee's Secretary-General to address the UN Sea-Bed Committee and the

Afro-Asian Group of the Sea-Bed Committee on suitable dates to be arranged in consultation with their respective chairman with a view to acquainting non-member States of the aims and purposes of the Committee and the work that was being done by it on the Law of the Sea. In accordance with the said request the Secretary-General addressed the UN Sea-Bed Committee at its plenary meeting on the 19th July, 1971. A special meeting of the Afro-Asian Group was convened under the Chairmanship of Mr. Justice Seaton of Tanzania which was addressed by the Secretary-General of the Committee.

The UN Sea-Bed Committee and its three Sub-Committees met in Geneva from the 19th July to 26th August, 1971. The first Sub-Committee dealt with the question of international sea-bed area and the establishment of appropriate machinery. Several drafts were placed before the Sub-Committee for its consideration by various delegations. The second Sub-Committee gave consideration to a number of suggetisons about the topics that should be taken up at the forthcoming Conference on the Law of the Sea.

At the thirteenth session of the Committee held in Lagos in January 1972, the Law of the Sea was taken up as the priority item and the subject was considered in detail in its various aspects on the basis of working papers prepared by the members of the Working Group and a special working paper on Land-locked States prepared by the Ambassador Tabibi of Afghanistan. The session was attended by delegations from seventeen member States of the Committee and observer delegations representing twenty-seven non-Member States, and eight international organisations including the United Nations. The main topics which were taken up for discussion during the Lagos session, both in the plenary and in the Sub-Committee were (1) International Regime for the Sea-Bed; (2) Fisheries; (3) Exclusive Economic Zone; (4) Territorial Sea and Straits; (5) Regional Arrangements; (6) Archipelagos and (7) Position of Land-locked States. Although the discussions on these topics went into considerable depths and there was full and free exchange of views, lack of time prevented the Delegates from concretising their views more precisely.

The Sub-Committee on the Law of the Sea met in Geneva during July 1972 in order to give further consideration to the topics which were discussed in Lagos and to formulate certain tentative proposals for consideration of the Committee at its fourteenth session. At this meeting concrete proposals were put forward by the representatives of Indonesia and the Philippines on '*Archipelagic States*', by the representative of Japan on '*Fisheries*' and these formed the basis for discussions in the Sub-Committee. The report of the Sub-Committee as prepared by the rapporteur and the members of the Working Group succinctly sets out an accurate summary of the discussions.

The expanded Sea-Bed Committee of the United Nations held two series of sittings during the spring and summer of 1972 during which considerable progress was made in the preparatory work for the Third Law of the Sea Conference; Sub-Committee II was able to prepare and finalise a list of subjects for consideration at the Conference and thus set at rest all controversies and debates on this delicate issue. A Working Group established by Sub-Committee I for the purpose of examining the various proposals on International Sea-Bed Regime under the Chairmanship of Mr. Christopher W. Pinto also made significant progress and succeeded in producing some tentative solutions. The other Sub-Committees also maintained steady progress on their subjects.

At the fourteenth session of the Committee held in New Delhi in January 1973, which was attended by the Delegations from 19 of the Member States of the Committee and Observer Delegations representing 30 non-Member States and four international organisations, the Law of the Sea and Sea-Bed was again taken up as a priority item. At the beginning of the session, the Working Group on the Law of the Sea met on the 10th of January, 1973, to consider the method of work to be followed at this session. The Working Group, having regard to the agenda of the forthcoming meetings of the UN Sea-Bed Committee and the time available at the disposal of the Committee at the present session, *inter alia*, recommended that deliberations on the subject at the present session, both in the plenary

and the Sub-Committee, should be confined to the following topics :

(i) Fisheries, Exclusive Economic Zone;

(ii) Rights and Interests of Land-locked States;

(iii) International Machinery for the Sea-Bed; and

(iv) Marine pollution.

The Working Group also recommended that in view of the resignation of Mr. C.W. Pinto (Sri Lanka), Dr. S.P. Jagota (India) should take over as the rapporteur of the Sub-Committee on the Law of the Sea. The recommendations of the Working Group were accepted by the Committee, and accordingly the Committee had discussions on the aforesaid topics in four plenary meetings. In these plenary meetings eleven Delegations and nine Observers made statements. In one of the plenary meetings, the Delegation of India introduced a set of Draft Articles on Exclusive Fisheries Zone. At the end of the discussion in the plenary, the matter was referred to the Sub-Committee for detailed consideration. The Sub-Committee held four meetings and thereafter the rapporteur drew up a report on the work done by the Sub-Committee which was placed before the main Committee. In the wake of discussions on the rapporteur's report, it was decided that the Draft Articles presented by the Delegation of India together with the text of questions posed by the Delegation of Japan, which formed annexture I and II respectively of the rapporteur's report, should be submitted to the member governments with the request that the governments give their concrete comments and suggestions on the Draft Articles to the Secretary-General of the Committee within one month from the close of the session. It was furthur decided that the Sub-Committee should meet in Geneva for a period of three days immediately prior to the summer session of the Sea-Bed Committee, to which Ambassaddor Tabibi might be invited as a special invitee. The Committee also took the decision that the study group on Land-locked States, establised by the Committee should meet at the earliest. The study group, accordingly, met in New Delhi from 22nd to 26th of March, 1973.

(ii) REPORT OF THE AALCC SUB-COMMITTEE ON THE LAW OF THE SEA INTER-SESSIONAL MEETING HELD IN GENEVA FROM 12TH TO 15TH JULY, 1972

Chairman	Hon'ble Dr. T. O. Elias (Nigeria) H. E. Dr. Mustafa Kamil Yaseen (Iraq)
Secretary-General	Mr. B. Sen
Rapporteur	Mr. C. W. Pinto (Sri Lanka)

I. Organization of Work

The Sub-Committee on the Law of the Sea held an inter-sessional meeting at the Palais des Nations, Geneva, on 12, 13, 14 and 15 July, 1972, in pursuance of a decision taken by the Liaison Officers of the Member Governments and approved by the President of the Committee.

The Sub-Committee first discussed the scope and method of its work. The Secretary-General indicated that the meeting had a twofold purpose, namely to have an exchange of views on matters which were likely to come up before the summer session of the U. N. Sea-Bed Committee and to help in crystallising the essential points on the major issue indicated in the Agenda Paper so as to facilitate the preparation in due course of draft texts on the Law of the Sea by the Committee's Secretariat and the Working Group on the Law of the Sea for consideration at the next regular session of the Committee. The Chairman observed that it would be very useful if the Committee were to prepare draft formulations on the major issues in preparation for the Conference on the Law of the Sea for assistance of the Member Governments and other Asian and African States.

The Sub-Committee decided that it would be useful to discuss the various amendments suggested by certain governments to the List of Issues introduced by 56 countries at the

spring session of the U. N. Sea-Bed Committee (Doc. No. A/AC. 138/66). It would not be the purpose of the discussion to take decisions on any matter relating to the List but merely to clarify certain areas and facilitate further discussion.

The Sub-Committee felt that if satisfactory solutions could be arrived at on the major issues listed in the Agenda Paper a great deal of progress would have been made and it was decided to concentrate on those issues both for the purpose of discussions in the Sub-Committee and for preparation of draft texts.

The Sub-Committee heard statements from the Delegate of Kenya about the work done in the Seminar on the Law of the Sea at Yaounde from 20 to 30 June, 1972. The Delegate of Egypt informed the meeting regarding the conference held in Malta from 5-7 July, 1972, by coastal States of the Mediterranean Sea. The Delegates of Indonesia and Japan also made statements concerning the Law of the Sea Institute meeting held at Rhode Island from 26–30 June, 1972.

The rapporteur suggested that members might wish to give special consideration to their positions on the following issues which could be expected to be the subject of difficult negotiations in the Preparatory Committee over the coming months :

(1) *Regulation of fisheries* : Proposals thus far made by the developed countries had in common an approach based on what they considered to be the traditional position on fisheries viz. that living resources in waters beyond the territorial sea belonged to the international community and could be harvested by all. Several developing countries, on the other hand, wanted the law to acknowledge their sovereignty over the living resources of the sea in an appropriate zone beyond the territorial sea. The developed countries, in an attempt to meet the demands of the developing world, had proposed adoption of the "preferential catch" approach in various forms. *But the approaches were fundamentally opposed to one another,* and he

wondered whether any compromise between the two, based on "traditional" concepts, was possible.

(2) *Regulation of sea-bed exploitation* :

(a) Several developing countries were seeking recognition of the principle that a coastal State had sovereignty over the natural resources of the sea-bed in an appropriate zone beyond its territorial sea, the sea-bed beyond that to be placed under the jurisdiction of a new international machinery and exploited for the benefit of mankind as a whole. Some developed countries on the other hand had proposed that there be an intermediate zone between national jurisdiction and the area of the machinery's competence, a zone from which the community (and the machinery) might derive substantial revenues through the agency of the coastal State. The possibility of compromise between the two approaches might be considered.

(b) *The question whether or not the international machinery should be endowed with the power to carry out exploitation of sea-bed resources by means of its own resources* was likely to become a major issue. Opposing views on the matter were genuinely and strongly held by several countries.

(c) *"Shelf-locked", "near-land-locked" and other terms* used to characterise certain groups of States which believed they had a special community of interest — sometimes transcending the basic one of level of economic development — would need to be defined before the problems of those States could be resolved.

(3) *Innocent passage* through straits used for international navigation falling within the territorial sea of

one or more riparian States, as opposed to the new concept of "free transit" through "international straits".

(4) *Questions relating to the settlement of international disputes* relating to the law of the sea : Should there be a system of compulsory settlement ? Should there be more than one such system, more than one tribunal ? Was this a field in which even countries traditionally wary of compulsory mechanisms ought to consider accepting third party settlement ? Was the highest level of compromise on this point still some kind of "compulsory conciliation" ending in a recommendation to the parties, or was it possible and desirable for the community to move a stage further ?

(5) *Finally, should the Conference on the Law of the Sea take place as planned in 1973* ? In the light of the work thus far, was it possible or desirable for a Conference to be held at all ? Would the delay of a year or two materially affect the degree of preparedness ? Should the Conference, if held, take place in two or more stages ?

II. Archipelagic States

The Delegations of Indonesia and the Philippines submitted the basic principles relating to archipelagic States as follows :

" (1) An archipelagic State, whose component islands and other natural features form an intrinsic geographical, economic and political entity, and historically may have been regarded as such, may draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic State is, or may be, determined.

(2) The waters within the baselines, regardless of their depth or distance from the coasts, the sea-bed and

the subsoil thereof, and the superjacent airspace, as well as all their resources, belong to and are subject to the sovereignty of, the archipelagic State.

(3) Innocent passage of foreign vessels through the waters of the archipelagic State shall be allowed in accordance with its national legislation, taking into account the existing rules of international law. Such passage shall be through sealanes as may be designated for that purpose by the archipelagic State."

The Delegations of Indonesia and the Philippines hoped that the members of the Committee would now be able to lend their support to these principles in the next Conference on the Law of Sea.

Some delegations continued to support the concept of the archipelagic State while some sought clarification of certain points, among them the following :

(a) *In determining the right of innocent passage through the waters of archipelagic States, should that State's national legislation prevail over international law ?*

The Delegations of Indonesia and the Philippines explained that a workable balance should be found between national legislation and international law. Thus, innocent passage should be regulated by national legislation with the understanding that such national legislation must take into account the existing rules of international law with regard to innocent passage. While under international law foreign ships had no right of innocent passage through the internal waters of a State, the archipelagic States were nevertheless prepared to grant that right through the archipelagic waters along designated sea lanes. This would, however, oblige archipelagic States to enact laws and promulgate regulations concerning innocent passage, and establish the necessary sealanes.

(b) *Would an archipelagic State after claiming the waters within the archipelago, still claim a zone of exclusive economic jurisdiction outside the archipelago* ?

The Indonesian and the Philippine Delegations explained that the concept of the archipelagic State was intended to guarantee the unity of such a State, and was thus concerned only with the waters *within* the baselines from which its territorial sea was measured and not with the area outside those baselines. The concept of a zone of exclusive economic jurisdiction had relevance only in areas outside the territorial boundaries of a State.

(c) *Were the four elements of the archipelagic State concept outlined in the Indonesian and Philippine draft, namely : existence as an intrinsic geographical, economic and political entity, and the historical element, all to be taken together and co-exist as conditions for application of the archipelagic State concept ?*

The Delegations of Indonesia and the Philippines said that the archipelagic State was basically a geographical entity strengthened by political and economic unity.

Some countries had historically been regarded as archipelagic States while others did not emphasise the historical element. For these reasons the Indonesian and Philippine draft had indicated that the historical element was an additional, but optional qualification.

(d) *Should not the depth of waters and the distance between the islands of an archipelagic State be taken into consideration ?*

The Delegations of Indonesia and the Philippines said that it was a fact of geography that some waters within an archipelago were very deep even though

they are very close to an island in the archipelago group. It was also true that some of the outlying islands of an archipelago group might lie at an irregular distance from each other. Since the main purpose of the archipelagic State concept was to unite the archipelagic country, any distance or depth criteria would merely be irrelevant and their application could endanger the very unity which archipelagic States were trying to safeguard. It was also emphasised that this aspect of the matter should not create any apprehension that any isolated islands in mid-ocean would claim to form archipelagic States within the continent since an archipelagic State must be an intrinsic geographical unit. Small islands scattered in the middle of an ocean, did not either among themselves or in relation to a continent, satisfy this criterion. It was noted that the problem of islands was a separate and distinct one falling under item 15 of the List of Subjects and Issues introduced to the U. N. Preparatory Committee on the Conference on the Law of the Sea by 56 States (A/AC. 138/66).

(e) *Questions relating to ratio of land to water, distances between islands, and other data relating to Indonesia and the Philippines, such as the longest baselines in the two countries; the application of the archipelagic State concept to other island countries etc.*

The Indonesian and Philippine Delegations explained that in their countries islands lay at relatively short distances from one another Both countries have a ratio of approximately one third of land and two-thirds of water. The longest Indonesian baseline was 122.7 nautical miles and the average length of a baseline was about 40 miles. There were only five baselines of more than 100 miles, and there were 53 baselines of less than 24 miles among the 201 baselines. Thus the longest Indonesian baseline was still shorter than the baselines which had traditionally been admitted for an "historic bay". And the average

Indonesian baseline was still less than the baseline admitted for an archipelago by the international Court of Justice in the *Anglo-Norwegian Fisheries Case* (45.5) miles.

On the other hand, the Philippines land area consisted of approximately 115,830 square miles while its total water area within the baseline was only about 170,000 square nautical miles which was distributed more or less evenly over the archipelago between and around islands. Most of the component islands were separated by distances of less than 24 miles, a few by more than 50 miles but not any of those adjacent to each other on any side were beyond 83 miles. The Philippines had 64 baselines, the longest being not more than 200 kilometres.

With regard to the application of the archipelagic State concept to other island countries, the Delegations of Indonesia and the Philippines mentioned, among others, Fiji and Mauritius. There were other island countries, for example, Japan, which could fulfil the criteria for an archipelagic State, but due to different interests, and being a country already united and highly developed, might not wish to be regarded as an archipelagic country.

After an extensive exchange of views it was suggested that the last part of the third principle be re-drafted in order to make it clearer that the interests of the international community in passage through the waters of an archipelagic State would be properly taken into account. This suggestion was received favourably by the Indonesian and Philippine Delegations. The main purpose of their draft had been to expound the basic principles relating to archipelagic States, while the actual treaty articles on the subject could be studied much further.

There were also questions with regard to the legal nature of the airspace above the archipelago, the

small far outlying islands of the archipelagic States as well as the fisheries arrangements within the archipelagic waters.

The Indonesian and Philippine Delegations stressed again that the unity of their peoples and countries is foremost in their minds and as a consequence of this the airspace above the archipelago, the small far outlying islands of the archipelagic States as well as the fisheries and other resources should be considered as falling within their sovereignty, and as being the patrimony of their peoples. They did not consider that the archipelagic State concept encroached upon the interests of the international community because such States would be merely exercising rights which they believed to have been theirs from time immemorial and which, (as in the case of Indonesia during the period of colonial domination), might have been taken away from them by force from time to time.

At the conclusion of the discussion the Chairman said that :

(1) At present there were no rules of international law applicable to archipelagic States, and that Indonesia and the Philippines had attempted to formulate basic principles which should be applicable to their specific situations. In doing so, they had sought a balance between their national interest and the interest of the international community.

(2) The explanations and information given by the Delegations of Indonesia and the Philippines had proved very enlightening and had made it possible for the members of the Sub-Committee to advise their respective governments on the problems of archipelagic States.

III. Fisheries

On the basis of a working paper on fisheries earlier submitted to the Committee at its thirteenth session held in

Lagos, the Delegate of Japan presented in the form of provisional draft articles certain basic rules to be applied to fishing and conservation on the high seas including the preferential fishing right of the coastal States. The main points covered were as follows :

(a) In areas of the high seas beyond a limit of 12 miles measured in accordance with the relevant rules of international law, all States and their nationals would have the right to fish, subject to the regime proposed. That right would be subject to the obligation to take appropriate measures of conservation whenever necessary. When nationals of two or more States were engaged in fishing a single stock of fish on the high seas, these States would be required to co-operate in taking the necessary conservation measures.

(b) For the purpose of ensuring that reasonable protection is given to the fishing industry of a coastal State in its adjacent waters beyond 12 miles, a preferential fishing right would be recognised :

(i) In the case of a developing coastal State, that right would entitle that State annually to that part of the allowable catch of a stock of fish that can be taken on the basis of the fishing capacity of its fishing vessels in the adjacent waters. In determining the part of the allowable catch to be so reserved, account would be taken of the rate of growth of the fishing capacity of that State until such time as it had developed the capacity to be able to fish for a major portion of the allowable catch of the stock of fish concerned.

(ii) A coastal State whose economy was to an exceptional degree dependent on its coastal fishery in its adjacent waters, would be recognised as entitled to the right provided for in paragraph (i) above.

(iii) In the case of a developed coastal State, a region or regions of which were dependent on coastal fisheries conducted by small fishing vessels in adjacent waters, the right shall entitle that State annually to that part of the allowable catch of a stock of fish in the adjacent waters that is required for the maintenance of such small-scale coastal fisheries. The interest of traditionally established fisheries of non-coastal States, if any, shall be duly taken into account in determining the catch to be reserved for small scale coastal fisheries.

(c) In order to implement and safeguard the coastal State's preferential fishing right referred to in (b) above, regulatory measures which may include the establishment of open and closed seasons, closing of specific areas of fishing, regulation of gear, and limitation of the catch and which would be made applicable to vessels of non-coastal States, would be agreed between the coastal and non-coastal States concerned, on the basis of specific proposals submitted by the coastal State, so as to ensure adequate protection to the fishing activities of vessels of coastal States in the adjacent waters. Any such arrangement, would be required to be consistent with the general objectives of conservation of living resources, the maintenance of their productivity, and their rational utilization.

(d) Provision would be made for international co-operation in the field of fisheries and related industries through arrangements between coastal and non-coastal States for the necessary regulatory and other measures designed to assist in the development of the fishing capacity of developing coastal States and to facilitate the full enjoyment by such States of their preferential fishing right.

(e) There would be appropriate regulation of the fishing of highly migratory stocks on the basis of international

consultation or agreement in which all interested States would participate.

(f) Coastal States may enforce any regulatory measures adopted. In the exercise of such enforcement the coastal State may inspect vessels of non-coastal States, arrest those vessels violating the regulatory measures. The arrested vessels would be promptly returned to the flag State. Violations of the regulatory measures in force shall be duly punished by the flag State. Each State shall make it an offence for its nationals to violate any regulatory measures adopted pursuant to agreement between the coastal and non-coastal States concerned.

(g) In case of failure to agree to the arrangements, disputes may be settled by a special commission to be established to deal with such disputes.

In the course of discussion it was suggested that allocation of resources based on the criterion of the fishing capacity of a coastal State would be of little practical value when applied to a developing coastal State, because the fishing capacity of most developing States was small and its rapid expansion unlikely. Determination of the allowable catch was difficult in practice and the notion of the growth of fishing capacity of a State too vague as a criterion and difficult to assess.

It was pointed out that the question of ownership of the resources was of fundamental importance. The Japanese proposal was based on the premise that the fishery resources beyond the limit of 12 miles were in principle common to all. Such premise was unacceptable to several States who held the view that these resources up to a fixed distance from the coast were the property of adjacent coastal State and therefore subject to its exclusive jurisdiction. In that connection it was argued that the situation had radically changed since 1958 when the Geneva Conventions on the Law of the Sea were adopted. The technological advances that had taken place since then required a different approach from that adopted in 1958 that would take into account the interests of developing countries.

Some delegates felt that the system of enforcement proposed was not appropriate and somewhat illogical because while it recognized the right of a costal State to inspect and arrest ships violating the coastal State's regulations, it did not acknowledge that State's right to prosecute and punish offenders, preferring to accord that right to the flag State. It was also suggested that it was not clear whether the proposal was based on a zonal approach and in this connection the definition of the term "adjacent waters" as used in the draft articles might be necessary.

In reply, the following points were made by the Delegate of Japan :

(a) The allowable catch could in fact be determined objectively by estimating it on the basis of the best scientific evidence available. The States concerned could enlist the help of appropriate third parties, including international or regional bodies, in making the assessment. The catch of non-coastal States should also be within the limit of the allowable catch. A developing coastal State would be entitled to a catch based on its fishing capacity. Furthermore, developing coastal States were not precluded from sharing with non-coastal States in that part of the allowable catch not reserved to coastal States.

(b) Every effort would be made to ensure that future growth rates of fishing capacity was not underestimated, and the development plan for the fishing industry of the developing coastal State would be considered as one of the basic data in such an assessment.

(c) The Japanese draft did give adequate consideration to bridging the gap in fishing technology between developed and developing States. Where, for example, the quota arrangement could not ensure to the coastal State a catch upto the limit provided for under preferential rights, non-coastal States could be subjected to additional discriminatory restrictions, such as closed seasons, closed areas and prohibition of certain

fishing gear none of which would apply to coastal States.

(d) The Japanese draft had avoided the details of enforcement measures since experience over the years had shown that a procedure for enforcement could be most effectively established if it was based on specific circumstance and needs. Under the proposed regime no State or group of States had the exclusive right to enforce regulatory measures adopted in connection with preferential fishing rights. Accordingly, the coastal States concerned had the right to control the fishing activities of non-coastal States in their adjacent waters, but they would be required to accept Joint control with non-coastal States which wished to co-operate with the coastal States in the enforcement of the regulatory measures.

(e) It was recognized that coastal States, in view of their legitimate interest in the orderly enforcement of the regulatory measures, had a role to play in the matter of enforcement measures. · However, in view of the legal status of the high seas, which include the adjacent waters, each State should reserve to itself criminal jurisdiction over its vessels violating the regulatory measures adopted under the present regime. Flag State jurisdiction was often regarded by coastal States as tantamount to loose enforcement. In order to secure strict enforcement of regulatory measures, it was considered necessary to establish rules according to which any violation would be duly punished by the flag State and the coastal State concerned would be informed by the flag State of its action.

(f) The proposed regime was not based on any zonal approach. It was, in the view of the Japanese Delegation, most practical and effective that regulatory measures should be established to the extent possible with respect to each stock of fish concerned, having regard to the migratory range and biological characteristics of fish species.

IV. Preservation of the Marine Environment (Marine Pollution)

Introducing the subject of preservation of the marine environment, including marine pollution, the rapporteur said that it was a problem that had been brought before the world by the industrialised, developed countries who were themselves. through commercial expediency and industrial neglect, largely responsible for its creation. It was also a problem that affected the highly industrialised countries more than most developing areas. While developed countries were striving to secure international acceptance of rules and standards to combat the growing menace of pollution, the developing countries might be expected to be more concerned to prevent any unwarranted increase those rules and standards might cause in their industrial investment, and which might even impede their programmes of industrialisation. In determining their position on the subject of marine pollution, the developing countries might wish to consider the following :

(1) Degradation of the human environment, including the marine evironment, was a "social cost" for which the industrialised. developed countries were mainly responsible, and the burden of which ought to be borne principally by them.

(2) Environmental protection measures should be regarded only as one of the multiple objectives of economic planning, its priority being determined by each society in the light of its own economic and social problems.

(3) An environment relatively free of pollution was a natural resource which a developing country may exploit in a prudent and discriminating manner, e.g. through offering conditions for industrial investment that imposed relatively liberal environmental protection rules and standards and therefore offer the investor substantial financial advantages.

(4) Problems of pollution of the environment, including the marine environment, were inter-related. Piecemeal measures for pollution control (e. g. the

regulation of ocean dumping on a regional basis) should be approached with caution, unless satisfactory global controls that safeguard the interests of coastal States, and especially developing coastal States, could be worked out.

These positions found ample support in the document circulated by the Secretariat in the Brief for the present Inter-Sessional meeting of the Sub-Committee — viz. the Founex Report and the GATT Study. Particular attention was invited to paragraphs 22-25 (International Action) at the end of the Founex Report.

It was agreed that the most fundamental problem of the developing countries was the urgent need to increase their rate of economic growth and thereby raise the living standards of their peoples. Environmental protection measures were only one of many problems that had to be dealt with in perspective and should not be permitted in any way to impede the course of a country's industrialisation and stifle its economic growth.

Some delegates pointed out that a distinction might be drawn between pollution on land and pollution on the sea. Land pollution measures might be approached with greater circumspection by the developing countries concerned to prevent hampering on their industrial programmes. On the other hand, since marine pollution could be conveyed over long distances to endanger developing coastal States, developing countries might wish to consider more ready acceptance of stringent norms and regulations in this field. One delegate said that two types of approach to regulating pollution in the marine environment were often considered :

(1) regulation at source; and

(2) increase of jurisdiction by the coastal State to permit it to apply certain regulatory norms and standards and ensure their enforcement.

He felt that the former — regulation at source — was the most reasonable approach, and one that was in harmony with existing international law.

It was suggested that while all countries should collaborate in the establishment of international norms and standards for marine pollution control, the developed countries would have to bear the major costs involved, and accept regulation in all its stringency. On the other hand, a relaxation of controls in the case of developing countries, justified on the ground that industrial growth might otherwise be impeded, was equally essential. One delegate pointed out that pollution might well be caused in one developing country through some allegedly justified relaxation of controls in a neighbouring developing country. It was not enough to think of regulatory measures : questions of jurisdiction and liability had also to be studied concurrently in order to cover the problem adequately.

It was emphasised that a cautious approach to the problem of marine pollution by the developing countries should not be construed as the result of a negative attitude. As had been emphasised in the Founex Report, no country could afford to treat environment as a free resource as the presently developed countries had done in the initial stages of their economic progress. It was important to avoid the mistakes of the past. What was important was that the long-term costs of environmental problems were fully understood and reflected in the current planning policies of the developing world.

Further Work

As to the further work to be done on the subject of marine pollution before the Committee's next session, the Sub-Committee felt that the following should be the subjects of study :

(1) Pages 8-14 of Document 10 of the Conference on the Human Environment, which was explicit as to the measures necessary to safeguard the interest of the developing countries.

(2) The question of liability for damage caused by marine pollution, including the question of jurisdiction and enforcement measures, in that connection paragraph 22 of the Declaration on the Human Environment called for special examination.

It was decided that the Secretariat should prepare and circulate :

(1) An analytical study of the Declaration on the Human Environment;

(2) A list of international agreements regarding marine pollution together with brief summaries of their main provisions.

V. Sea-bed beyond National Jurisdiction

Regulation of the exploration and exploitation of the sea-bed beyond national jurisdiction was discussed on the basis of working papers prepared by the Government of Japan reproduced on pages 111–126 of Volume IV of the Brief of Documents for the Committee's Lagos meeting, and by the rapporteur reproduced on pages 375–411 of the Report of that meeting. The rapporteur recalled that Dr. Jagota of India had been kind enough to introduce his working paper in Lagos. He intended to revise that paper in the light of comments he had received, but the revisions were not yet complete. In the main, the revision would consist of regrouping of provisions and the elimination of non-essential material. He did not envisage many major changes of substance.

The rapporteur suggested that rather than embarking on an article by article discussion of the draft, the meeting might consider four main areas of importance : (1) the functions of the proposed International Sea-Bed Authority, (2) financing the organization; (3) the composition of the executive body and (4) benefit sharing. As to the first, he recalled that at the Committee's Colombo meeting in January 1971, he had proposed a tentative list of powers and functions of the Authority which had been accepted by the Committee. These were the powers and functions now listed in section 2 of Chapter III of the draft before the Committee. They had also been incorporated in the Tanzanian draft before the Preparatory Committee for the Conference on the Law of the Sea. The first power listed, viz.

> "to explore the international sea-bed and exploit its resources for peaceful purposes by means of its own facilities, equipment and services, or such as are procured by it for the purpose"

had immediately evoked sharp criticism from several developed countries whose private industry currently held a monopoly of sea-bed technology. It had been urged time and time again that this particular power of the Authority be omitted altogether. The developing countries had, in general, remained unconvinced of the wisdom of omitting this power which appeared to them entirely logical to confer on machinery that was in effect the trustee or administrator of the "common heritage of mankind." They had pointed out that although the power to exploit should be conferred on the organization by its charter, it would not be exercised initially, and would be exercised at all only if and when the management were to decide that such exploitation was technologically, financially and from a business point of view, a sound proposition. The draft envisaged that exploitation by the Authority would exist side by side with a system for licensing other exploiters of sea-bed resources and there was no intention to create a monopoly situation. Members would have to give serious thought to how strongly they felt regarding conferment of this power since it could become a matter of controversy with far-reaching consequences for the progress of the Conference.

If this power was to be conferred on the Authority, it would have to be decided how it was to be exercised. The present draft envisaged that this power would be exercised through an autonomous body — the Sea-bed Development Corporation, under the aegis of the Authority. But there were other methods.

Another power which the developing countries felt should be conferred on the machinery that was likely to cause controversy was that of taking action to minimize fluctuation of prices of land minerals and raw materials that might result from the exploitation of the resources of the sea-bed, and any adverse economic effects caused thereby. In this connection it was necessary to note that conferment of the power did not necessarily mean that the Authority should alone seek to establish and implement measures for the purpose by itself. It could and should seek these results through collaboration with existing

arrangements and organizations already active in the field, e.g. UNCTAD, commodity arrangements, so as to take advantage of their experience and expertise.

In the course of the discussion of this point, one member suggested that consideration be given to employing a stage-by-stage approach to the conferment of powers on the Authority. It might be better for the organization in its initial stages not to undertake complex tasks that would necessitate a large capital outlay, but rather to allow it to start in a modest manner and progress toward fulfilling all the functions that might appear desirable. It was pointed out that there were two ways of doing this : either to confer all desirable powers on the Authority as and allow it to determine how and when to use them; or to confer powers on the authority and when it was felt that it was ready to exercise them with acceptable efficiency. Of the two, the latter was open to the objection and charters were notoriously difficult to amend, particularly in controversial areas such as this one. It was suggested that if a slow evolutionary process was desirable, and perhaps inevitable in the circumstances, it would be preferable to let it take place on the basis of a carefully drafted comprehensive competence enshrined in its charter. The chairman suggested that much of the heat might be taken out of the controversy surrounding powers of the Authority if the drafting could be made somewhat less explicit. The same result could be achieved by drafting in broader terms less likely to evoke specific apprehensions among certain interests.

On the question of financing, the rapporteur said that provision might be made for the Authority to receive moneys through (1) a form of contribution from developed countries out of value received through exploitation of sea-bed resources within their national jurisdiction (not available for distribution as "benefits" to all members) ; (2) license fees, and other levies on exploitation, such as rents and royalties ; (3) profits from its own exploitation activities ; (4) loans ; (5) voluntary contributions ; and (6) regular contributions from all member States of the organization assessed in accordance with an agreed scale. The question of financing had been linked with the question of limits of national jurisdiction, the argument being

that if the area beyond national jurisdiction were to contain no mineral resources of significance, or was not commercially exploitable with acceptable efficiency, this would greatly reduce the income of the Authority, and could affect its scope and competence as it was being currently evolved in the deliberations of the U. N. Preparatory Committee. Members would have to assess the validity of this argument and decide how best to proceed.

Some delegates were not inclined to accept as conclusive the assertion that if national jurisdiction over sea-bed resources were to extend, for example to 200 miles, there would be little of commercial significance for exploitation in the immediate future beyond that limit, so that the whole concept of an organization with "comprehensive powers" might have to be abandoned. If the 200-mile zone were to be accepted, this would still leave several areas at commercially exploitable depth from which revenues might be expected.

The rapporteur invited the members to consider prior to the next meeting of the Committee, the structure, and particularly the financing, of the proposed Sea-Bed Development Corporation. Should, as had been proposed in his paper, all members of the Authority be *ipso facto* members of the Corporation ? If so, profits and losses of the Corporation might be distributed or borne proportionately. On the other hand, if only some States become shareholders of the Corporation, profits might have to go to them only, and correspondingly only they would bear the Corporation's losses. It was also essential to give serious consideration to the Latin-American idea of "joint ventures" as the only method of sea-bed exploitation that would ensure the authority of the organization in the matter of price adjustment. One member pointed out that adequate control over prices could well be achieved through a licensing system, the conditions of the licence and contingencies for withdrawal, suspension or cancellation of licences providing a sufficient framework. It was suggested by one delegate that provision ought to be made in the convention for sanctions in the event of default in payment of dues to the Authority.

It was pointed out that inadequate attention had been paid to methods of benefit-sharing. The Secretariat and some

member States had proposed methods varying with the "benefit" concerned, but no general opinion had begun to crystallise.

On the question of the composition of the executive organ, the rapporteur invited attention to section 2 of chapter IV of his draft, which was patterned after the governing body of the International Atomic Energy Agency. This was a scientific and technical organization within the U. N. family that had stood the test of time. The basis of the composition of the "Council" was (a) technological competence ; (b) politics and (c) geography — in a wide sense of comprehending geomorphological features in addition to mere location.

Some delegates felt that while the proposal went a good way toward achieving a balance of various competing interests, the second designated group in Article 33 (1) (a)–States most advanced in sea-bed technology from ten regions to be delimited after negotiation — might be difficult to arrive at. In many regions countries had only an elementary knowledge of sea-bed technology and it would be a case of choosing the least ignorant among them. Again, in certain regions, a country once designated on this basis would tend to occupy that position indefinitely since the technological gap between it and its neighbours was unlikely to close. Sometimes the country most qualified for designation might be politically unacceptable as a representative of the region. For these regions, it was suggested that a different system of selection might be sought.

One delegate asked how the number of representatives of special interest groups on the Council [Article 33 (1) (b)] had been arrived at and whether they might not need to be increased. Adequate safeguards should be included to ensure their receiving an equitable share of the benefits of the sea-bed.

The rapporteur said that degree of technological advancement had been thought to be a logical basis for designation to the executive organ of an operational organization of this kind. The difficulties mentioned by some delegates in relation to designations under Article 33 (1) (a) did exist, but might not

prove insurmountable in practice. The categories of special interest groups and number of representatives from each could be expanded if necessary.

The Delegate of Japan introduced his proposal pointing out that in regard to the composition of the executive organ, that proposal too took account of the existence of various competing interests and attempted to bring about a balance between them. He emphasized that special consideration had been given to the representation of developing countries, and that unlike certain other proposals before the Preparatory Committee, no system of veto or weighted voting had been incorporated.

With reference to the draft prepared by the rapporteur he said it was not realistic or necessary to accord the power of direct exploitation to the international machinery since it would involve a commercial risk as well as large expenditure and organization for equipment and technical staff, whereas the use of existing enterprises would involve neither such risk nor expenditure. Effective control of sea-bed exploitation by international machinery could be ensured without necessarily having recourse to direct exploitation by the machinery, either under a joint venture system or otherwise, if the machinery could be entrusted with the necessary powers for issuing exclusive licences, exercising regular supervision and revocation of licences or sub-licences. Collection of licence fees, rental fees and royalties must be strictly enforced by the machinery.

The machinery should be financed in principle out of the revenues derived from fees and royalties but, before becoming financially self-supporting, the gap should be borne by the member States. In this connection, six designated members of the Council which are the most industrialized States, might be requested to give sympathetic consideration to such financing. The proposal of the rapporteur regarding the composition of the Council was in some respects similar in approach to the Japanese proposal.

VI. Exclusive Economic Zone

The representative of Kenya presented a number of draft articles on the exclusive economic zone concept. He explained

that the concept of the exclusive economic zone had been generally discussed since the Colombo session of this Committee in the Sea-bed Committee and in a number of other forums, including, most recently, the African States Regional Seminar on the Law of the Sea held at Yaounde from June 20 to 30, 1972, which had agreed on significant recommendations. The present articles had been drafted bearing in mind the suggestions made in those meetings.

His point of departure had been the premise in Article I, that all States have a right to determine their jurisdiction over the sea adjacent to their coasts, taking into account such considerations as their own geographical, geological, biological, ecological, economic and national security factors. From that basic premise Article II went on to formulate a principle of vital concern to the developing countries viz. that they had a right to establish an economic zone beyond a distance of 12 miles from their coasts, over the natural resources of which they had sovereignty and wherein they would exercise exclusive jurisdiction for the control, prevention, regulation and exploitation of both living and non-living resources, for the primary benefit of their peoples and economies. Jurisdiction would also extend to the prevention and control of pollution.

The Delegate of Kenya said that the aim of Article II had originally been to protect the developing countries only. They alone needed protection, as the developed marine nations had the rest of the seas and oceans which they had the means to harvest. However, it had not proved feasible to restrict the right to establish a zone to developing countries only, and Article II now contemplated that all States would have that right.

Most of the delegates welcomed the Kenya initiative in preparing these draft articles which went a long way toward giving expression to the concept of the exclusive economic zone.

Some delegates suggested that the reference in Article I should be to all *coastal* States since land-locked countries could

not determine limits of jurisdiction over marine areas. Others felt, however, that the meaning was clear : "All States" could only be understood in the sense of all *coastal* States.

One delegate suggested that the reference to 12 miles in Article II should be deleted since many States had territorial limits beyond 12 miles, and Article VII in any event provided for the maximum limit of the economic zone.

A number of delegates felt that the draft articles should only cover the economic zone as such, and not other factors. In this connexion they were of the view that reference to "national security factors" in Article I was not appropriate. The Delegate of Kenya noted that every State would be concerned with security within the economic zone and suggested that nothing would be lost by mentioning "national security factors" in a non-exhaustive list of the factors. Other delegates suggested the deletion of the reference to "reasonable" as applied to "criteria" in Article I as being superfluous in view of the list of criteria already contained in that provision.

It was agreed that the philosophies of the Japanese paper on fisheries and the Kenya paper on the exclusive economic zone were essentially different and therefore difficult to reconcile. The former started from the assumption that the resources beyond 12 miles belonged to all and conceded limited preferential rights to the developing countries. The latter, however, took as a point of departure the premise that a developing coastal State had sovereignty over the resources beyond 12 miles. Noting this fundamental difference, one delegate suggested that Article II of the Kenya paper should, in addition to its present provisions, commence with a statement that coastal States had sovereignty over the resources adjacent to their territorial sea, and add a provision on the right of a coastal State to enforce its laws and prosecute and punish those who infringed its rights in the economic zone.

One delegate said that the draft correctly denied the right to establish an exclusive economic zone around islands under foreign domination. However, that prohibition ought to extend to all territories under colonial rule, and not merely to islands.

It was decided that the draft articles should be amended in the light of the discussion. The amended draft is contained in the Annex to this Report.

VII. Straits

On the question of straits it was observed by most of the delegates that the notion of "international straits" within territorial or archipelagic waters did not receive support. Consequently, the notion of "free transit" through and over straits used for international navigation falling within territorial archipelagic waters was not accepted. Passage through straits used for international navigation is governed by the right of innocent passage.

VIII. Land-locked States

The problems of the land-locked States were discussed in relation to one important area viz. the exclusive economic zone. It was decided that discussion of these and related questions should continue at the next meeting of the Committee.

IX. Other Subjects

The Sub-Committee was unable to discuss fully, for lack of time, the amendments that had been proposed to the List of Subjects and Issues relating to the Law of the Sea sponsored by 56 States (UN Doc. A/AC. 138/66), and problems relating to the territorial sea, including the question of its breadth. As to the latter, the Sub-Committee noted the chairman's suggestion that the discussion might proceed on the basis of an examination of the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone in order to determine in what areas it had proved inadequate.

ANNEX

REVISED DRAFT ARTICLES ON THE EXCLUSIVE ECONOMIC ZONE

(Submitted by Kenya as Member of AALCC)

Article-I

All States have a right to determine the limits of their jurisdiction over the seas adjacent to their coasts beyond a territorial sea of 12 miles in accordance with criteria which take into account their own geographical, geological, biological, ecological, economic and national security factors.

Article-II

In accordance with the foregoing article, all States have the right to establish an economic zone beyond the territorial sea for the primary benefit of their peoples and their respective economies, in which they shall exercise sovereign rights over natural resources for the purpose of exploration and exploitation. Within the zone they shall have exclusive jurisdiction for the purpose of control, regulation and exploitation of both living and non-living resources of the zone and their preservation, and for the purpose of prevention and control of pollution.

The coastal State shall exercise jurisdiction over its economic zone and third States or their nationals shall bear responsibility for damage resulting from their activities within the zone.

Article-III

The establishment of such a zone shall be without prejudice to the exercise of freedom of navigation, freedom of overflight and freedom to lay submarine cables and pipelines as recognised in international law.

Article-IV

The exercise of jurisdiction over the zone shall encompass all the economic resources of the area, living and non-living, either on the water surface or within the water column, or on the soil or sub-soil of the sea-bed and ocean floor below.

Article-V

Without prejudice to the general jurisdictional competence conferred upon the coastal State by Article II above, the state may establish special regulations within its economic zone for—

(a) Exclusive exploration and exploitation of non-renewable marine resources;

(b) Exclusive or preferential exploitation of renewable resources;

(c) Protection and conservation of renewable resources;

(d) Control, prevention and elimination of pollution of marine environment;

(e) Scientific research.

Any State may obtain permission from the coastal State to exploit the resources of the zone where permitted on such terms as may be laid down and in conformity with laws and regulations of the coastal State.

Article-VI

The coastal State shall permit the exploitation of the living resources within its economic zone to the neighbouring developing land-locked or near land–locked States and States with a small shelf provided the enterprises of those States desiring to exploit these resources are effectively controlled by their national capital and personnel.

To be effective the rights of land-locked or near-land-locked States small be complemented by the right of access to the sea and the right of transit. These rights shall be embodied in multilateral, regional or bilateral agreements.

Article-VII

The limits of the economic zone shall be fixed in nautical miles in accordance with criteria in each region, which take into consideration the resources of the region and rights and interests of developing land-locked, near-land locked, shelf-

locked States, and States with narrow shelves and without prejudice to limits adopted by any State within the region. The economic zone shall not in any case exceed 200 nautical miles, measured from the baselines for determining territorial sea.

Article-VIII

The delineation of the economic zone between adjacent and opposite States shall be carried out in accordance with international law. Dispute arising there from shall be settled in conformity with the Charter of the United Nations and any other relevant regional arrangements.

Article-IX

Neighbouring developing States shall mutually recognise their existing historic rights. They shall also give reciprocal preferential treatment to one another in the exploitation of the living resources of their respective economic zones.

Article-X

Each State shall ensure that any exploration or exploitation activity within its economic zone is carried out exclusively for peaceful purposes and in such a manner as not to interfere unduly with the legitimate interests of other States in the region or those of the international community.

Article-XI

No territory under foreign domination and control shall be entitled to establish an economic zone.

(iii) SUMMARY RECORD OF DISCUSSIONS HELD AT THE FOURTEENTH SESSION

The subject "Law of the Sea including questions relating to Peaceful Uses of the Sea-Bed and the Ocean Floor and the Subsoil thereof lying beyond the limits of National Jurisdiction" was taken up as a priority item at the fourteenth session of the Committee held in New Delhi from January 10 to 18, 1973. At the beginning of the session, the Working Group of the Committee on the Law of the Sea met on the 10th of January and it recommended that discussion at the present session be confined to the following four topics : (i) Fisheries. Exclusive Economic Zone; (ii) Rights and Interests of Land-locked States; (iii) International Machinery for the Sea-Bed; and (iv) Marine Pollution. Although the aforesaid recommendation was accepted by the Committee, deliberations during the plenary session were confined only to the topic of "Fisheries. Exclusive Economic Zone." However, in the meetings of the Sub-Committee, apart from this topic, the question of the Rights and Duties of Land-locked States was also discussed at some length.

Opening the discussion in the plenary meeting held on Thursday the 11th of January, 1973, the Observer for ARGENTINA stated that although his country had been a member of the so-called '200-mile club' and supported fully the unilateral declarations by coastal States of their maritime jurisdictions, it was nevertheless the view of his Government that determination of boundaries in the sea adjacent to the coast must be done according to reasonable principles reflecting in the main geographical and biological characteristics as well as the needs of a rational use of their resources and the requirements of international communications. In regard to the concept of the continental shelf, the observer expressed the view that future negotiations on the law of the sea must proceed from the legal conception of the continental shelf which, according to him, had already been accepted by the international community in order to fill

the gaps and develop new criteria which might satisfy the aspirations of all the coastal States. As regards delimitation of the international sea-bed area, the Observer suggested that this be established either on the basis of a pre-fixed distance such as 200-mile line or on the basis of a depth line. Touching upon the question of the rights and interests of land-locked States in regard to their access to the sea and the resources therein, the Observer pointed out that the policy of his country had been to facilitate, to the extent possible, the access to the sea of the land-locked countries, allowing the free transit of goods to and from the sea and the unrestricted use of her rivers and maritime harbours.

Discussion being resumed in the plenary meeting held on Friday the 12th of January, the Observer for MEXICO stated that the relatively new concept of exclusive or preferential fishing zone for coastal States in the high seas adjacent to their coast had taken shape and gained acceptability by a large number of States as a result of the philosophy of development and as a corollary of the greater recognition by the international community of the interests and needs of developing countries. Elaborating the concept of patrimonial sea, as recognised in the Santa Domingo Declaration of 1972, the Observer said that patrimonial sea was an economic jurisdictional area — not a sovereignty zone — and its purpose was purely economic and not political or strategic. He felt that the concept of patrimonial sea was similar to the concept of exclusive economic zone as contained in the Kenyan proposal. The legal rules applicable to the proposed zone would, in his view, set the maximum to which the coastal State could legally limit the freedom of others within that zone. The effect of those rules would be that all States would have an obligation to respect regional arrangements made or measures taken by individual States which fell within the maximum limits authorised by the proposed universal rule.

The Delegate of JAPAN said that his Government could not endorse the idea behind the exclusive economic zone concept as, in his Government's view, any attempt to solve the problem of fisheries by recognising exclusive economic rights of coastal States over the fishery resources in a zone of waters extending far beyond the limit of territorial sea, if not 200 miles but less

according to the need of each nation, would totally fail to take into account the legitimate interests of other States. Further, his Government considered that any solution which provided for a limited number of States having very extensive and long coast-lines, and a further limited number of States adjoining the rich fishing grounds of the world, an exclusive enjoyment of fishery resources at the expense of the legitimate interests of other States, would not be an equitable one. The Delegate felt that efforts and process of development of the fishing industries in the developing countries would be seriously jeopardised by an arbitrary partition of the seas and oceans into areas of national jurisdiction in pursuance of the establishment of exclusive economic zones. Besides, the concept of exclusive economic zone, in his view, would be contrary to sound conservation of the fishery resources because each coastal State would apply in an arbitrary manner the measures it deemed fit, without regard to international standards of conservation based on scientific data. The Delegate then explained in detail the salient features of the Japanese proposal submitted to the United Nations Sea-Bed Committee in August 1972, which, according to him, aimed at reconciling the interests of coastal States with those of distant water fishing States in the international law of high seas fisheries.

The Delegate of IRAN observed that the basic provisions of the international sea-bed regime should be based on the Declaration of Principles adopted by the U.N. General Assembly in December 1970, which could be translated into treaty language. He suggested that the activities of the proposed International Sea-Bed Authority should extend to only non-living resources of the sea, while the living resources might be subject of a separate arrangement. The proposed International Authority, he added, should have powers that would enable it to cope rationally and effectively with matters relating to exploration and exploitation of the international sea-bed area. The Authority, in his view, must be able to engage directly in the exploration and exploitation of the sea-bed and subsoil thereof and at the same time it must also have the competence to supervise and regulate scientific research and other activities in the international area, keeping in view the legitimate needs of developing States, including land-locked countries. The Delegate felt that

the international Sea-bed Authority might further be empowered to prevent adverse economic repercussions on land-based mineral production by controlling the production, processing and marketing of minerals derived from sea-bed exploitation. He was also of the view that the machinery might be empowered to engage in joint ventures in the transitional period before it could assume its full powers and duties. Dealing with the question of exclusive economic zone, the Delegate stated that the boundaries of such a zone should be determined by the coastal State taking into account the geological and biological characteristics of the sea adjacent to its coast as well as the economic necessities of its inhabitants. He advocated for the establishment of an institute with the avowed objective of undertaking research in marine technology, predicting hazards and providing intensive training courses so as to obviate the dangers of technological irresponsibility of the past. On the subject of marine pollution, the Delegate commended the resolutions adopted by the Stockholm Conference on Human Environment as a step in the right direction. He considered that inspite of the prevailing misconception about duplication of work in view of the Stockholm Conference and the recent London Conference on Ocean Dumping, the U.N. Sea-Bed Committee should go ahead with preparing draft articles on the preservation of marine environment and the prevention of pollution. He was of the view that while the Stockholm Conference dealt mostly with pollution on land, the London Conference dealt with marine pollution. The latter, however, in his view, suffered from two limitations, namely (i) it neither sought to prohibit dumping of certain materials including such poisonous substances like arsenic and lead nor (ii) dumping of pollutants in rivers which was a major source of marine pollution. He pleaded, finally, for close collaboration of the bodies established for the preservation of marine environment and prevention of marrine pollution.

The Delegate of SRI LANKA believed that acceptance of the concept of exclusive economic zone would pave the way to discussions on the application of certain international norms and practices by coastal States within that zone. The Delegate welcomed the Kenyan initiative and observed that the Draft Articles on the Exclusive Economic Zone submitted by the

Delegate of Kenya were extremely valuable and had materially enhanced the prospects for the success of the Conference on the Law of the Sea. On the question of fisheries, the Delegate was of the view that any proposals on that subject should contain adequate safeguards for any historic rights which a coastal State presently enjoyed in regard to fishing whether it was in relation to free moving or sedantary fisheries. Finally the Delegate invited the attention of the Committee to the problems that could arise in relation to decision making process in the procedure of the forthcoming Conference on the Law of the Sea.

The Delegate of GHANA recognised that any viable international legal order could not be established without reconciling the conflicting interests in the world community. In his view, the developing nations were not likely to accept any international system under which the content of the right of coastal States to exploit the resources of the seas adjacent to their territorial waters was determined by their economic development, capacity to exploit fishery and other resources. The Delegate basically endorsed the concept of the exclusive economic zone propounded by Kenya and suggested that as far as the limits were concerned, it should be possible to operate between a lower limit of 50 and an upper limit of 200 nautical miles measured from the coastline. He, however, stressed that the establishment of such a zone by a developing coastal State should not preclude the participation of a developed State in the exploitation of the resources in that zone. In his view, some of the responsibilities incidental to the exclusive economic zone concept would be to prevent pollution of waters in that zone. Commenting on the proposal of Japan on fisheries he stated that the regulatory measures taken by a coastal State should be supported by the international community.

The Observer for AUSTRALIA drew attention to the Working Paper on Fisheries jointly sponsored by Australia and New Zealand at the fourth session of the Sea-Bed Committee in July-August 1972. The said Working paper, according to him, represented a serious attempt on the part of the co-sponsors to reconcile the interests of coastal States and of distant water

fishing States. That could, in his view, be done only if these States reached an agreement which would result in the rational utilisation of each particular stock of fish, besides further ensuring the maximum possible production of food from the available resources. On the question of exclusive economic zone, the Observer said that the U.N. Sea-Bed Committee would be benifitted by the useful and constructive contribution of various regional conferences and seminars such as the recent ones held at Santa Domingo and Yaounde. As regards the topic of land-locked States, he made three observations : Firstly, the Convention which hopefully would emerge from the work of the Sea-Bed Committee and the Conference would inevitably involve compromises in order to accommodate as far as possible the interests of all States. Secondly, the position of land-locked States was taken due note of in the 1958 Conference of the Law of the Sea, as evidenced by Article 3 of the 1958 Convention on the High Seas. Thirdly, the Kenyan draft articles on the exclusive economic zone, which took into account the rights and interests of land-locked States might possibly contain the seed of a possible solution.

The Australian Observer felt that the proposed International Sea-Bed Authority should not, in the first instance, undertake operational activities connected with sea-bed exploitation until such time as it was able to command its own financial resources.

On the question of marine pollution, the Observer stated that Australia, with her extensive coastline, was deeply interested with the progressive development of rules which could effectively be applied to combat marine pollution. He was hopeful that the decisions taken at the Stockholm Conference and at the recent London Conference would pave the way to an effective action in the Sea-Bed Committee on this vital issue.

The Delegate of the REPUBLIC OF KOREA considered the question of fisheries as one of the most pivotal questions at the forthcoming U. N. Conference on the Law of the Sea. He said that his country, although belonging to the category of long distant fishing countries, had never pursued its own economic

interests in such a manner as to be incompatible with the interests of the international community in general and the interests of developing countries in particular. The Delegate was convinced that the Japanese proposals on fisheries provided a rational approach which, after some adaptation and elaboration, could accommodate the conflicting interests of various countries to the widest extent possible. As regards the concept of economic zone, the Delegate said that although in principle he agreed with the argument for a wider belt of economic zone, nevertheless he was not satisfied with the way the Kenyan draft articles were presented.

The Observer for BRAZIL said that in extending its territorial waters to the limit of two hundred miles, Brazil had in mind its national interests of economic, political and sociological nature. He, however, explained that this act of extension of jurisdiction should not be taken as a threat to the freedom of the seas, especially to the freedom of navigation, once this was guaranteed by the national legislations of countries which had adopted such a limit. As for fishing position of his country, the Observer pointed out that his country had established a zone of 100 miles within its territorial sea where fishing activities could be conducted by its national fishing vessels only. Beyond that zone, upto 200 miles, fishing activities might be conducted by both Brazilian and foreign fishing vessels.

The Observer for CANADA emphasised that the problems of the Law of the Sea constituted an indivisible whole, requiring an overall solution rather than a piecemeal and patchwork approach. On the question of pollution, the Observer recalled the contribution made by his Delegation in various international forums. As regards the rights and interests of land-locked States, he recognised that indeed there were certain very special problems and satisfactory solutions to those problems could be found by making multilateral efforts. As regards the concept of exclusive economic zone, the Canadian Observer welcomed the Declarations of Santa Domingo and Yaounde Seminar and the proposal submitted by the Kenyan Delegation on the exclusive economic zone. In his view, these historic documents put

forward in clear and helpful terms the concept of economic zone — patrimonial sea — which was increasingly gaining recognition as being rich in promise for the future development of the Law of the Sea. The Observer concluded that it was inappropriate and unwise to draw arbitrary and unnecessary distinction between developed and developing coastal States in such a manner as to damage the interests of one group without advancing the interests of the other.

Resuming the discussion in the meeting held on Friday the 12th of January, the Observer for the UNITED STATES OF AMERICA stated that it was almost universally recognised that the classic division of the seas into two jurisdictional categories, namely the territorial sea and the high seas, was too rough a legal division to solve the real problems of States. He thought that it was now becoming apparent that just as the territorial sea was too rough a tool to harmonise navigation and resource interests, economic jurisdiction that was completely coastal in its elements was also inadequate to the task of harmonising divergent interests with respect to resources. Accordingly, coastal State jurisdiction over fisheries and sea-bed resources should be tampered by international treaty standards and compulsory dispute settlement procedures. An international approach to regulating pollution from ships was considered necessary to protect free navigation and for practical reasons. He stated that the three inter-connected and fundamental issues relating to machinery envisaged for the international sea-bed regime were : first, the structure of international machinery; second, the nature of the exploitation system; and third, protection of consumers' interests. He was hopeful that deliberations in the Committee would make an important contribution to a timely and successful law of the sea conference.

The Observer for PERU stated that the limits of the territorial sea must be established by each State in accordance with reasonable criteria taking into consideration the geographic, geologic, ecologic, economic, social and national security factors. For that reason and in order to meet the realities and the needs of the various States, he added, it would be necessary to accept the plurality of limits of the territorial sea on regional or

sub-regional basis. The maximum limit of the sea, however, in his view, should not exceed two hundred nautical miles. The Observer explained that the States that had proclaimed their sovereignty over the 200-mile limit did not intend to restrict the transit of foreign ships and aircraft upto that limit, but only to ensure the proper utilisation of natural resources which they needed for their own development, to prevent damages from marine pollution and to supervise scientific research activities. The Observer stated that confinement of the sovereignty of coastal States to a narrow zone of territorial sea and the recognition of only preferential rights on areas adjacent to that sea, was a limitation on the possibilities of development for a majority of coastal countries in benefit of a minority of maritime powers whose financial and technological capacity allowed them to exploit advantageously the said areas, deepening in this way the gap between the rich and the poor countries. In his view, it was necessary to modify the classical attributes of the territorial sea, and he believed that this could be done on the occasion of the next international conference on the Law of the Sea.

The Delegate of the ARAB REPUBLIC OF EGYPT felt that the concept of freedom of fishing and its permissiveness might lead to conflicting claims and could be detrimental to the promotion of friendly relations among States. In his view, among the various approaches to the equitable solution of the problem of fishing were the recognition of two basic ideas relating to preferential or exclusive rights for the coastal State. He pointed out that there were certain basic differences between those two approaches on the one hand and those on the other which arose from the desire to maintain the present situation as much as possible, and only allowing minimum changes in the present regime of fisheries. Such proposals helped to create monopoly by developed States over certain living resources which were economically advantageous, like the so-called highly migratory fishery, and to control the growth of the fishing industries, particularly of those who had recently started national programmes for development. He agreed with the view that the rights of States should not be tied to their scientific and technological advancement. Such a course would only deepen, and not lessen, the gap between the rich and poor countries.

On the question of land-locked countries, the Delegate expressed his concern over the difference of opinion between the land-locked countries and the group of less developed countries as a whole.

The Delegate of SIERRA LEONE stressed that his Delegation considered the whole question of the Law of the Sea not only from an economic point of view but from a security point of view as well. The Delegate said that by a legislation adopted in 1971, the limits of Sierra Leone's territorial sea had been extended to two hundred nautical miles. He, however, categorically stated that the adoption of two hundred nautical miles of territorial sea need not alarm any one because his country had no intention to interfere with normal oceanic or maritime traffic.

The Delegate of the PHILIPPINES said that the exclusive economic zone concept submitted by Kenya was a laudable effort towards achieving a balance between the interests of the individual State and the international community. In his view, the Kenyan draft recognised the economic needs of the coastal States. He felt that the use of oceans as a means of communication and transport was well protected in that draft. As regards the proposal of Japan on fisheries, the Delegate said that it was a commendable effort at accommodation and merited serious consideration. He appreciated the special needs and problems arising from the relevant geographical circumstances of the land-locked States. He, however, felt that a country that was not land-locked but 'sea-locked' or as was the case of archipelagos sea-engulfed, the situation was not very different. He said that while such a country had easy access to the sea, it had also to put up with the hazards and travails that the sea might bring. The Delegate expressed his great concern over the pollution of the waters of the Pacific Ocean bordering the Philippines' archipelago. On the question of international sea-bed regime and machinery, the Delegate said that it must be effective and should function not by the mandate of some States only, but by all the States. Finally, the machinery should also in his view, have authority to exploit resources directly.

The observer for the U.S.S.R. touching upon the question of breadth of the territorial sea stated that his country had

proposed that each State should have the right to establish the breadth of its territorial sea within the limits of no more than twelve nautical miles. A limit exeeding twelve nautical miles, he said, would place international navigation under the control of coastal States and would interfere with international communications and foreign trade, including that of developing countries. Refering to the problems of fishing, he said that all States, particularly developing States, should be given a fair opportunity to exploit fishery resources in order to meet the needs of their peoples and, at the same time, provision should be made for the future development of fishing industry and the increase in the catch. The representative of U.S.S.R. explained in detail the provisions on freedom of navigation through straits used for international navigation, as submitted by his delegation to the U.N. Sea-bed Committee in 1971 and 1972. Finally, he stated that greater effort should be made in order to complete the preparatory work for the third international conference on the Law of the Sea.

The Delegate of INDONESIA said that as far as his country was concerned, its most vital interest was naturally the question of the recognition of the concept of archipelago. With regard to the question of fisheries, the Delegate thought that in order to protect its special interest, a coastal State was entitled to fix a zone where it would exercise exclusive fishing rights. The Delegate was happy to note that his suggestions on the exclusive economic zone concept were reflected in the principles of draft articles on exclusive economic zone presented by Kenya. The Delegate expressed his concern over the increase in traffic of tankers and supertankers through Indonesian waters or high seas adjacent to it, and thus exposing his country to pollution danger especially by oil coming from ships in case of accident, damage or other causes during their passage.

Resuming the discussion in the meeting held on Saturday the 13th of January, 1973, the Delegate of NEPAL stated that the condition of economic under-development of land-locked countries was directly related to their distance from the sea, and, by and large, the land-locked countries belonged to the category

of the least developed among the developing countries. In his view, all land locked countries sought transit and access only for trade and development purposes and none had far-flung interests outside their borders. He, therefore, stressed that the forthcoming Conference on the Law of the Sea should reaffirm the importance of transit and access, as well as the obligation of transit coastal countries to accord favourable treatment to the transit trade of land-locked countries in terms of the clearly defined rules and principles of international law. In his view, the new regime under the common heritage principle should fully take into account particularly the questions of representation, participation and sharing of benefits in conformity with the spirit of the United Nations Sea-Bed Declaration of 1970. He also stated that the interests of land-locked countries in fisheries in areas outside the territorial waters should be protected.

The Delegate of INDIA outlined the development plans of fishery resources along the coast of India. He felt that since the highly migratory fishery resources of the seas were now being over-fished, they might become depleted and even extinct, unless some global regulations were made and an effective regulatory body established. The Delegate considered that the developing countries of the world had a special stake in establishing a fair international legal order for the proper distribution and utilisation of the fishery resources of the sea and the oceans. In his view, the concept of exclusive fishery zone should be separated from the concept of territorial sea, which, according to him, served a different purpose altogether. The delegate then introduced a set of draft articles on fisheries which *inter alia* provided that a coastal State shall exercise exclusive jurisdiction and control over the resources of the exclusive fishery zone, the outler limit of which will be settled after negotiation. The exclusive fishery zone would, however, lie outside the territorial sea. If the breadth of this zone was narrow, the interests of the coastal State in the fishery resources of the area adjoining the exclusive fishery zone should also be protected.

The Observer for SPAIN said that though his country was one of the chief fishing powers, she shared the aspirations of the

coastal developing countries and was ready to lend them her support even against her own immediate interests, in order that, in accordance with a principle of international social justice, the preferential rights of the said country might be laid down which would be to the long term advantage of everybody concerned. The right to exploit, preserve and explore the natural resources of the high seas adjacent to their coasts, inherent in the littoral States, according to him, was fully justified when its exercise was practised in accordance with reasonable and equitable criteria and within the framework of a general solution on this subject, its essential purpose being to raise the standard of living of the sea-board populations. Seaboard States, he added, should, therefore, be entitled to establish special maritime jurisdictions with a view to preserving, regulating and using the live resources of the sea adjoining their coasts. And of course when adopting such measures, they would be bound to take into account - through the channel of negotiation - third-party States' interests, in reasonably participating in the fishing thus regulated.

At the end of the aforesaid general discussion, the matter was referred to the Sub-Committee on the Law of the Sea, which is composed of the entire membership, for study and submission of a report. The Sub-Committee held four meetings between 13th and 17th of January, 1973 and a report was drawn up on its work by the rapporteur which was considered by the Committee in the plenary session held on the 18th of January, 1973. The Committee decided that the Draft Articles presented by the Delegation of India on Fisheries together with the text of the questions posed by the Delegation of Japan be submitted to the member Governments with the request that the Governments may give their concrete comments and suggestions on the Draft Articles to the Secretary-General within one month from the close of the session, if possible.

(iv) REPORT OF THE RAPPORTEUR ON THE WORK OF SUB-COMMITTEE ON THE LAW OF THE SEA DURING THE FOURTEENTH SESSION

Chairman	Mr. J.D. Ogundere (Nigeria)
later :	Mr. A.A. Adediran (Nigeria)
Rapporteur	Dr. S.P. Jagota (India)

1. Organisation of work

The Working Group on the Law of the Sea, which met on 10th of January 1973, recommended that the discussions on the Law of the Sea, both in the plenary and in the Sub-Committee, be confined to the topics set out below, viz.

(1) Fisheries. Exclusive Economic Zone;
(2) Rights and Interests of Land-lockd States;
(3) International Machinery for the Sea-Bed; and
(4) Marine Pollution.

2. Dr. S.P. Jagota of India was elected rapporteur in the place of Mr. C.W. Pinto of Sri Lanka, who had resigned.

3. The subject was discussed in the four plenary meetings during the session at which eleven delegations and nine observers made statements.

4. The Sub-Committee on the Law of the Sea held four meetings on the 13th, 15th and 17th January 1973. The discussion held therein is summarised, subject-wise, below.

Fisheries

5. On this subject the Japanese proposal, which may be found on pages 341-351 of Volume III of the Brief of Documents prepared for the 1973 New Delhi session of the AALCC, was

referred to. Another proposal regarding the exclusive fisheries zone was made by the Indian Delegation in the plenary meeting on the 13th January 1973. A copy of this proposal is annexed to this report.

6. A number of delegates spoke on the Indian proposal. Clarifications were sought by the Delegation of Japan which were later circulated among the members of the Sub-Committee and are annexed to this report.

7. The concept of exclusive fishery zone found general support in the Committee. The Delegation of Japan reserved their position. According to them, the fishery resources beyond the 12-mile territorial sea are to be considered as the object of the common interest of the international community, which must be utilised by the coordination of all the States concerned, keeping a balance between the interests of the coastal States and those of the distant water fishing States. It is on this conception that the Japanese proposal for a regime of fisheries on the high seas (UN Doc. A/AC. 138/SC. II/C. 12) was prepared. The concept of the exclusive fishery zone suggested by the Indian Delegation is difficult to accept for the Japanese Delegation insofar as the coastal State is to claim the exclusive interests on fisheries within the zone in such a way that, in some cases, it may only allow foreign fishing vessels to come to fish. The word "may" in Article 4 is based on the concept of exclusiveness. In addition, this concept of exclusive fishery zone would be contrary to proper conservation of the fishery resources because, under this concept, each coastal State may apply in an arbitrary manner the measures it deems fit.

In the Indian draft, regulations to be made for the fisheries outside the limits of the exclusive fishery zone are not clearly defined and the clause concerning the settlement of disputes is far from clear.

The Japanese Delegation, which put some questions for clarification purposes, reserved the right to comment on these problems after the ideas behind these suggestions have been clarified.

8. One other delegate (Republic of Korea) said that he neither supported nor opposed the Indian proposal, and that he would present his government's views on this subject at a later stage.

9. Comments were also made by a number of other delegations. The Delegate of Sri Lanka, while supporting the concept of exclusive fishery zone, emphasised that the historic rights of coastal States in such zone must be protected. The Delegate of Egypt wanted the information about the fishing capability of a coastal State to be notified to a designated authority. The Delegate of Indonesia wanted that the outer limit of the exclusive fishery zone need not be uniform and that in fixing it the special economic and social interests of the coastal State should be borne in mind. Some other questions were also raised. The Delegate of India agreed to bear these in mind and answer them in his future presentation on the subject.

10. The Indian Delegate suggested that the draft articles may be examined by the various member governments, and concrete comments and suggestions for improvement of the draft may be sent by them to the Secretary-General, if possible, within one month after the close of the session. These might then be passed on to the Government of India so that these could be given the most earnest consideration by them before the beginning of the next session of the U.N. Sea-Bed Committee in March 1973.

11. This view was supported by the delegates.

Exclusive Economic Zone

12. The concept of exclusive economic zone found general support in the Sub-Committee. Statements were made by the Delegates of India, Sri Lanka and Kenya clarifying that this concept protected the economic interests of the coastal State in the zone adjoining its coast, including their interests in the resources of the sea-bed, the sub-soil, and of the water column. The concept of exclusive fishery zone, it was stated, was subsidiary to the exclusive economic zone. The two concepts should, therefore, be regarded as complementary rather than contradictory.

13. Reservation was made by one delegate to this concept.

Land-locked States

14. The Chairman of the Special Study Group of Land-locked States, Ambassador Tabibi of Afghanistan, introduced his working paper in the Sub-Committee on the 17th January 1973, and emphasised that the special interests of the land-locked States, which required international recognition and protection, related to the following :

(1) Free access to the sea (in both directions); and

(2) Adequate sharing of the resources of the sea including the sea-bed.

15. He traced the history of the evolution of the first concept and indicated how it had gradually been recognized at the 1958 Conference on the Law of the Sea, the Convention on Transit Trade of Land-locked States in 1965, and in subsequent developments. The access to the sea should include the access to the resources of the sea, including those of the continental shelf, the fishery zone, and the high seas. He said that the land-locked States had a special interest in the resources of the sea and the sea-bed, which had been declared by the U. N. General Assembly in 1970 as the "common heritage of mankind". Accordingly, the interest of the land-locked States must be protected in the regime to be established for the sea and the sea-bed as well as in the distribution of benefits arising from the exploitation of these resources. In his view, these interests would be better protected if the zone of exclusive coastal jurisdiction was a restricted one.

16. A short discussion followed this presentation. Views were expressed that the right of land-locked States should be subject to reciprocity and that since most of the land-locked States were developing countries their interest lay in aligning their views with the viewpoint of the developing countries in the Group of 77, particularly in relation to the limits of exclusive coastal jurisdiction. It was suggested that the land-locked States should consider supporting the coastal interests and secure

protection of their reasonable interests in the zones reserved for them, apart from getting an adequate share of the benefits from the resources of the sea and the sea-bed. This view was opposed by another delegate who suggested that the resources of the sea and the sea-bed, being the common heritage of mankind, included the interests of the land-locked States, and therefore these should not be reserved exclusively for the coastal States.

17. It was agreed that the Special Study Group on the Land-locked States should hold its meetings urgently and consider the various issues involved and, if possible, submit its report on progress achieved to the next session of the Sub-Committee and, if possible, give its concrete formulations on the subject.

International Machinery

18. Statements were made on this subject by the Delegates of India and Sri Lanka. It was recalled that the subject of international machinery and the draft articles prepared on the subject by Mr. Pinto of Ceylon, were introduced and elaborately discussed at the AALCC session held in January 1972 at Lagos. It was further stated that since the UN Sea-Bed Committee had only recently started substantive discussion on this subject, we need not discuss in depth the various issues involved in this question. Depending upon the progress achieved in March 1973 on this subject, a further discussion on this question could be taken up by the Sub-Committee at the inter-sessional meeting, if one was held. However, the chief features of the proposal of Sri Lanka were again elaboratated by the delegations.

Marine Pollution

19. For lack of time the subject of marine pollution could not be considered in depth. Request was, however, also made by the Delegate of Egypt for the preparation of comprehensive material on the subject by the Secretariat, particularly on the question of liability arising from pollution damage.

Sd/-
(S.P. Jagota)
Rapporteur
18.1.1973

ANNEX-I

DRAFT ARTICLES ON FISHERIES
(as proposed by INDIA on 13.1.1973)

Article—1

A coastal State shall exercise exclusive fisheries jurisdiction and control in a fisheries belt, the outer limits of which are..... nautical miles measured from the outer limits of territorial waters. The area covered by such belt is hereinafter described as "the exclusive fisheries zone".

Article—2

Each coastal State shall notify to the Authority established for the purpose by the Conference on the Law of the Sea the limits of the exclusive fisheries zone defined by coordinates of latitude and longitude and marked on large scale charts officially recognised by that State within a period of.....

Article—3

Where the coasts of two or more States are opposite or adjacent to each other and the limits of the exclusive fisheries zone overlap, such States shall, by agreement, precisely delimit the boundary separating their respective zones and inform the Authority of such agreement. In the absence of an agreement, and unless another boundary line is specified by special circumstances, the boundary shall be the median line, every point of which is equidistant from the nearest point on the baseline from which the outer limits of the respective exclusive fisheries zones are measured. If the parties agree, the Authority shall assist them in concluding a satisfactory agreement with regard to the limits of their respective zones.

Article—4

The coastal State shall have exclusive rights of exploration and exploitation of the living resources of the exclusive fisheries zone. It alone shall adopt measures for the conservation and development of these resources. It shall determine the optimum sustainable yield from these resources. If such yield is not

exploited by the coastal State itself, whether due to its lack of technological capability or otherwise, it may allow nationals of other States to fish in the zone, subject to such regulations as may, *inter alia*, relate to the following :—

(a) licensing of fishing vessels and equipment;

(b) limiting the number of vessels and the number of units of gear that may be used;

(c) specifying the gear permitted to be used;

(d) fixing the periods during which the prescribed species of fish may be caught;

(e) fixing the size of fish that may be caught;

(f) fixing the quota of catch, whether in relation to particular species of fish or to catch per vessel over a period of time or to the total catch of nationals of one State during a prescribed period.

2. The regulations prescribed by the coastal State shall not discriminate between the nationals and vessels of one foreign State and another.

3. The privileges allowed for the nationals of a land-locked State to fish in the exclusive fisheries zone shall be determined by a bilateral agreement concluded between the coastal State and the land-locked State or shall be such as are determined regionally or by the convention adopted at the Conference on the Law of the Sea in 1973-74.

Article—5

A coastal State has a special interest in the maintenance of the productivity of the living resources of the area of the sea adjacent to the exclusive fishery zone.

Article—6

For the living resources of the sea outside the limits of the exclusive fishery zone, regulations may be made for their exploration, conservation, development and exploitation by the States of the region concerned, if the fish stock is of limited migratory habits The States of the region may establish these regulations

either by entering into an agreement or convention or by requesting the international fishery commission of the area to formulate these regulations for the region, subject to ratification by them.

Article—7

In respect of fisheries of highly migratory habits outside the limits of the exclusive fisheries zone, regulation for conservation and development as well as exploration and exploitation shall be made by the Authority established by the Convention adopted at the Law of the Sea Conference in 1973/1974.

Article—8

All fishing activities in the exclusive fisheries zone and the rest of the sea shall be conducted with reasonable regard to the interests of other States in the uses of the sea. In the exercise of their rights, the other States shall not interfere with fishing activities in the exclusive fishery zone.

Article—9

The jurisdiction and control over all fishing activities in the exclusive fisheries zone shall lie with the coastal State concerned. Any dispute or difference concerning the limits of the respective zones, the application or validity of the regulations, or the interpretation or application of these articles shall be settled by the judicial institutions of the coastal State concerned.

2. Appeal from the decision of the judicial institution on the question of the interpretation or application of these articles may lie to a forum agreed upon between the coastal State and the other State concerned.

3. Any disputes concerning the fishing activities outside the protected fisheries zone, whether arising out of the regulations or concerning the interpretation or application of these articles, shall be referred to the Authority established by the Convention adopted at the Law of the Sea Conference in 1973/1974 for its decision. The decision of the Authority shall be binding on the parties to the dispute, and will be implemented by them forthwith.

Article—10

(Final clauses, if necessary).

ANNEX-II

THE QUESTIONS PUT TO THE INDIAN DELEGATION FOR THE CLARIFICATION PURPOSES

by *Prof. S. Oda of JAPAN*

1. There is no reference to the high seas in the Indian draft. Is it intended in this draft that the areas beyond the territorial sea, including the exclusive fishery zone, still be considered as a part of the high seas ?

2. If the extent of the exclusive fishery zone is to be uniformly fixed, what will be the merit of notifying to the Authority the limits defined by coordinates of latitude and longitude in each case ? Is it the intention of the author to apply the same procedures also in case of the territorial sea and the continental shelf ?

3. It is understood that, under the Indian draft, the coastal State is entitled to prescribe fisheries regulation, apply it to foreign fishing vessels in the exclusive fishery zone, and, in case of violation, to seize the foreign fishing vessels, take them to its own port, punish their captain/master and confiscate the vessels at its own court under its own procedure. If this is the case, the exclusive fishery zone would not be different from the territorial sea, as far as fisheries regulations are concerned. The question may be raised, as to why, in the Indian draft, a provision is specifically prepared to the effect that the coastal State **may** (not **shall**) allow foreign nationals to fish in the zone in some specific cases. It is submitted that even within the limit of the territorial sea, the coastal State **may** always allow foreign nationals to fish therein according to its own discretion.

4. If the coastal States only **may** (but not **shall**) allow foreign nationals to fish in the exclusive fishery zone, why have the regulations to be applicable to foreign nationals, such as enumerated in Article 4, paragraph 1 to be specified ?

5. It is provided in the Indian draft that the coastal State **may** allow foreign fishing vessels to come to fish in its exclusive fishery zone on the **non-discriminatory basis** among the foreign States, if the optimum sustainable yield is not fully exploited by the coastal State. If the coastal State introduces foreign capital of any specific countries to set up joint ventures for fishing industries, is this interpreted as contradictory to the said rule of non-discrimination ?

6. The rule of non-discrimination among foreign States under Article 4, paragraph 2, is specifically applicable in the exclusive economic zone, but not in the territorial sea. However, in case that the regulations are prescribed in terms of limiting the number of fishing vessels, fixing the quota of catch, etc. how can this rule work in effect ?

7. In connection with limited migratory habits beyond the exclusive fishery zone (Article 6), is it the intention of the author to exclude non-regional States from fishing in that region ? It may also be asked how the regulations made by the States of the region concerned are to be enforced upon the fishing vessels of the respective States of the region and of the non-regional States.

8. With regard to highly migratory habits (Article 7), how are the regulations made by the International Authority to be enforced upon fishing vessels ?

9. The idea behind Article 9 does not seem to be quite clear. What does paragraph 1 mean ? If the concept of the exclusive fishery zone is to be accepted under the new rule of international law, there would be no doubt that the full jurisdiction be exercised by the coastal State, and then paragraph 1 would not make any sense.

10. Article 9, para. 2 is so much different from the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes of 1958. It will be appreciated that the idea behind the paragraph be fully explained. For instance, does "appeal

from the discussion of the judicial institution" mean an appeal by any foreign individual prosecuted on the ground of the violation of the fisheries regulation of the coastal State, or an appeal by a foreign State whose nationals are punished at the judicial court of the coastal State ?

These Questions are only for Clarification Purposes and should not be interpreted either in Favour of or Against the Indian Draft.

V. THE LAW RELATING TO INTERNATIONAL RIVERS

(i) INTRODUCTORY NOTE

The subject "Law of International Rivers" had been referred to this Committee for consideration under Article 3 (b) of its Statutes by the Governments of Iraq and Pakistan. Although the subject is fairly vast it became clear from the preliminary statements made by the delegations of the referring governments at the ninth session of the Committee, held in New Delhi in December 1967, that the topics which they wished the Committee to consider related to some particular aspects of the problem. Iraq appeared to be primarily interested in two questions, namely, (a) definition of the term "international rivers", and (b) rules relating to utilisation of waters of international rivers by the States concerned for agricultural. industrial and other purposes apart from navigation. Pakistan's primary concern also appeared to be with regard to the uses of waters of international rivers, and more particularly, the rights of lower riparians.

It has been well-recognised that protection of the legitimate rights of the States concerned in the waters of international rivers is a matter to be regulated by rules which would be acceptable to the international community as a whole. As has been pointed out by several jurists and writers, there are certain rules on the subject which are already in existence derived from international custom, practices among nations, opinions of jurists, decisions of courts and provisions of treaties and conventions. In recent years, a great deal of work in the field has been done by various learned institutions and bodies such as the Institute of International Law, the International Law Association, the Inter-American Bar Association, New York University School of Law and the Economic Commission for Europe. The most notable and comprehensive study prepared so far in this field may be found in the formulations adopted by the International Law Association at its 1966 Conference which are known as the Helsinki Rules. The General Assembly of the United Nations by a decision taken at its twenty-fourth session

had requested the International Law Commission to formulate the draft rules on this subject after taking into account the work done by other bodies, and the same is now pending consideration of the Commission.

This Committee at its ninth session after a preliminary exchange of views on the subject directed the Secretariat to collect the relevant background material on the issues indicated in the statements made by the delegations and to prepare a Brief for consideration of the Committee. One of the main issues that arose in the course of discussions at that session was how far the rules developed and practised by European nations would be applicable to the problems which arise in the Asian-African region having regard to the different geophysical characteristics of the rivers and the needs of the people for varying uses of the waters. Some of the delegates stressed on the urgent need for the development of the law in a manner that would reflect the Asian-African viewpoint. Opinions were also expressed that the draft principles adopted by the International Law Association and the Institute of International Law did not meet the situation faced in certain Asian and African countries.

The Committee at its tenth session held in Karachi in January 1969 took up the subject for further consideration on the basis of the material placed before it by the Secretariat with a view to formulate its recommendations on the subject in the form of draft principles. The Committee took note of the views and opinions expressed from time to time by jurists and experts on various questions, the decisions of the Permanent Court of International Justice, federal courts and arbitral tribunals as well as the work already done by learned institutions and bodies. The Committee also had before it the relevant provisions of treaties and conventions with regard to international rivers in Asia, Africa, Europe and the Americas. The Committee at that session by resolution No. X (6) appointed a Sub-Committee to give detailed consideration to the subject and to prepare a draft of articles on the Law of International Rivers, particularly in the light of the experiences of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilisations and legal systems for consideration at the

Committee's next session. The Committee also directed its Secretariat to assist the Sub-Committee and to collect relevant background data in the light of the discussions at the Committee's tenth session. It also requested the member governments to indicate points on which they desired further data to be collected by the Secretariat.

The Sub-Committee appointed at the Karachi session met in New Delhi in December 1969 to consider the matter in the light of the suggestions made by the member States of the Committee and further material collected by the Secretariat in pursuance of the aforesaid resolution No. X (6). The matters taken note of by the Sub-Committee included the question of formulation of the definition of an international river ; the general principles of municipal waters rights existing between owners of adjacent land under different municipal systems ; the decisions of courts and arbitral tribunals on disputes relating to water rights between independent States and constituent States of the federation, general principles governing the responsibility of States and the doctrine of abuse of rights ; river pollution ; rights of riparians regarding the uses of waters of international river basins ; and State practice regarding settlement of river water disputes. At this meeting the Delegate of Pakistan placed a set of ten draft articles for consideration of the Sub-Committee and the Delegate of Iraq also placed before the Sub-Committee a set of draft principles consisting of 21 articles. The Delegates of Iraq and Pakistan desired that the Sub-Committee should proceed to discuss the subject on the basis of the draft formulations presented by them, whilst the Delegate of India desired that the Sub-Committee should take the Helsinki Rules as the basis for discussion. As the discussions in the Sub-Committee were not conclusive, it was agreed that the matter should be further discussed at the next session of the Committee.

At the Accra session held in January 1970, the Delegates of Iraq and Pakistan submitted a joint draft consisting of 10 articles which they wished the Committee to take up as the basis for discussion. The Delegate of India also submitted a proposal that the Helsinki Rules adopted by the International Law Association in 1966 should be the basis of the Committee's

study and, to begin with, the first 8 articles of the Helsinki Rules should be taken up. No progress could be made at the Accra session on this subject as the discussions centred around procedural matters and there was not sufficient time to discuss the substantive issues.

At the Colombo session of the Committee held in January 1971, following the discussions in the plenary, it was decided to appoint a Sub-Committee comprising of the representatives of Ceylon (now Sri Lanka), Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Nigeria, Pakistan and the U. A. R. (now Arab Republic of Egypt) to give detailed consideration to the subject. The representative of Ceylon (Sri Lanka) and the representative of Japan were elected as the chairman and the rapporteur to prepare a working paper consisting of a set of draft articles amalgamating, as far as possible, the propositions contained in the joint proposal of Pakistan and Iraq and in the Helsinki Rules. The rapporteur submitted his working paper containing ten (I to X) draft propositions, which were accepted by the Sub-Committee as the basis of discussion. However, due to lack of time, the Sub-Committee was able to consider only the draft propositions I to V and it recommended consideration of the rest of the propositions at an inter-sessional meeting to be convoked prior to the thirteenth session of the Committee. The Sub-Committee accordingly met again in Colombo from 6 to 10 September 1971 when it considered the draft propositions I to X.

At the thirteenth session of the Committee held in Lagos, the subject was taken up for further consideration by the Standing Sub-Committee as reconstituted at that session. During the meetings of the Sub-Committee it was observed that the draft proposals prepared by the rapporteur did not cover all aspects of the Law of International Rivers and that they were silent in particular on the rules relating to navigational uses of such rivers. The Sub-Committee accordingly agreed to take up other aspects of this subject including navigation, pollution, timber floating etc. in its future sessions. The Sub-Committee also agreed that the Committee should direct the Secretariat to prepare a study on the subject of the right of land-locked

countries to access to the sea through international rivers. It was further agreed that the new draft proposals with appropriate commentaries thereon should be prepared by the rapporteur of the Sub-Committee and circulated through the Secretariat to members of the Sub-Committee before the next session.

During the fourteenth session of the Committee held in New Delhi in January 1973, the matter was again considered by the Standing Sub-Committee. Although the Sub-Committee exhausted its consideration of the revised draft formulations and commentaries prepared by the rapporteur, it was unable to agree on a set of propositions on the Law of International Rivers. It was, however, able to analyse the problems critically and extensively and thereby could identify several areas which it recommended for further study by the Committee at an appropriate time in the future. The subject will accordingly be taken up by the Committee at one of its future sessions.

(ii) REPORT OF THE STANDING SUB-COMMITTEE ON THE LAW OF INTERNATIONAL RIVERS
Presented at the Fourteenth Session

PART-I

General

The Standing Sub-Committee on the Law of International Rivers, which was constituted at the thirteenth session held in Lagos in January 1972, met at the present fourteenth session in New Delhi with the following delegates of the member countries of the Sub-Committee :

Egypt	represented by	Mr. Mohamed M. Hassan
Ghana	represented by	Mr. G. Nikoi
India	represented by	Mr. S. N. Gupta Mr. V. N. Nagaraja Mr. S. C. Jain
Iran	represented by	Mr M. A. Kardan
Iraq	represented by	Mr. Sabah Al-Rawi
Japan	represented by	Mr. E. Furukawa
Nigeria	represented by	Hon. Mr. A. A. Adediran Mr. J. D. Ogundere
Nepal	represented by	Hon. C. R. S. Malla and Mr. K. N. Upadhya

The Secretariat was represented by Mr. K. Ichihashi, Deputy Secretary-General, and Dr. Aziza Fahmi.

The Standing Sub-Committee held six meetings with Mr. Furukawa of Japan as chairman and Mr. Mohamed Hassan of Egypt as rapporteur.

At the beginning of its work, the Sub-Committee agreed that the draft propositions prepared by the special rapporteur, Prof. Shihata, should be the basis of the discussions and agreed

to hear the comments by Dr. Aziza Fahmi on the draft propositions.

2. The rapporteur introduced the draft propositions prepared by Prof. Shihata, and Dr. Aziza Fahmi submitted a document entitled "Commentary on the Draft Propositions" which has been distributed among the members of the Sub-Committee.

PART II

Background of the Subject and Recommendations

The subject, "Law of International Rivers" had been referred to this Committee for consideration under Article 3 (b) of its Statutes by the Governments of Iraq and Pakistan. The sponsors of the subject appeared to be primarily interested in two questions, namely (a) definition of the term "international rivers" and (b) rules relating to utilisation of waters of international rivers by the States concerned for agricultural, industrial and other purposes apart from navigation, particularly in connection with the rights of lower riparians.

The centre of the problem, therefore, was how far the rules developed and practised by European nations which were compiled in the Helsinki Rules 1966, the most outstanding achievement on this subject in recent decades, would be applicable to the problems which arise in the Asian-African region having regard to the different geophysical characteristics of the rivers and the needs of the people for varying uses of the waters.

The Committee had first considered this subject at the ninth session held in New Delhi in December 1967, and then subsequently at the tenth session in Karachi in January 1969, at the eleventh session in Accra in January 1970, at the twelfth session in Colombo in January 1971, and at the thirteenth session in Lagos in January 1972.

It was decided at the Colombo session to request the then rapporteur to formulate a set of draft propositions amalgamating the two draft proposals submitted by Iraq and Pakistan, on one hand, and by India, on the other. The draft propositions thus

prepared were carefully and extensively considered at the Sub-Committee meetings at Colombo at the regular session in January 1971 and at the inter-sessional meeting in September in the same year. At Lagos session, after further examination of the formulation of the first rapporteur, it was decided to request the new rapporteur to prepare a revised set of propositions with suitable commentary.

At the meetings of the present session, the Sub-Committee considered the new formulation prepared by Professor Shihata of Arab Republic of Egypt and completed consideration of all the 10 propositions of the said formulation.

In all four sessions stated above, the Sub-Committee had the opportunity of hearing the various views from member governments on certain problems relating to the equitable utilization of waters of an international river which had particular importance to the Asian and African countries.

Since the problems were so complex and involved a wide range of significance, the Sub-Committee was still unable to reach an agreement on a set of propositions on this subject. However, the Sub-Committee had been able to analyse the problems critically and extensively and thereby could identify several areas which may deserve a further study by the Committee at some opportune time in future. It may be specifically mentioned here that while it is regretted that Pakistan is not represented at the present session, major points raised by the Pakistan Delegation at the earlier sessions are more or less incorporated in the Part III of the present report.

The Sub-Committee wish. therefore, to report to the plenary meeting that it has almost exhausted its discussions on the subject referred by the two sponsoring countries, viz. Iraq and Pakistan.

Finally, the Sub-Committee recommends to the plenary session to consider the present report of the Sub-Committee at an opportune time in a future session.

PART-III

Summary of Discussions

PROPOSITION-I

Text of the rapporteur's formulation

"The general rules set forth in these propositions are applicable to the use of waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among the basin States."

Summary of Discussions

1. One delegate stated that there were certain difficulties, e. g. delimitation of water-shed limits in open lands would have to be taken into consideration.

It was also pointed out by some delegates whether to accept the international drainage basin concept in toto or try to adapt the concept to the factors which characterise rivers in Africa and Asia.

According to another delegate these difficulties were of technical rather than of legal nature and therefore the international basin approach was adequate to meet various situations.

2. A proposal was submitted by one delegate to substitute "binding custom" by "established custom" and no agreement was reached.

PROPOSITION-II

Text of the rapporteur's formulation

"1. An international drainage basin is geographic area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

2. A "basin State" is a State the territory of which includes a portion of an international drainage basin."

Summary of Discussions

1. According to one delegate, the knowledge in most Asian and African countries in regard to underground waters was not sufficient and, therefore, be left out of consideration. According to another delegate, underground water was an essential part of the water resources system of drainage basin and in the context of the overall development of these resources, it cannot be left out of consideration without detriment to development.

2. One delegate proposed the adoption of the traditional definition of "international river" as proposed in the Iraq-Pakistan draft to overcome certain difficulties as pointed out by Dr. Aziza Fahmi and some other delegates were of the opinion that the problems involved should be studied carefully before deciding on the final approach to be adopted. Another delegate stressed the validity of the drainage basin approach and saw no advantage in detracting from it. Hence he did not consider it necessary to define "an international river."

PROPOSITION-III

Text of the rapporteur's formulation

"1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case.

3. Relevant factors which are to be considered include in particular :

(a) the economic and social need of each basin State and the comparative costs of alternative means of satisfying such needs.

(b) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State.

(c) the past and existing utilization of the waters.

(d) the population dependent on the waters of the basin in each basin State.

(e) the availability of other water resources.

(f) the avoidance of unnecessary waste in the utilization of waters of the basin.

(g) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses.

(h) the geography of the basin.

(i) the hydrology of the basin.

(j) climate affecting the basin."

Summary of Discussions

1. The following amendment proposed by one delegate entailed an extensive discussion. That is to say, it was proposed to add to paragraph 1. a phrase "giving priority to land within the watershed limit."

2. It was also proposed by another delegate to add after "basin State" of paragraph 3 (a) "with due regard to the development interest of the less developed basin State."

3. The proposal made by the same delegate to add to sub-paragraph 3 (j) "and in particular the rate of rainfall and wells in the basin" was unanimously accepted.

4. Another delegate proposed to substitute "other water resources" in sub-paragraph 3 (e) by "other alternative resources" because certain benefits derivable from water, e. g. communication, power etc. could be derived by utilization of other resources, e. g. oil, gas, etc.

5. Still another delegate suggested that the sub-paragraph 3 (e) of the rapporteur's draft may be read as follows:

"(e) The availability of other water resources within that portion of the international drainage basin that lies in each co-basin State."

6. It was proposed by one delegate to renumerate the factors considered in paragraph 3 as follows :

Sub-paragraph (c) becomes (a),
Sub-paragraph (a) becomes (b), and
Sub-paragraph (b) becomes (c).

PROPOSITION-IV

Text of the rapporteur's formulation

"1. Every basin State shall act in good faith in the exercise of its rights on the waters of an international drainage basin in accordance with the principles governing good neighbourly relations.

2. A basin State may not therefore undertake works or utilisation of the waters of an international drainage basin which would cause substantial damage to another basin State unless such works or utilisations are approved by the States likely to be adversely affected by them or are otherwise authorised by a decision of a competent international court or arbitral commission."

Summary of Discussions

1. One delegate stated that paragraph 2 of the proposition is not acceptable to its delegation and that he proposed to replace the same by the following amendment :

"Consistent with the principles of sovereign equality of all States, every basin State should have due regard to the rights of co-basin States in the excercise of its right to use the waters of an international drainage basin."

2. Another delegate objected to the said proposition. and suggested that the word "shall" in paragraph 1 should be replaced by the word "must" so that it gives the firm confirmation of an obligation. He supported the suggestion made by Dr. Aziza Fahmi that Proposition IV should just state the rules and the procedure to be followed in the settlement of disputes should be subject to special propositions.

No agreement was reached on this question.

PROPOSITION-V

Text of the rapporteur's formulation

"In determining preferences among competing uses of different co-basin States of the waters of an international drainage basin, special weight should be given to uses which are the basis of life, such as the consumptive uses."

Summary of Discussions

1. One delegate objected to the wording of Proposition V in its present form and suggested a proposal along the lines of Article VI of Helsinki Rules giving no preference to competing uses.

2. One delegate suggested the deletion of the phrase "the consumptive uses" at the end of the proposition to avoid the ambiguity in the interpretation of the uses which the phrase might imply. Another delegate agreed to the deletion and proposed adding "are essential to sustain life" after the word "which."

3. No agreement was reached on this proposition.

PROPOSITION-VI

Text of the rapporteur's formulation

"A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters."

Summary of Discussions

1. One delegate proposed to substitute the word "present" in the first sentence by the word "existing."

2. Another delegate proposed to adopt the suggestion made in the report of Dr. Aziza Fahmi, that is to say, to add the words "and equitable" after the word "reasonable."

3. Still another delegate supported the rapporteur's formulation.

PROPOSITION-VII

Text of the rapporteur's formulation

"1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing *but more important* incompatible use.

2. (a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation.

(b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandoned.

3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use."

Summary of Discussions

1. One delegate proposed to the following phrase at the beginning of paragraph 1 of the present proposition, namely, "with the exception of existing uses in arid lands" and to add paragraph 1 (b) dealing with compensation as follows :

> "The decision to terminate one use in order to accommodate another use in accordance with the preceding paragraph shall be coupled with the compensation to be paid for losses incurred for terminating the use."

2. Another delegate supported the rapporteur's formulation.

3. No agreement was reached on this proposition.

4. Another delegate suggested an amendment to paragraph 2 (a) and (b) in view of the ambiguous and undefined terms used in both paragraphs. An amendment was proposed to substitute paragraph 2 (a) and (b) by "A use shall be deemed to be an existing use when it is in fact in operation."

There was no agreement on this question.

(Note : Before starting the discussions on the Propositions VII to X, a discussion took place regarding whether the Sub-Committee could proceed in its deliberations with only four members out of ten, and whether a quorum was necessary according to the rules of procedure. It was decided to proceed with the work as the rules of procedure were silent on the quorum question and in view of the precedent at the inter-sessional meetings in Colombo in September 1971).

PROPOSITION-VIII

Text of the rapporteur's formulation

"1. Consistent with the principle of equitable utilization of the waters of an international drainage basin a State must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial damage in the territory of a co-basin State, regardless of whether or not such pollution originates within the territory of the State.

2. Water pollution, as used in this Proposition, refers to any detrimental change resulting from human conduct in the natural composition, content or quality of the waters of an international drainage basin."

Summary of Discussions

1. It was pointed out in the report of Dr. Aziza Fahmi that Proposition VIII, paragraph 1 was drafted in an improper manner because a State cannot be responsible for pollution outside its country where it has no control. It was thus suggested by a delegate to add the following at the end of this paragraph, viz. "if it is caused by the State conduct." After some discussion, it was agreed to adopt that suggestion after substituting "if" by "provided that."

2. One delegate proposed to change the order of the paragraphs, namely, to exchange the places of paragraph 1, and paragraph 2. However, another delegate objected to the change of paragraphs. No agreement was reached on the proposal.

3. Another delegate suggested to add the words "and salinity" between the words "pollution" and "or any increase" and between "such pollution" and "originates".

PROPOSITION-IX

Text of the rapporteur's formulation

"Any act or omission on the part of a basin State in violation of the foregoing rules may give rise to State responsibility under international law. Tne State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it, unless such injury is confined to a minor inconvenience compatible with good neighbourly relations."

Summary of Discussions

1. A suggestion was made in the report of Dr. Aziza Fahmi to begin the Proposition with reference to the doctrine of good faith.

2. A delegate suggested to replace the first sentence of the proposition by the following sentence :

"Any act or omission on the part of the co-basin State in contradiction of the foregoing Propositions III to VIII shall be a violation of law, a breach of good faith or abuse of right that gives rise to State responsibility."

3. Another delegate proposed the following amendment to the proposition :

"In the case of violation of the foregoing rules, the State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury caused to it unless such injury is confined to a minor inconvenience compatible with the good neighbourly relations."

One delegate objected to this amendment, while another delegate supported the present draft proposition.

4. No agreement was reached on the proposition.

PROPOSITION-X

Text of the rapporteur's formulation

"A State, which proposes a change of the previously existing uses of the waters of an international drainage basin that might seriously affect utilization of the waters by another co-basin State, must first consult with the other interested co-basin States. In case agreement is not reached through such consultation, the States concerned should seek the advice of a technical expert or commission. If this does not lead to agreement, resort should be had to the other peaceful methods provided for in Article 33 of the United Nations Charter and, in particular, to international arbitration and adjudication."

Summary of Discussions

One delegate suggested to replace the rapporteur's formulation and incorporate Articles XXVI to XXXVII of the Helsinki Rules instead. Another delegate remarked that the Helsinki Rules relating to the settlement of disputes would in that case be more voluminous than the substantive propositions and supported the view that no change be made to the present wording of the proposition. One delegate supported this view.

2. Another delegate suggested to take Article XXIX of the Helsinki Rules as paragraph 1 of the present proposition and as for paragraph 2 the rapporteur's formulation should be substituted by the following sentences, viz.

"Disputes between co-basin States shall be settled on the basis of the foregoing proposition and in accordance with Article 33 of the Charter of United Nations."

VI. THE LAW RELATING TO INTERNATIONAL SALE OF GOODS

(i) INTRODUCTORY NOTE

The subject "The Law relating to International Sale of Goods" was originally included in the programme of work of this Committee under Article 3 (c) of its Statutes at the suggestion of the Government of India. A study concerning the rules of conflict of laws relating to international sales and purchases was prepared by the Secretariat and was placed before the Committee at its fourth session held in Tokyo in 1961. The matter was considered by a sub-Committee at the Tokyo Session which recommended collection of further material. It was not possible to make further progress on this subject for some time in view of the Committee's preoccupation with a number of references by member governments under Article 3 (b) of the Committee's Statutes which needed urgent attention.

The United Nations Commission on International Trade Law at its first session held in New York in 1968 selected for its consideration "International Sale of Goods" as a priority item and the subject was accordingly taken up at its second session held in Geneva during March 1969. In the course of discussions in UNCITRAL the representatives of Ghana and India suggested that the Asian-African Legal Consultative Committee should be requested to revive its consideration of the subject and consequently the subject was taken up as a priority item at the eleventh session of the Committee held in Accra in January 1970.

At the Accra Session, the Committee had before it a brief prepared by the Secretariat dealing with the topics which were generally discussed at the second session of UNCITRAL in March 1969. These topics included : (i) the Law relating to International Sale of Goods in general ; (ii) the two Hague Conventions of 1964 ; (iii) the Hague Convention on the Law applicable to International Sale of Goods of 1955 ; (iv) Standard contracts and general conditions of sale; (v) Incoterms and other Trade Terms ; and (vi) Time-Limits and Limitation (Prescription) in the field of International Sale of Goods. The

Committee considered the subject in the plenary and after noting the views and comments made by the various Delegations as well as by the Secretary-General of the Hague Conference on Private International Law, the Secretary of UNCITRAL, and the representatives of ECA and the Arab League, the Committee decided to constitute a Sub-Committee composed of the representatives of Ceylon, Ghana, India, Japan, Nigeria, Pakistan and the United Arab Republic for giving detailed consideration to the subject. The Sub-Committee primarily concentrated its attention on two points, namely (i) how to increase the familiarity of the member governments with the work done by UNCITRAL and other organisations ; and (ii) make recommendations regarding the manner in which the subject might be discussed in the Committee on a regular basis. The Sub-Committee also discussed the question of conclusion and adoption of standard or model contracts, particularly in relation to commodities of special interest to buyers and sellers in the Asian-African region.

The subject was taken up for further consideration at the twelfth session of the Committee held in Colombo in January 1971 in the light of further work done in UNCITRAL and the replies received from governments and trading organisations in the Asian-African region to a circular letter issued by the Committee's Secretariat inviting their views regarding the desirability of drawing up of model or standard contracts and the commodities in respect of which adoption of such model or standard contracts or general conditions of sale might be helpful. The Committee after some discussion in the plenary decided to refer the subject for detailed consideration to a Sub-Committee whose composition was the same as that appointed at the Accra Session with the addition of Iraq. The meetings of the Sub-Committee were also attended by the Secretary-General of UNIDROIT and the Secretary of UNCITRAL. The questions mainly considered by the Sub-Committee were : (i) adoption of standard or model contracts in relation to specific commodities of special interest to buyers and sellers of Asian-African region; (ii) Articles 1 to 17 of the Hague Convention on Uniform Law on International Sales of 1964 with a view to determine their utility for the countries of the Asian-African

region; and (iii) the Law of Prescription (Limitation) in the field of International Sale of Goods on the basis of the Questionnaire and Preliminary Draft by the Working Group appointed by UNCITRAL.

At the Lagos session, the Standing Sub-Committee took up for discussion the draft standard form of contract for sale of goods prepared by the joint rapporteur after taking into account the various terms and conditions in the model contracts and general conditions of sale in use in various regions of the world. The Assistant Secretary of UNCITRAL and the Secretary-General of UNIDROIT also attended the meetings of the Sub-Committee. After some discussion, the Sub-Committee drew up a report recommending certain amendments to the draft standard form of contract and directed the Secretariat to elicit information from the member countries in relation to the question of arbitration clauses used in the contracts relating to the types of transactions intended to be governed by the proposed standard form of contract in order that the Sub-Committee may make further studies in that regard. During the fourteenth session of the Committee held in New Delhi in January 1973, the subject was further considered by the Standing Sub-Committee.

At the fourteenth session, a letter addressed to the Secretary-General of the Comnittee from the Legal Counsel of the United Nations informing the Committee of the U. N. General Assembly resolution 2929 (XXVII) to convene a U. N. Conference on "Prescription (Limitation) in the International Sale of Goods" was brought to the notice of the Sub-Committee. The letter also called for comments and proposals from the Committee on the Draft Convention on Prescription and requested that these sholud reach the U. N. Secretary-General not later than the 30th June 1973. The Sub-Committee, therefore, in its subsequent meetings examined the provisions of the Draft Convention on Prescription. While generally approving the approach of the Draft Convention as a workable compromise, the Sub-Committee suggested a number of points which needed to be considered in relation to Articles 1, 2, 3, 7, 10, 11, 12, 15,

16, 17, 18, 19, 22, 30 and 36 at the U. N. Conference on Prescription.

The Committee's Secretariat is at present engaged in preparing the final drafts of certain model contracts with the view that the same may be placed before a special meeting to be convened with the participation of representatives of trade and other interested organisations engaged in the field.

(ii) COMMENTARY PREPARED BY THE SECRETARIAT OF THE COMMITTEE ON THE DRAFT CONVENTION ON PRESCRIPTION (LIMITATION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS

INTRODUCTORY

The United Nations Commission of International Trade Law (UNCITRAL), at its second session established a Working Group on Time-limits and Limitations (Prescription) and requested it to study the subject of Time-limits and Limitations (Prescription) in the field of the International Sale of Goods. At its third session, the Commission, having considered a report of the Working Group (A/C N. 9/30), requested it to prepare a preliminary draft convention setting forth uniform rules and to submit this draft to the Commission at its fourth session.

In conformity with the foregoing decision, the Working Group submitted to the Commission at its fourth session a report (A/C N. 9/50 and Corr. 1) setting forth the text of a preliminary draft Uniform Law on Prescription (Limitation) in the International Sale of Goods, a commentary on the draft Uniform Law, and the text of a questionnaire addressed to governments and international organizations designed to obtain information and views regarding the length of the limitation or prescription period and other related matters. At that session, the Commission, after having considered various issues arising out of the preliminary draft, invited members of the Commission to submit to the Secretary-General any proposals or observations they might wish to make with respect to the preliminary draft and requested the Secretary-General to analyse the replies received to the questionnaire and to submit the analysis to the members of the Working Group. The Commission further requested the Working Group to prepare a final draft of the Uniform Law on Prescription (Limitation) for submission to the

Commission at its fifth session; in this work, account would be taken of the views expressed during the discussion of the subject at the fourth session, of the analysis by the Secretariat of replies to the questionnaire mentioned above, and of any proposals or observations communicated to the Working Group. Pursuant to this decision, the Working Group held its third session from 30 August to 10 September 1971 and prepared a revised draft Convention on Prescription (Limitation) in the International Sale of Goods.

At the fifth session, the Commission had before it the report of the Working Group on its third session (A/C N. 9/70), to which the text of the draft convention was annexed, and a commentary on the draft Convention which was issued as an addendum (A/C N. 9/70/Add. 1). The Commission also had before it a compilation of the studies and proposals considered by the Working Group (A/C N. 9/70/Add. 2), a note by the Secretariat regarding consideration of the report of the Working Group, and a note by the Secretariat concerning alternative methods for the final adoption of the draft Convention.

The Commission discussed, article by article, the draft Convention submitted by the Working Group and in the eourse of this discussion, various amendments and proposals were suggested by the members. The Commission adopted some articles without change and requested the Working Group to reconsider other articles in the light of the proposals and amendments that were made. For this purpose, the Working Group held several meetings in the course of the session and submitted a revised text of the draft Convention.

The Commission considered this revised text and approved most articles as revised. The Commission also set up a number of drafting parties to consider further the language of certain articles and adopted these articles as recommended by the drafting parties. The Commission, however, was not able to reach a consensus on certain provisions and, to indicate this fact, placed these provisions within square brackets for final consideration by an international conference of plenipotentiaries.

The Commission considered alternative methods for the final adoption of the draft Convention on Prescription (Limitation) in the International Sale of Goods in the light of the note submitted by the United Nations Secretariat on this subject. A statement was made by the representative of the Secretary-General on the financial implications of alternative procedures of adoption. All representatives who took the floor expressed the opinion that, in view of the highly technical and specialized nature of this draft convention, the Commission should recommend to the General Assembly that an international conference of plenipotentiaries be convened to conclude, on the basis of the draft articles approved by the Commission, a Convention on Prescription (Limitation) in the International Sale of Goods.

The Commission at its 125th meeting on 5th May 1972, adopted unanimously the following decisions :

The United Nations Commission on International Trade Law

1. **Approves** the text of the draft Convention on Prescription (Limitation) in the International Sale of Goods, as set out below in paragraph 21 of the report of the Commission, noting that no consensus was reached with respect to those provisions appearing within square brackets ;

2. **Requests** the Secretary-General :

   (a) To prepare, together with rapporteur of the Commission, a commentary on the provisions of the draft Convention which would include both an explanation of the provisions approved by the Commission and references to reservations by members of the Commission to such provisions;

   (b) To circulate the draft Convention, together with the commentary thereon, to governments and to interested international organizations for comments and proposals;

(c) To prepare an analytical compilation of those comments and proposals and to submit this compilation to governments and to interested organisations;

3. **Recommends** that the General Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft Convention adopted by the Commission, a Convention on Prescription (Limitation) in the International Sale of Goods. (Vide report of the work of the fifth session of UNCITRAL).

In order to enable member governments and other Asian African governments to evaluate the draft Convention and to form their views on it, the Secretariat has prepared a commentary which deals with it article by article. This commentary reproduces first the text of the draft Convention which was first debated at the first session of UNCITRAL, and below it the final text that was adopted after the debates. The commentary seeks to explain and analyse the final text, and in certain cases to indicate areas in which different views might be held.

The ideas which motivated the formulation of this draft Convention may be briefly indicated. The contract of international sale of goods is a most important element in international trade and commerce. The legal system which would govern such a contract, and the rules of limitation applicable to the contract, are discovered by applying the rules of the conflict of laws of the forum where an action on the contract is brought. It is clear that this situation presents a great deal of uncertainty. In the first place, which system of conflict of laws is applied will depend on the forum in which the action is brought. The different systems of conflict of laws differ in their rules regarding the selection of the legal regime to govern limitation. Further, even after a particular municipal legal system has been indicated as governing limitation, the rules of that legal system may not be clear, or may be unfair. Considerable difficulties are, therefore, created for business-men and their legal advisers. The purpose of this draft Convention is to have a law of limitation which

will be both clear and fair to both parties. It has also been the aim to secure as great a uniformity as possible on the ambit of its operation. Although the Convention deals with only a subsidiary aspect of the sales transaction (i.e. limitation), the achievement of uniformity and certainty even in this field is eminently desirable.

PART 1. UNIFORM LAW

Sphere of Application of the Law

Article 1 (A/CN. 9/70, Annex I)

(1) This Uniform Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller relating to a contract of international sale of goods [or to a guarantee incidental to such a contract]

(2) This Law shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of this claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

(3) In this Law ;

(a) "buyer" and "seller" means persons who buy or sell goods, and the successors to and assigns of their rights or duties under the contract of sale ;

(b) "party" and "parties" means the buyer and seller [and persons who guarantee their performance] :

(c) ["guarantee" means a personal guarantee given to secure the performance by the buyer or seller of an obligation arising from the contract of sale] ;

(d) "creditor" means a party seeking to exercise a claim, whether or not such a claim is for a sum of money ;

(e) "debtor" means a party against whom the creditor seeks to exercise such a claim ;

(f) "legal proceedings" includes judicial, administrative and arbitral proceedings ;

(g) "person" includes any corporation, company or other legal entity, whether private or public ;

(h) "writing" includes telegram and telex.

PART 1 : SUBSTANTIVE PROVISIONS

Sphere of application

Article 1 (Final draft)

1. This Convention shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller against each other relating to a contract of international sale of goods.

2. This Convention shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

3. In this Convention :

(a) "Buyer" and "seller" or "party" means persons who buy or sell, or agree to buy or sell goods, and the successors to and assigns of their rights or duties under the contract of sale ;

(b) "Creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money ;

(c) "Debtor" means a party against whom the creditor asserts a claim ;

(d) "Breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract ;

(e) "Legal proceedings" includes judicial, administrative and arbitral proceedings ;

(f) "Person" includes corporation, company, association or entity, whether private or public ;

(g) "Writing" includes telegram and telex.

Commentary

This article, together with Articles 2 to 6, define the sphere of application of the Convention. This question will be dealt with as a whole after each of these articles has been commented on.

In the course of the debates at the fifth session of UNCITRAL, it was unanimously decided to exclude the application of the Convention to guarantees, as a guarantee constituted an independent contract different in its nature from a sale. This decision, it is submitted, is to be welcomed.

The retention of the two phrases "*...limitation of legal proceedings* and to the *prescription of the rights of the buyer and seller.....*" (which might at first sight appear unnecessary) was due to the fact that certain legal systems used the concept of limitation of actions (without affecting the rights which were the subject-matter of the actions) and others the prescription (and extinction) of the rights themselves. The Convention was intended to apply to both cases.

The insertion of the phrase "against each other" has been made to clarify beyond doubt the point that the Convention is only intended to apply to parties in privity of contract. It is not to apply to possible rights of third parties, other than the third parties coming within the definition in 1.3 (a) (A/CN. 9/SR. 94, p.5).

The intention of the draft appears to be to exclude claims in tort or delict as between buyer and seller relating to the contract (A/CN. 9/50, p. 7 and A/CN. 9/70, p. 10) and if this is so, the question as to whether the words 'relating to a contract of sale' should not be amended to make this clearer is worthy of consideration.

The purpose of 1.2 is to preserve time-limits which may have to be observed by the parties under the applicable law. Such time-limits are often specified in contract documents. Thus a buyer dissatisfied with the quality of goods may be required to notify the seller of his dissatisfaction "promptly" or "within a week". The effect of non-observance of these time-limits will be determined by the applicable law.

There has been some modification of the technical definitions contained in 1.3 of the earlier draft, including the insertion of a definition of breach of contract. Questions which may require consideration in this connection are the following :—

(a) Whether the meaning of 'administrative proceedings' in 1.3 (e) should not be clarified ;

(b) The definition of 'person' is intended to include any group, whether or not it has legal personality. The application of this idea to common law systems may create some difficulty. Thus a common law partnership would presumably be a person within the meaning of this definition (A/CN.9/SR. 115).

As the article now stands, the Convention applies to all legal proceedings and all rights of the buyer and seller against each other. A difference of view arose in the course of the debates as to whether actions which seek to annul or set aside the contract on the ground that it is void or non-existent should be excluded from the scope of the law. The argument in favour of exclusion appeared to be that such actions, founded on the basis that the contract is invalid, can be classified as distinct from actions which are founded on the basis that the contract is valid, but has been broken. The arguments against exclusion are —

(a) That there will be uncertainty as to when an action is one for nullity, and when it is not.

(b) In principle it is desirable that all actions relating to a contract be subject to the same period of limitation.

(c) A businessman will not expect two periods of limitation to govern the contract, depending on whether the contract is a nullity or not.

A compromise has been reached by providing that an exclusion of actions for nullity can be achieved by reservation (Article 34).

Article 2 (A/C N. 9/70. Annex I)

(1) Unless otherwise provided herein, this Law shall apply without regard to the rules of private international law.

(2) [Notwithstanding the provision in paragraph 1 of this article, this Law shall not apply when the parties have expressly chosen the law of a non-contracting State as the applicable law.]

Article 3 (A/C N. 9/70. Annex I)

(1) For the purpose of this Law a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.

(2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph 1 of the article shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.

(3) Where a party does not have a place of business, reference shall be made to his habitual residence.

(4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 2 (Final draft)

[(1) For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.]

(2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of this article and of article 3 shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.

(3) Where a party does not have a place of business, reference shall be made to his habitual residence.

(4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 3 (Final draft)

(1) This Convention shall apply only when at the time of the conclusion of the contract, the seller and buyer have their places of business in different contracting States.

(2) Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

(3) This Convention shall not apply when the parties have validly chosen the law of a non-contracting State.

Commentary

These two articles also raise the important question of the sphere of application of the Convention, which will be discussed separately.

One major controversy is whether the definition of the class of case to which the Convention applies (2.1) should only be finalized after the corresponding class has been finalized for the purposes of the revised Uniform Law on International Sale of Goods. There was unanimity in the view that identical applications of the two Conventions would be very desirable.

The difference of view arose from the fact that it was generally felt that finalization of the revised Uniform Law on International Sales (revised ULIS) would not take place for many years to come. To wait for that final definition, it was argued, would be to delay this Convention also for many years. As against this, it was argued that the delay was not too high a price to pay for the advantages of an identical application of both laws. The latest draft of Article 1 of revised ULIS is as follows :—

Article 1

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States :

   (a) when the States are both contracting States; or

   (b) when the rules of private international law lead to the application of the law of a contracting State.

2. [The fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.]

3. The present law shall also apply where it has been chosen as the law of the contract by the parties. (A/C N. 9/62/Add. 2)

It will be seen that whereas an international contract of sale will be governed by both texts in certain cases, this will not be so in other cases. The condition that the place of business of each of the parties must be in a contracting State is a necessary condition for the application of this draft Convention, but is only a sufficient condition for the application of revised ULIS. Revised ULIS can also apply through the rules of private international law. e.g.

(i) 'A' having his place of business in State 'X', contracts with 'B' having his place of business in State 'Y'. Both States 'X' and 'Y' are contracting parties to both Conventions. Both Conventions will apply to the contract, provided an action is brought in the forum of a contracting State;

(ii) Suppose that in the above case State 'Y' is not a contracting party. Then the Convention on Prescription will not apply. But if the rules of private international law of the forum specify the application of the law of State 'X', the Convention on Uniform Law of Sales will apply;

(iii) 'A' and 'B', neither having places of business in States parties to either Conventions, choose revised ULIS and this Convention to govern their contract. Revised ULIS will apply, but not this Convention.

The classes of exempted sales (Article 4 of this draft and Article 2 of revised ULIS) are identical, but this draft has a set of exempted claims which has no correspondence in revised ULIS.

The decision as to whether to defer finalization of the draft Convention on Prescription depends on balancing the advantage of having a Convention on Prescription finalized and in force early, but with the disadvantage that its scope may not completely harmonize with the scheme of revised ULIS, as against the advantage of waiting until both texts achieve

harmony but with the disadvantage that the Convention on Prescription on which there is major agreement will be delayed. Another suggestion has been that the Convention on Prescription should contain a revision clause under which its scope would be automatically harmonized with the scope of revised ULIS when the latter came into force. It is presumably because of this division of opinion that 2.2 has been placed within square brackets to indicate a lack of consensus in regard to it.

The clause in 2.2 "unless ..... the contract" is intended to prevent the application of the law to a case which is really municipal in character, i. e. the case where the principal places of business of the parties are in different States, but the contract in question has a closer connection with the place of business of a party which is situated in the same State as the place of business of a party of the other party. For example, 'A' and 'B' conclude a contract for the supply of manufactured articles to be supplied by 'A' to 'B'. The principal place of business of 'A' is in State 'X', and of 'B' in State 'Y'. But all the negotiations are conducted from a branch office which 'A' has in State 'Y'. The goods also are to be delivered from this branch office. The Convention would not apply as there are no elements here of an international sale.

2.2 may also deal with the case of a contract entered into under the common law system by an agent on behalf of an undisclosed principal. A, the agent, and B, the other contracting party, may both have their place of business in State X, but C, the undisclosed principal may have his place of business in State Y. Although the contract may ultimately be held to be between C and B, yet by reason of this article it could be argued that the draft Convention did not apply, as the place of business of the agent must be taken to be the place of business of the principal. Such a result is eminently desirable, as C would not have contemplated the application of this Convention.

Having regard to the importance of the clause (for it may determine whether the Convention or municipal law applies) it appears to leave room for some uncertainty.

(a) Two or more places of business of a party may have a relationship to a contract and its performance, and deciding which has the closer relationship may be a difficult matter.

(b) It is not beyond doubt whether individual knowledge or contemplation or only joint knowledge or contemplation is in issue. Individual knowledge may be private knowledge and while to one party a particular place of business of the other party seems to have the closer connection, the full circumstances which are only known to the other may clearly show another place of business as having the closer connection. If joint knowledge or contemplation is in issue this could be made clearer. Joint knowledge seems to be intended (A/C N. 9/70/Add. 1, p. 21), and the formulation in Article 1.2 of revised ULIS seems to be preferable.

(c) The phrase 'principal place of business' may require clarification. It can sometimes be understood in a technical sense (e. g. the place where a limited liability company has its registered office) or in a non-technical sense (where the trading of a company is actually carried on). It would appear that the latter is what is intended (A/C N. 9/52 p. 11).

(d) In deciding the 'closer relationship to the contract and its performance' it is intended to take into account all the incidents of the contract and its performance. The evaluation of this may often be a matter of opinion. Since parties would like to know at the time of the conclusion of the contract whether or not the Convention is to apply, it may be considered whether a more easily identifiable object of relationship could be substituted.

Article 5 (A/CN.9/70. Annex. I)

This Law shall not apply to sales :

(a) of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller at the time of conclusion of contract knows that the goods are bought for a different use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels or aircraft;

(f) of electricity.

Article 4 (Final draft)

This Convention shall not apply to sales :

(a) of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless the fact that the goods are bought for a different use appears from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels or aircraft;

(f) of electricity.

Commentary

These types of excluded sales have been brought into conformity with the corresponding excluded sales in revised ULIS. These various types of sales are excluded from the sphere of the draft Convention for various reasons, which can be shortly stated as follows :

4(a) These are what are sometimes called 'consumer sales'. Many national laws have special provisions protecting the consumer, and placing such sales in a special category. For this reason these sales were excluded.

They are also excluded for the purpose of maintaining uniformity with revised ULIS.

4(b) These are excluded mainly in the interests of uniformity with revised ULIS. It is excluded in revised ULIS because at the time of commencement of the auction the seller would not know which person would eventually become the buyer, and so whether ULIS would apply or not.

4(c) These sales are usually governed by special rules of the State, and form a separate category.

4(d) The articles in question are of a special character, and are often subject to special rules in municipal legislation.

4(e) The articles in question are of a special character. The corresponding Article 2(2) (b) of revised ULIS is as follows :

"Of any ship, vessel or aircraft [which is registered or is required to be registered]" (A/CN. 9/62/Add. 2).

There are divided opinions on whether the words in brackets should or should not be retained in revised ULIS. The arguments in favour of deleting these words are that an element which might be cause of uncertainty is eliminated (e.g. what is 'registration'? When is it required ?). The argument in favour of retaining these words is apparently that it is considered desirable that sales of small boats should fall within the ambit of revised ULIS, and small boats generally do not require registration. But it would appear that in some countries even small boats require registration. If this is the object, some other criterion such as tonnage may be adopted to distinguish small boats.

4(f) The substance in question is of a special character.

Article 6 (A/CN. 9/70. Annex I)

This Law shall not apply to claims based upon :

(a) liability for the death of, or injury to the person of, the buyer [or other person];

(b) liability for nuclear damage caused by the goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

(e) a document on which direct enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought;

(f) a bill of exchange, cheque, or promissory note;

(g) a documentary letter of credit.

Article 5 (Final draft)

This Convention shall not apply to claims based upon :

(a) Death of, or personal injury to, any person;

(b) Nuclear damage caused by the goods sold:

(c) A lien, mortgage or other security interest in property;

(d) A judgement or award made in legal proceedings;

(e) A document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought:

(f) A bill of exchange, cheque or promissory note.

Commentary

The purpose of this article is to exempt claims which are of such a special character that the period of limitation specified in the draft Convention is not appropriate. The following is a short account of this special character.

1. 5(a) The loss caused in this case is not primarily pecuniary loss, which is the usual type of loss in an international sales transaction.

2. 5(b) Such damage may only manifest itself after a long period. Further, special periods in regard to such actions are contained in the Vienna Convention on Civil Liability for Nuclear Damage of 21.5.1963.

3. 5(c) The rights included here may be rights *in rem*, whereas a sales transaction normally creates rights *in personam*.

4. 5(d) It is felt when a judgement is sought to be enforced it may not be clear whether the judgement in question adjudicated upon a transaction falling within the scope of the draft Convention. Further, the *ex post facto* investigation of whether an action which was the basis of a judgemcnt was barred by limitation is a different matter, particularly when the investigation may have to be carried out by a forum different from the one which delivered the judgement. In certain legal systems the rights and obligations of parties to an action which conclude in a judgement are merged in the judgement, which thereafter is the sole source of rights and obligations. It may thereafter be difficult to classify an action on such a judgement as one relating to a contract of international sale. The enforcement would also involve local procedural rules of the forum, and it would be difficult to subject a judgement to a uniform rule limited to contracts of international sale of goods.

5. 5(e) Such documents, as are evident, stand in a special category.

6. 5(f) (i) Such instruments are often governed by international conventions.

(ii) Such instruments pass into the hands of third parties, who may be ignorant of the sales transaction, and would have no means of knowing that the period of limitation prescribed by the draft Convention was applicable.

(iii) The obligations under these instruments are often independent of the sales transaction.

Article 4 (A/CN. 9/70 Annex I)

1. This Law shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.
2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

* * *

Article 6 (Final draft)

1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.
2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Convention, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

* * *

Commentary

Article 3 of the Revised ULIS is as follows :-

"1. [The present law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.]

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production." (A/CN. 9/62/Add. 2).

There was a uniform eonsensus at the debates at the fifth Session that these corresponding articles in the two Conventions should be identical. The deletion in the final draft of the word 'essential' found in the second half of 4.2 of the first draft slightly narrows the cases to which the first sentence of 6.2 applies.

This article deals with what are called 'mixed' contracts in that the sole elements are not the buying and selling of goods. In the case dealt with in 6.1, the additional element present is the supply of labour or other services (e.g. insurance of the goods in a C.I.F. contract) by the seller. The contract cases to be one of sale to which the Convention applies when these other elements become 'preponderant'. The article is meant to apply to a single contract containing the other elements. It will not of course apply where the other elements are the subject-matter of a contemporaneous but independent contract.

In the case dealt with in 6.2, the additional element present is that the 'buyer' undertakes to supply a substantial part of the materials necessary for the manufacture of the goods. Since the most important activity of the "seller' in such a case is turning the materials into the manufactured product, the contract is more akin to the supply of skill or labour, and is thus excluded from the scope of the draft Convention.

* * *

Article 7 (A/CN. 9/70. Annex I)

In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

* * *

Article 7 (Final draft)

In interpreting and applying the provisions of this convention, regard shall be had to its international character and to the need to promote uniformity in its interpretations and application.

* * *

Commentary

This is a directive to tribunals which have to interpret and apply the Convention. It is intended to prevent tribunals from adopting an insular outlook, and to encourage them to seek

assistance from the decisions of foreign tribunals on corresponding provisions. It is also intended to indicate that tribunals should consider *travaux preparatoires* where under normal circumstances they would consider themselves precluded from doing so.

The intention of the framers of the Convention has been to provide a code of law which will deal with all aspects of limitation. History has shown, however, that owing to various reasons, cases arise for which the most elaborately drafted code contains no provision. Two approaches are possible in such a situation. The first is to apply municipal law. The second is to apply this Convention by a process of judicial legislation, extending it "by analogy" or on the basis of "inherent principles". Both approaches have the disadvantage that different forums may reach divergent results. The second approach, however, seems to be preferable in principle as judicial decisions will not proceed beyond the framework of the Convention. If this be so, the question which merits consideration is whether Article 7 in its present form gives the tribunal a sufficiently clear indication of this desired approach. The phrase "In interpreting and applying the provisions of this Convention .." may be construed as applying to a case which already falls within the Convention, and not one for which no provision is made. This is, therefore, a question which deserves consideration.

The Scope of Application of the Convention

In its latest form, the draft Convention will only apply if the following conditions are satisfied :-

1. The question at issue must be the limitation of legal proceedings and the prescription of rights (Article 1.1).
2. There must be a concluded contract of international sale of goods (Article 1.1).
3. Such limitation or prescription must be of the rights of the buyer and seller against each other relating to the said contract (Article 1.1).
4. At the time of the conclusion of the contract, the buyer and seller must have their places of business in different contracting States (Article 3.1).

5. The parties must not have validly chosen the law of a non-contracting State to govern the contract (Article 3.3).

6. The sale must not be an excluded sale (Articles 4 and 6).

7. The claim must not be based upon an excluded subject matter (Article 5).

8. The forum must belong to a contracting State.

Some of these conditions can be further sub-divided, but the above classification is convenient. No account has been taken of the possibility of reservations under Articles 33 to 38.

Judging by the debates at the fifth session, it would appear that the limitations contained in conditions 1, 2, 3, 6, 7 and 8 are in principle acceptable to most governments.

This comment will therefore relate to :

(a) The principles at stake in conditions 4 and 5.

(b) The language in which some of the conditions are expressed.

(A) Article 3.1 states that the Convention shall only apply when at the time of the conclusion of the contract, the seller and buyer have their places of business in different *contracting states*. This constitutes an extensive limitation on its applicability. Nor are parties given the choice to expressly make the law applicable where by reason of this article it would not apply. The insertion of this condition, which was not present in the first draft, appears to be for the following reasons :—

i) It secures greater uniformity between the sphere of application of this Convention and of revised ULIS. The latest draft of Article 1.1 of revised ULIS reads as follows :

> "1.1 the present law shall apply to contracts of sale of goods entered into by parties *whose places of business are in different States* :"
>
> (a) *When the States are both Contracting States ;*
> or

> (b) when the rules of private international law lead to the application of the law of a Contracting State.

ii) When the parties both have their places of business in contracting States, it is almost certain that they will then decide, within the limits permitted to them whether or not to exclude the application of the law. The likelihood of the Convention becoming applicable contrary to the expectations of the parties is minimized.

The deletion of this provision, on the other hand, will lead to a wider application of the Convention. Being a model Convention reached after international consultation, this is regarded as a desirable result, and is the object sought to be achieved by Article 3.2.

If giving parties freedom to choose not to apply the Convention is desirable, because it gives effect to the autonomy of the will of the parties, it may act as a balance, while preserving this provision, also to give parties the freedom to expressly make the Convention applicable, even if they do not each have their places of business in contracting States. This freedom of choice is given by Article 1.3 of revised ULIS. Such a provision would enable a party in a weak bargaining position to suggest to the other party in a strong bargaining position, that the Convention should be made applicable as a fair and equitable law, even though one or both of the parties do not have places of business in contracting States. Such a suggestion cannot be made under the present draft.

Article 3.3 permits the parties to exclude the operation of the Convention by choosing the law of a non-contracting State. This, coupled with 3.1 referred to above, permits parties, each of whom has his place of business in a contracting State, nevertheless to exclude the operation of the law. There was a division of opinion on the desirability of this provision during the debates. The argument in favour of maintaining the provision is that the choice it gives to the parties is valuable and desirable. This choice is also preserved in revised ULIS. (Article 5 of revised ULIS). This is often expressed by saying that the autonomy of the parties should be safeguarded. The argument for deleting the clause is that, while the parties have a legitimate interest

in being allowed to choose the law which governs the incidence of performance (the choice permitted by revised ULIS being thus justifiable), they have no such interest with regard to the law governing limitation, and the widest application of a model Convention is desirable.

One consideration that applies to countries of Asian-African region is that where they are (as they sometimes are) in a weaker bargaining position, freedom of choice generally leads to dictation of the choice by the party with the stronger bargaining power. This can be used to impose on the weaker party a complex municipal law of limitation of which he is totally unfamiliar.

The majority of governments which expressed their views at the debate were in favour of deleting this provision.

It is suggested that, apart from the question of the principle at issue, that draft may require clarification in the following respect. Where the parties have validly chosen the prescription or limitation laws of a non-contracting State, the Convention clearly cannot apply. If, however, they make no express mention of limitation but merely choose the law of a non-contracting State to govern the contract, is the Convention excluded ? Apparently it is intended that the Convention is not to apply only where the parties have selected the law of a non-contracting State, not merely in general terms, but specifically including its law of limitation. (A/CN.9/70. Add. 1, p. 16). This may be made clear by inserting the words 'of limitation or prescription' after the word 'law' and before the word 'of' in Article 3.3.

(B) There is no definition of a contract of sale of goods though from Article 1.3 (a) an agreement for sale comes within the definition. Article 6 expressly deals with two cases which may otherwise be in dispute. The remaining case which requires consideration is exchange, or barter, where the consideration does not consist of money, which is not unknown in international trade. Article 1.3 (b) ("Creditor means a party who asserts a claim, "*whether or not such a claim is for a sum of money*") would include a party to a barter agreement within the meaning

of 'creditor' But it may be desirable to put the matter beyond dispute.

The Draft Convention and the Conflict of Laws

It has been noted that Article 3.2 of the final draft provides that :—

"Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law".

The result is that when the forum of a contracting State deals with a contract falling within the ambit of the Convention, this Convention is applied in the sphere of limitation irrespective of any legal system indicated by its system of conflict of laws. However, the conflict of laws remains relevant in certain matters. Many Articles refer to "the applicable law" (vide Articles 11, 13, 16, 21) and the applicable law will have to be determined by applying the rules of the conflict of laws. Further, the conflict of laws will determine which legal system governs the substance of the obligations *inter se* between buyer and seller. In the Anglo-American system, for instance, this will be "the proper law of the contract." If, however, the 'proper law of the contract contains a rule which extinguishes the right of action after the passage of a certain period of time, and the rules of the conflict of law classifies this as a "substantive" and not a "procedural" rule, the right of the creditor would be extinguished, and there would be nothing left for him to enforce. In such a case this Convention cannot operate. (Rabel, *The Conflict of Laws, a Comparative Study*, 2 Ed, p. 516; Dicey and Morris, *Conflict of Laws*, 8th Ed, p. 1095).

THE LIMITATION PERIOD

Article (A/CN. 9/70, Annex I)

The limitation period shall be four years.

* * *

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8 (Final draft)

Subject to the provisions of Article 10. the limitation period shall be four years.

* * *

Commentary

There now appears to be a consensus on this period.

COMMENCEMENT OF THE LIMITATION PERIOD

Article 9 (1), 9 (2) (A/CN. 9/70, Annex I)

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of Article 2, the limitation period in respect of a breach of the contract of sale shall commence on the date on which such breach of contract occurred;

(2) Where one party is required as a condition for the acquisition of exercise of a claim to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice;

Article 9 (1), 9 (2), 9 (3) (Final draft)

1. Subject to the provisions of Articles 10 and 11, the limitation period shall commence on the date on which the claim becomes due.

2. In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall, for the purpose of paragraph

(1) of this article, be deemed to become due on the date on which the fraud was or reasonably could have been discovered.

3. In respect of a claim arising from a breach of the contract the claim shall, for the purpose of paragraph (1) of this article be deemed to become due on the date on which such breach occurs. Where one party is required, as a condition for the acquisition or exercise of such a claim, to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

Commentary

The description of the event which was to give rise to the commencement of the period of limitation had earlier been the subject of much controversy. The first draft provided that the two events were to be "breach of contract", or (where no allegation of breach was made) "the date when the claim could first be exercised". In the present draft, the event is "the date on which the claim becomes due", breach of contract being merely one of the events which could make a claim become due (9.3). The concept of breach of contract was criticised as being foreign to some legal systems, and this has resulted in a definition of it being inserted (1.3d). The date on which a claim becomes due will depend on the particular claim asserted, in the light of the contract, supervening events, and the applicable law. This general solution, however, leaves out of account certain special cases, for which Articles 10 and 11 provide.

Article 9.2 deals with a case where there has been fraud committed before or at the time of the conclusion of the contract, which has not been discovered at the time of conclusion. The nature of the subsequent claim based on fraud, however, needs clarification. Tortious or delictual claims based on fraud are in any event outside the scope of the Convention.

For this article to apply, two conditions must be satisfied :—

(a) The claim must be based on fraud, and

(b) The claim must relate to a contract of international sale of goods.

It is probably intended to apply to an action for annulment based on fraud. (A/C N.9/SR. II 5). But in some legal systems, a claim based on fraud and a claim based on breach of contract, are juristically distinct.

If a claim based on fraud and relating to an international contract of sale can fall within the ambit of the Convention, the line at which tortious or delictual claims are excluded becomes unclear. For example, A fraudulently conceals defects in goods before the conclusion of the contract, and sells them to B. The fraud and the defects are discovered after the conclusion of the contract, and B sues A in delict on the basis of the fraud. This would *prima facie* come within 9.2, and the action would appear to relate to the contract. But such actions are intended to fall outside the ambit of the Convention.

A phrase could also be added to deal with the case where the date when the fraud was discovered differs from the date on which it reasonably could have been discovered (e. g. "whichever was earlier").

The last sentence of 9.3 should be read with Article 1.2. While by reason of 1.2 the Convention does not affect requirements as to the time-limits within which notice has to be given (which, therefore, parties have to observe to safeguard their rights) the requirements as to such notices does not affect the running of time in terms of the Convention.

Article 9 (3) (A/CN. 9/70. Annex I)

(3) Subject to the provisions of paragraph 4 of this article, the limitation period in respect of a claim arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale, irrespective of the time at which such defects or other lack of conformity are discovered or damage therefrom ensues.

Article 11 (A/CN. 9/70. Annex I)

If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise the limitation period, in respect of any claim arising from the undertaking, shall commence on the date on which the buyer first informs the seller that he intends to assert a claim based on the undertaking, but not later than on the date of the expiration of the period of the undertaking.

Article 10 (1), (2), (3) (Final draft)

1. The limitation period in respect of a claim arising from a defect or lack of conformity which could be discovered when the goods are handed over to the buyer shall be two years from the date on which the goods are actually handed over to him.

2. The limitation period in respect of a claim arising from a defect or lack of conformity which could not be discovered when the goods are handed over to the buyer shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, provided that the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer.

3. If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking, shall commence on the date on which the buyer discovers or ought to discover the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

Commentary

Paragraph 9(3) of the first draft was subjected to criticism during the debates at the fifth session. The criticism mainly consisted of two points :—

(1) That the normal limitation period of 4 years was too long where questions of defects or lack of conformity was in question.

(2) That the starting point for the running of time in these cases should not be fixed irrespective of the time at which such defects or lack of conformity were discovered by the buyer.

The final draft is a response to both criticisms. A number of relevant factors have to be considered and balanced in reaching a decision on these questions.

(a) A starting point as from the time the goods are handed over to the buyer can be easily ascertained and makes for certainty. As against this, it can lead to hardships for the buyer where latent defects manifest themselves late, after or just before the prescription period has expired, and where these could not have been discovered earlier by the exercise of due diligence. A starting point as from the time the defects are discovered by the buyer is relatively uncertain. Further, the evidence as to the latter time would be in the hands of the buyer alone. As against this, such a starting point would be the fairest from the point of view of a buyer faced with the latent defects which manifest themselves after some time and which he could not earlier have discovered by the exercise of due diligence.

(b) The longer the period of prescription, the longer the parties are left with possibility of claims still open as against them, with repercussions on financial stability. A very short period, however, may not be sufficient for defects to manifest themselves, so that the buyer may become unfairly penalized.

The two questions are interconnected, in that delaying the start of the running of prescription in effect leads to a longer period.

The Working Group drafting the Convention had in principle consistently placed the need for certainty as the first requirement in priority. At the debates, however, strong criticism was made by almost all the developing countries that *in the field of*

claims arising out of defects or lack of conformity, this would lead to unfairness. It was pointed out that in the case of plant and machinery, which was invariably purchased by the developing countries, these may come into commission several years after purchase. The present draft tries to satisfy all the relevant considerations in the following ways :—

(1) In the case of so-called 'latent' defects, a period of 2 years, shorter than the normal 4 years, is fixed, commencing to run from the date when the buyer should have become aware of them (i.e. the date of handing over). This is justifiable because it would be unbusinesslike and unfair to allow the buyer to sleep over his rights for a longer period. The starting point is relatively certain.

(2) In the case of so-called 'latent' defects, the same shorter period is used (for the same reasons), but the starting point is defined as the time the defect is or could reasonably have been discovered. This prevents hardship to the buyer. The interests of the seller in being free of possible claims after a certain period is protected by laying down an over-all limitation period of 8 years commencing from the date the goods are handed over.

One case which may require consideration is whether the buyer refuses to accept the goods because of a manifest patent defect, so that the goods are never "actually handed over". There may therefore be no starting point within the meaning of 10.1. The earlier formulation of "placed at the disposition of the buyer" avoided this difficulty, and it may be considered whether this wording should not be restored.

Provision may also be made in 10.2 for the case where there is a difference between the dates when the defect is discovered and could reasonably be discovered.

10.3 is intended to apply to a case when the seller gives an express undertaking relating to the goods. If 10.3 was absent under the normal rule the limitation period would commence

when the claims falls due. However, it is felt that by reason of the additional burden undertaken by the seller by the express undertaking, a later period of commencement is justified. The definition of the commencement period in the first draft (i.e. Article 2 of A/CN. 9/70, Annex I) was adopted in the interest of certainty, and is easier to apply. An example of a case covered by Article 10.3 would be the following :—

> A sells a fleet of cars to B, and states that "no serious defect will arise for one year from commencement of use". One month after use commences, a serious defect develops, which only manifests itself requiring repair after eleven months have passed. Prescription starts to run from the latter date.

It has been suggested (A/CN. 9/70/Add. I) that this article does not require that "the undertaking be contained in the contract of sale. The seller, after delivering the goods, might adjust certain components of the goods and in this connection might give an express warranty. Such an undertaking is governed by this article". An undertaking of this nature may constitute a separate contract with varying degrees of connection to the original contract. Whether it is desirable to make the Convention govern such a separate contract may require consideration.

Article 10.3 uses the phrase "express undertaking". "Express" terms are usually contrasted with "implied" terms, and are used to make the following distinctions :

(i) An express term is explicitly stated by one party orally or in writing, and agreed to by the other. An implied term is not explicitly stated, but agreement as to its incorporation in the contract is implied by conduct, usage etc.

(ii) An implied term is one on which there has been no agreement but is implied by law as a term of the contract.

In order to make for greater certainty, the replacement of the words "express undertaking" by the words "undertaking in

writing" may be considered. Every undertaking in writing would be an express undertaking.

Article 9(5) and 9(6) (A/CN. 9/70. Annex I)

(5) Where, as a result of a breach of contract by one party before performance is due, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any claim arising out of such breach shall commence on the date on which such breach occurred. If the contract is not treated as terminated, the limitation period shall commence on the date when performance is due.

(6) Where, as a result of a breach by one party of a contract for the delivery of or payment for goods by instalments, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any claim arising out of the contract shall commence on the date on which such breach of contract occurred, irrespective of any other breach of contract in relation to prior or subsequent instalments. If the contract is not treated as terminated, the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

Article 11(1) and 11(2) (Final draft)

1. If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstance shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

2. The limitation period in respect of a claim arising out of a contract for the delivery of or payment for goods by instalment shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled

to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

Commentary

This article provides for the case where under the appliable law one party is entitled to declare the contract terminated before the time for performance is due. He may become so entitled, for example either as a result of a breach of contract by the other party (e. g. a declaration by the other party that he will not perform on the due date) or owing to circumstances not amounting to a breach of contract (e. g. supervening impossibility of performance). The first draft only took account of breach of contract. The article probably covers not only the case where the termination takes effect by virtue of the declaration (i.e. where the party has an option either to terminate by declaration or not) but also the case where termination takes effect by operation of law independently of declaration by the party. In the latter case it may be said that the "party is entitled to declare the contract terminated" because it is already terminated by operation of law. Where there has been such a termination by declaration, it is logical to commence the running of the period of limitation from the date of declaration, for the parties thereafter have no excuse for not instituting legal proceedings. Where there has been no declaration, in a case where the party has an option in regard to termination, the party not making the declaration will be taken to be exercising the option to keep the contract alive, and claiming performance when it falls due. The claim would fall due when performance becomes due, and this is indicated as the start of the commencement of the limitation period.

If the article also covers the case where the contract is terminated by operation of law, it is arguable that the time of such termination is the logical starting point, and not the date on which performance falls due.

Article 11.2 is an application of the principle of 11.1 to the case of an instalment contract.

INTERRUPTION OF THE LIMITATION PERIOD : LEGAL PROCEEDINGS: ACKNOWLEDGEMENT

Article 12 (A/C N. 9/70 Annex. I)

(1) The limitation period shall cease to run when the creditor performs any act recognized under the law of the jurisdiction where such act is performed:

(a) as instituting judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim; or

(b) as invoking his claim for the purpose of obtaining satisfaction or recognition thereof in the course of judicial proceedings which he has commenced against the debtor in relation to another claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 12 (Final draft)

1. The limitation period shall cease to run when the creditor performs any act which, under the law of the jurisdiction where such act is performed, is recognised as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

2. For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised. However, both the claim and counterclaim shall relate to a contract or contracts concluded in the course of the same transaction.

Commentary

The entire group of articles contained under this heading are inter-related and the articles contained under the heading **"Effects of the expiration of the limitation period"** are also closely related. This article deals with the effect of the commencement of judicial proceedings on the running of the limitation period, and provides that the period shall 'cease to run' as from such commencement. The implications of 'ceasing to run' has to be gathered from this article together with Articles 15, 16, and the articles dealing with the effects of the expiration of the limitation period. The second limb of 12.1 ("or as asserting his claim.....the debtor") provides for the case where the creditor introduces a claim relating to an international contract of sale into an action already commenced. The law of the jurisdiction where the act is performed determines whether it has been done "for the purpose of obtaining satisfaction or recognition of his claim". Thus, depending on that law, a diversity of actions may be found sufficient for this purpose, e. g. actions for damages, specific performance, declaration of rights and possibly even criminal prosecutions. To cause the limitation period to cease to run. a counter-claim must qualify as an act of the type defined in 12.1.

There is no definition of what constitutes a sufficient act by way of counter-claim. One necessary condition must be that it must relate to an international contract of sale. Must it also be a counter to a claim relating to an international contract of sale ? The effect of the last sentence of 12.2 (which is an innovation) appears to suggest that it need not. The following example illustrates the point :

> A and B in the course of the same transaction enter into two contracts. The first is an international contract of sale, the second is not. A sues B both on the international contract and on the other contract. B, who has a counter-claim under the international contract, raises it, not in the action relating to the international contract, but in the other action. The applicable law of the forum permits this. The counter-claim will presumably operate to stop the running of this limitation period.

If it is intended that both or all the contracts concluded in the course of the same transaction need to be contracts of international sale of goods, this should be made explicit. The policy behind the first sentence of 12.2 has been said to be "to promote efficiency and economy in litigation by encouraging consolidation of actions rather than the hasty bringing of separate actions." (A/C N. 9/50, Annex II, p.31. and A/C N. 9/70/Add. I). If a counter-claim dates back to the date of the claim, it will be made in time if the claim is made in time. A party contemplating a claim can, therefore, rest on the secure assumption that however late a claim is made by the other party, he can assert his own claim as a counter-claim in the same action and not be ruled out on the ground of limitation. Another reason which has been urged to justify this doctrine is that "a litigant generally cannot complain of being visited with stale claims if he himself, by asserting a claim arising from the same event or transaction, disturbed the tranquillity sought to be safeguarded by the statute of limitation" (A/C N. 9/70/Add. 2, p.51). It might be objected, however, that a person who asserts a claim within time does not disturb the tranquillity safeguarded by the statute of limitations.

The effect of 12.2 on the provisions of Article 10 may also be considered. The following examples are given to illustrate same possible cases :—

(1) A, the seller, on 1.1.74 hands over to B, the buyer, goods containing defects which can be discovered when the goods are handed over. B does not pay the price, neither does he assert a claim against A in respect of the defects. On 1.12.75 A brings an action for the price. B makes a counter-claim in this action on 1.1.77. Is B's claim out of time by reason of 10.1 (because it is brought more than two years after the goods have been handed over) or within time by reason of 12.2 (because it is deemed to have been performed on 1.12.75. within two years) ?

(2) A, the seller, sells and hands over goods to B, the buyer, on 1.1.73. The goods contain defects which

cannot be discovered at the time of handing over. B does not pay the price, and A institutes proceedings for the price on 30.12.76. B discovers the defects on 1.10.77, and makes a counter-claim. Does B's counter-claim relate back to 30.12.76 by reason of 12.2 ? If it does, it will relate back to a point of time before the claim fell due.

(3) A, the seller, sells and hands over goods to B, the buyer on 1.1.73. The goods contain defects which cannot be discovered at the time of handing over. B does not pay the price, and A institutes proceedings for the price on 30.12.76. The proceedings are protracted and on 1.12.80 B discovers the defects. He makes a counter-claim on 1.2.81. Is the claim out of time by reason of the proviso of 10.2, (because more than eight years have elapsed from the date the goods were handed over) or within time by the operation of 12.2 (because it relates back to 30.12.76.)

It is to be noted that there is no relation back to the date of the original claim where a creditor adds a claim relating to an international contract of sale into proceedings already instituted; e.g.

A commences proceedings on an international contract of sale against B on 1.1.74. On 10.1.74 he introduces into this action a claim relating to another international contract of sale. The date when the period of limitation ceases to run in regard to the latter claim would be 10.1.74 and not 1.1.74.

Article 13 (A/C N. 9/70. Annex I)

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings by requesting that the claim in dispute be referred to arbitration in the manner provided for in the arbitration agreement or by the law applicable to that agreement.

(2) In the absence of any such provision, the request shall take effect on the date on which it is delivered at the habitual residence or place of business of the other party, or, if he has no such residence or place of business, then at his last known residence or place of business.

(3) The provisions of this article shall apply notwithstanding any term in the arbitration agreement to the effect that no right shall arise until an arbitration award has been made.

Article 13 (Final draft)

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to that agreement.

(2) In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party, or if he has no such residence or place of business, then at his last known residence or place of business.

(3) The provisions of this article shall apply notwithstanding any term in the arbitration agreement to the effect that no right shall arise until an arbitration award has been made.

Commentary

This article applies to arbitration the principle contained in the preceding article relating to judicial proceedings.

In the case of arbitration the event causing the period to cease to run is not referred to the law of the jurisdiction, as in the earlier Article 12, because contracts of arbitration often leave the question as to what act commences arbitration to the

agreement of the parties. 13.2 provides for the occasions where 13.1 cannot be applied. It requires actual delivery of the request for arbitration, and places the risk of non-delivery on the party making the request.

13.3 is intended to deal with a term in the arbitration agreement that "no right shall *arise* until an arbitration award has been *made*". Such a provision will not operate to prevent the limitation period from ceasing to run under 13.1, or to effect the provisions of the article as to when arbitration has commenced.

Article 15 (A/CN. 9/70. Annex I)

Where any legal proceedings are commenced upon the occurrence of :

(a) the death or incapacity of the debtor;

(b) the bankruptcy or insolvency of the debtor;

(c) the dissolution of a corporation, company or other legal entity;

(d) the seizure or transfer of the whole or part of the assets of the debtor,

the limitation period will cease to run only if the creditor performs an act recognized under the law applicable to those proceedings for the purpose of obtaining satisfaction or recognition of his claim. Such act may be performed before the expiration of any further period as may be provided for under that law.

Article 14 (Final draft)

In any legal proceedings other than those mentioned in Articles 12 and 13, including legal proceedings commenced upon the occurrence of :

(a) the death or incapacity of the debtor,

(b) the bankruptcy or insolvency of the debtor, or

(c) the dissolution or liquidation of a corporation, company, association or entity;

the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, unless the law governing the proceedings provides otherwise.

Commentary

The purpose of this article is to deal with the effect of those legal proceedings which do not fall within Article 12. This may be because they cannot be classified as judicial proceedings. Further, Article 12 only applies where the *creditor* commences judicial proceedings against the debtor. There are certain legal proceedings (including judicial proceedings) which are commenced by persons who are creditors under other transactions, or which may commence by operation of law.

The article has been amended in the final draft so that the types of legal proceedings enumerated are not exhaustive of the proceedings to which the article can apply. The only requirement now to make the period cease to run is that the creditor should assert his claim in legal proceedings for the purpose of obtaining satisfaction or recognition of the claim.

By reason of the last clause in the article, the body of the article has no effect if the law governing the proceedings provides otherwise, i.e. in such a case the limitation period will continue to run as against the debtor. Whether the law governing the proceedings provides otherwise or not will be determined by the interpretation of that law.

EXTENSION OF THE LIMITATION PERIOD

Article 18 (A/CN. 9/70. Annex I)

(1) Where the creditor has commenced legal proceedings in accordance with Articles 12, 13, or 15 :

(a) the limitation period shall be deemed to have continued to run if the creditor subsequently discontinues the proceedings or withdraws his claim ;

(b) where the court or arbitral tribunal has declared itself or been declared incompetent, or where the legal proceedings have ended without a judgement, award or decision on the merits of the claim, the limitation period shall be deemed to have continued to run and shall be extended for one year respectively from the date on which such declaration was made or from the date on which the proceedings ended.

(2) Where an arbitration has been commenced in accordance with Article 13, but such arbitration has been stayed or set aside by judicial decision, the limitation period shall be deemed to have continued to run and shall be extended for one year from the date of such decision.

Article 15 (Final draft)

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with Articles 12, 13, or 14 but such legal proceedings have ended without a final decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

2. If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended, unless they have ended because the creditor has discontinued them or allowed them to lapse.

Commentary

Articles 12, 13 and 14 provided for the cessation of the running of the limitation period. Where it has ceased to run under those articles, unless some further provision was made, the cessation would continue indefinitely. This article, and those following, deal with the problem and relate the future incidents of the running of the limitation period to the outcome of the legal proceedings.

Under 15.1, where the legal proceedings have "ended *without a final decision binding on the merits of the claim,*"

the period shall be deemed to have continued to run. Whether the proceedings have ended in the specified manner will have to be determined by the forum before which the question may arise upon an interpretation of the facts of the case and the language of the article. If they have ended in the specified manner, the creditor under 15.2 gets a further period from the date of ending for the purpose of instituting another action, if at the time the proceedings ended the limitation period had expired or has less than one year to run, unless the ending was the result of the creditor's discontinuing the proceedings or allowing them to lapse. Where the creditor has discontinued them or allowed them to lapse, there is no reason to give him another opportunity to commence proceedings since it is by his own default that he has lost the possibility of getting judgement. In other cases, since external causes have deprived him of the possibility of getting a final judgement, it is considered fair to give him a second opportunity.

The following questions may be considered in this connection :—

(1) Under the present draft, a creditor who finds the period of limitation is about to expire, and who desires to obtain an extension of the period, can commence proceedings which he knows are bound to end without a final decision binding on the merits of the claim. When proceedings are ended by order of the forum, he will get a further period of at least one year to institute proceedings again. Should a provision be inserted to prevent this ? Opinion is divided on this point. While there is universal agreement that such conduct is undesirable, it is pointed out that in fact a creditor will not resort to such action because he will have to bear the costs of the abortive proceedings.

(2) Is the period of one year granted by 15.2 to be classified as 'the limitation period' within the meaning of Articles 12.2 and 15.2 ? Under the Draft in A/CN. 9/70, Annex I, which speaks of "extending the limitation period," this would clearly be so. The change of language in the final draft leaves the matter in doubt. Further Article 8 states "*Subject to the*

provisions of Article 10, the limitation period shall be four years." This suggests that the term can only be applied to the period of four years, subject to the special exception created by the article.

The practical consequences depending on the classification may be illustrated by the following :—

A commences judicial proceedings against B on 1.1.74. The limitation period expires on 1.1.75. The action ends without a final decision binding on the merits of the claim on 1.1.76, without A having discontinued the proceedings or allowed them to lapse. On 1.6.76 A, as he is entitled to do under article 15.2, institutes a second action against B. This also ends on 1.3.77 without a final decision binding on the merits of the claim, without any responsibility on A's part. A now institutes a third action against B on 1.5.77.

(a) Does the period of one year commencing on 1.1.76 cease to run by the operation of Article 12.1 when the second action is instituted on 1.6.76 ? If the one year period allowed to A from 1.1.76 to 31.12.76 is within the meaning of the phrase 'the limitation period' in 12.1 this will be so.

(b) If the answer is in the affirmative, does Article 15.1 also apply to the second ending so as to give a further period of one year from 1.3.77 to institute another action ? If so, his third action also will not be out of time.

The special provision for arbitration contained in Article 18 (2) of the first draft has been deleted as unnecessary in terms of the final draft.

Article 21 (A/CN. 9/70. Annex I)

Where the creditor has obtained a final judgement or award on his claim in judicial or arbitral proceedings, but such judgement or award is not recognised in another jurisdiction, he shall be entitled, within a period of four years from the date of such final judgement or award, to institute legal proceedings in

that jurisdiction for the purpose of obtaining satisfaction or recognition of his claim.

Article 16 (Final draft)

1. Where a creditor has asserted his claim in legal proceedings within the limitation period in accordance with Articles 12, 13 or 14 and has obtained a decision binding on the merits of his claim in one State, and where, under the applicable law, he is not precluded by this decision from asserting his original claim in legal proceedings in another State, the limitation period in respect of this claim shall be deemed not to have ceased running by virtue of Articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the decision.

2. If recognition or execution of a decision given in one State is refused in another State, the limitation period in respect of the creditor's original claim shall be deemed not to have ceased running by virtue of Articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the refusal.

Commentary

Article 16.1 deals with a case where a creditor has obtained a decision binding on the merits of his claim, but where, under the applicable law, he is not precluded by this decision from asserting his original claim in legal proceedings in another State. The limitation period in respect of these possible proceedings is deemed to have continued to run. The result may be that the period may have expired or not, but in any event the creditor is entitled to an additional period of one year from the date of the decision for the purpose of instituting a second action, e.g. :—

A commences proceedings for non-payment of the price against B in State X on 1. 1. 74, and gets a decision

binding on the merits of the claim on 1. 1. 75. The applicable law permits A to commence proceedings for non-payment of the price against B in State Y despite this decision. The limitation period has expired on 1. 12. 74 (or will expire on 1. 2. 75). A is given a further period of one year from 1. 1. 75 to commence proceedings against B in State Y if he so desires.

No provision corresponding to this appears in the first draft and the provision is one on which there has been no consensus. The arguments in favour of such a provision appear to be the following :

(a) A creditor, although he may get a decision in one State in his favour binding on the merits of the claim, may not be able to obtain satisfaction, because, for example. the debtor has disposed of his assets in that State. It is then fair to give him a second chance.

(b) The remedies available in the second State, e.g. specific performance, which are not available in the first State, may also be required to secure justice for the creditor.

As against this, it may be argued that :

(a) A creditor should select his forum with diligence, and should select that forum from which he can get maximum redress. If he is careless in his selection of the forum he should bear the consequences. He should also have taken the precaution of instituting parallel actions, if this was desirable.

(b) It is undesirable to allow a debtor to be faced with successive actions, where the first has reached a decision on the merits.

Although a provision corresponding to 16.2 appeared in the earlier draft, there is still no consensus on it. On the one hand, it is regarded as desirable, because it would be unfair to deprive a creditor of the chance of instituting a second action when recognition or execution is thus refused. On the other hand, it is argued that the creditor should have exercised

diligence in selecting the forum most advantageous to him, where execution of the decision in that very forum would satisfy his claim. The present text attempts to find a via media by giving the creditor a second chance, but reducing the period available for commencing proceedings to one year (as against the earlier four years).

The following questions also may require consideration :—

(1) Is it intended that Article 15 and Article 16.1 are to have mutually exclusive applications ? Article 16.1 does not use the term '*final* decision', whereas Article 15 does. As a result, there appear to be cases to which both 15 and 16.1 may simultaneously apply, e.g.

A commences legal proceedings against B in State X. They end on 1.1.75 with a decision binding on the merits of the claim in State X, but which decision is not a *final* decision (because e. g. it is subject to review). The decision becomes final in State X on 1.2.77 (or does not become final at all for some reason independent of A's action). As at 1.1.75, do both 15 and 16.1. apply ?

(2) As at present drafted, under 16.1 a creditor gets a second chance of commencing proceedings irrespective of whether he loses or wins in the first proceedings on the merits of the claim. Is it desirable to give him the second chance when he loses ? 16.2 only contemplates the case where he succeeds in his first proceeding.

(3) If the additional one year granted under 16.1 and 16.2 are classified as within the meaning of the term "limitation period" some of the problems set out earlier arise. A large series of successive actions become possible. This period of one year its perhaps not intended to be so classified. Article 22 provides final cut-off periods of 8 years and 10 years beyond which no extension is possible. But no consensus was reached on Article 22.

Article 14 (A/CN. 9/70. Annex I)

The institution of judicial or arbitral proceedings against one debtor shall have effect in relation to any other person jointly and severally liable with him [or liable under a guarantee], provided that the creditor, before the expiration of the limitation period, informs such person in writing that the proceedings have been instituted.

Article 20 (A/CN. 9/70, Annex I)

[Where judicial or arbitral proceedings are instituted against the buyer within the limitation period prescribed by this Law either by a sub-purchaser or by a person jointly and severally liable with the buyer, the buyer shall be entitled to an additional period of one year from the date of the institution of such proceedings for the purpose of obtaining recognition or satisfaction of his claim against the seller].

Article 17 (Final draft)

[1. Where legal proceedings have been commenced against one debtor within the limitation period prescribed by this Convention, the limitation period shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

2. Where legal proceedings have been commenced by a sub-purchaser against the buyer, the limitation period prescribed by this Convention shall cease to run in relation to the buyer's claim against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

3. In the circumstances mentioned in this article, the creditor or the buyer must institute legal proceedings against the party jointly or severally liable or against the seller, either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal

proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later.]

Commentary

No consensus was reached on this article. The provisions of Article 17.1 in regard to legal proceedings relating to debtors jointly and severally liable have been supported for the following reasons :

(1) Municipal legal systems vary in the effect they attribute to an action by a creditor against one such debtor. In some, the limitation period is interrupted, in others it is not. This provision provides a uniform rule.

(2) If not for this rule, a creditor who is not certain whether one debtor can satisfy a judgement will have to sue both debtors lest the period of prescription were to expire and he be later precluded for sueing the other debtor. Where the debtors are resident in two countries this will often entail considerable expense.

It has been criticised for the following reasons :—

(1) It creates unnecessary complications.

(2) It is unduly favourable to the creditor.

The further course of the interruption created by 17.1 is determined by 17.3. Assuming that the policy behind 17.1 is acceptable, the following matters require consideration :

(a) In its present draft, the time-limit given within which the creditor must notify the debtor not sued is the limitation period. Is this too long ? e. g.

A (having his place of business in State X) and B (having his place of business in State Y) are jointly and severally liable to C (having his place of business in State Z). The limitation period of four years commences to run on 1.1.74. C commences an action against A on 1.2.74. He

notifies B in writing of the action against A on 1.12.77. Such notification is within time. The limitation period (which has upto now been running as against B) now ceases to run with retrospective effect from 1.2.74 as against B. Upto 1.12.77, B may have been ignorant of C's action against A and may have destroyed the relevant evidence in his possession.

The insertion of a shorter period of time in which C must notify B (e. g. within two weeks of commencing legal proceedings against A) may be more equitable. It is assumed in the above example that the time from which the period ceases to run against B is the date of commencement of proceedings against A. If it is the date of notification in writing to B this should be made clear.

(b) The limitation period should cease to run against B only in respect of the particular claim asserted against A, and not any other claim. It may be considered whether a phrase such as "in respect of the claim asserted" should be inserted at an appropriate point.

Article 17.2 is intended to provide for the case where the buyer has a remedy against the seller only in the event of the sub-purchaser sueing him, or where he may have a remedy in any event, but does not wish to press it unless the sub-purchaser sues him. In such a case if the sub-purchaser commences proceedings towards the very end of the limitation period, the buyer may, in the absence of such a provision, have insufficient time to commence proceedings against the seller. The arguments against this provision are that it complicates the Convention, and makes the period of limitation between buyer and seller depend on the actions of a third party.

In this situation, on certain facts, the time allotted to the buyer to give notice in writing appears to be too long, in others too short. Thus where the sub-purchaser commences proceedings immediately after the start of the limitation period the buyer has over three years to give notice to the seller. If,

however, the proceedings are commenced just before the period expires, he may have insufficient time to give notice.

Article 17.3 provides an extension of a possible maximum period of one year beyond the normal limitation period to the party in whose favour the limitation period ceased to run to commence legal proceedings (i.e. where the proceedings are instituted at the very end of the period of limitation).

Article 16 (A/CN. 9/70. Annex I)

Where the creditor performs any act, recognized under the Law of the jurisdiction where such act is performed as manifesting his desire to interrupt the limitation period, a new limitation period of four years shall commence on the date on which notice of this act is served on the debtor by a public authority.

Article 18 (Final draft)

1. Whether the creditor performs, in the State where the debtor has his place of business and before the expiration of the limitation period, any act, other than those acts prescribed in Articles 12, 13 and 14, which under the law of that State has the effect of recommencing the original limitation period, a new limitation period of four years shall commence on the date prescribed by that Law, provided that the limitation period shall not extend beyond the end of four years from the date on which the period would otherwise have expired in accordance with Articles 8 to 11.

2. If the debtor has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of Article 2 shall apply.

Commentary

This article reflects a decision of policy that a creditor should, under the draft Convention, be entitled to the advantage of any act which, under the law of the State where the debtor has his place of business, has the effect of recommencing the

running of the limitation period. However, it has been argued that the Convention alone should determine what acts recommence the running of the period; and that a provision such as this creates difficulty for businessmen who now have to find out the law of limitation in the State of the debtor's place of business.

Whether the act is sufficient to recommence the running of the period, and the date from which such recommencement is to operate, are determined by the law of the State of the debtor's place of business. However, the total length of the limitation period cannot extend beyond the end of four years from the date on which the period would otherwise have expired.

The new limitation period is always four years. This may be difficult to justify when the original period was shorter, e.g.

> A (having his place of business in State X) sells to B (having his place of business in State Y) goods containing a defect which could be discovered when the goods are handed over. The limitation period in respect of a claim arising for such a defect is two years (Article 10). B performs an act in State X which has the effect of making the period of limitation recommence. Once it recommences, the new period of limitation is four years, and not two years.

The intention appears to be that this extended period cannot be further extended (e.g. by recourse to Articles 12, 13 or 14). This should perhaps be made more explicit.

Article 17 (A/CN. 9/70. Annex I)

(1) Where the debtor acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run by reason of and from the date of such acknowledgement.

(2) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledgement if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(3) Payment of interest shall be treated as payment in respect of the principal debt.

[(4) The provisions of this article shall apply whether or not the limitation period prescribed by Articles 8 to 11 has expired.]

Article 19 (Final draft)

1. Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

2. Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph(1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Commentary

It has been said that "the basic purposes of prescription are to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of certainty in legal relationship" (A/C N. 9/70/Add. 2). As a corrollary, it follows that when events occur after prescription has commenced to run which provide reliable evidence, or provide anew the required certainty, there is no reason why the period should not recommence running. Article 19 deals with specific events within this class which are in many legal systems regarded as sufficient to make the period recommence.

Article 19.1 provides for the case where the debtor "acknowledges in writing his obligation to the creditor". Whether any particular writing would be an acknowledgement of the obligation would be a matter of interpretation. The requirement of writing has been introduced in the interests of certainty.

The acknowledgement must be made "before the expiration of the limitation period". This requirement did not exist under the first draft (vide 17.4 of A/C N. 9/70. Annex I). But at the debates at the fifth session a consensus emerged in favour of the view that once the prescription period has elapsed, the claim should be regarded as incapable of revival. In some civil law systems, the passing of the prescription period has the effect of extinguishing the right. A theory of revival by acknowledgement, therefore, encounters theoretical difficulties in these systems.

Whether the writing in question constitutes an acknowledgement in writing by the debtor of his obligation (which would invoke the operation of 19.1), or constitutes the creation of a new obligation (sometimes called a "novation") which would be outside the ambit of 19.1, may often be a question of real difficulty. The tribunal dealing with the matter will have to classify the writing in question.

Under 19.2, where an acknowledgment can reasonably be inferred from payment of interest or partial performance, this has the same effect as under 19.1. The new limitation period will presumably commence from the date of payment or partial performance. It is not explicit whether the payment of interest or partial performance should take place before the expiration of the limitation period. However, since 19.2 appears merely to give two special cases of acknowledgement which are not in writing, the limitations contained in 19 1 are probably intended to apply to 19.2 as well. Thus, the payment of interest or partial performance are probably intended to have effect only if done before the expiration of the limitation period.

A question which may require consideration is whether the new limitation period created by the operation of Article 19 should be four years where the original limitation period was only two years (e. g. under Article 10 — vide commentary on Article 18).

Under Article 17 (3) of A/CN. 9/70. Annex I, it is clear that 'payment of interest' refers to interest paid in respect of

the principal debt. Article 19.2 lacks this clarity. The insertion of the words 'in respect of the principal obligation' after the word 'interest' may be considered.

The question is sometimes debated whether the obligation to pay interest is or is not independent of the principal obligation. If it is held to be independent, payment of interest may be construed as an acknowledgment only of obligation to pay interest — ("that obligation"). But acknowledgment that interest is due will in turn almost always be an acknowledgment that the principal obligation is due.

Successive extensions are possible under this article, e. g.

A (the buyer) owes B (the seller) the purchase price, together with interest thereon. The limitation period has commenced to run on 1.1.73. On 1.3.73 A pays the interest due, on 1.10.73 he pays part of the principal, and on 1.1.74 he acknowledges in writing the amount outstanding. Each of these acts will successively start a new four year period of limitation. However, the extensions will be subject to the overall limitation imposed by Article 22. However, there has been consensus on that article.

Article 19 (A/CN. 9/70. Annex I)

Where, as a result of a circumstance which is not personal to the creditor and which he could neither overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his claim, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond 10 years from the date on which the period would otherwise expire in accordance with Articles 8 to 11.

Article 20 (Final draft)

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither

avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond 4 years from the date on which the period would otherwise expire in accordance with Articles 8 to 11.

Commentary

The purpose of this article is to give further time to a creditor when, through no fault of his, he has been prevented from causing the limitation period to cease to run. The phraseology of the two drafts is different. The conditions to be satisified under the final draft are :

(1) the circumstances must be beyond the control of the creditor. This points to the fact that the circumstance must have been caused by factors beyond the control of the creditor.

(2) the circumstance must be one which he could neither avoid nor overcome.

The first condition is perhaps intended to point to the relationship of the creditor to the occurrence of the circumstance, and the second to his relationship to the continuance of the circumstance. However, the distinction is not explicitly drawn, and it may be suggested that the two conditions overlap, e. g. if a circumstance is beyond the control of the creditor, he cannot overcome it. However, circumstances can be imagined where one condition is satisfied but the other is not, e. g.

> A travels through a plague stricken area, and falls ill despite his taking preventive medicines. As a result he is unable to commence proceedings which would interrupt the running of the prescription period. Here it might be argued that while his falling ill was beyond his control, he could have avoided it by not going through the plague stricken area.

The phrase (a circumstance) "which is not personal to the creditor" in the first draft has been deleted, and the phrase (a circumstance) "which is beyond the control of the creditor" has been substituted in the final draft. Thus cases of personal disability such as lunacy, are now sufficient circumstances, though they would not have been sufficient under the earlier draft.

It is sufficient for the application of Article 20 that the circumstance must have prevented the creditor from causing the limitation period to cease to run for any part of the limitation period. The fact that it did not prevent the creditor from causing the limitation period to cease to run for another part of the limitation period is irrelevant, e. g.

> The limitation period of four years is due to expire on 1.1.74. On 24.12.73 an insurrection breaks out in State X which prevents A, the creditor, from commencing legal proceedings before 1.1.74. Conditions return to normal on 8.1.74. The period of limitation is extended by one year from 8.1.74. The fact that A was not prevented from commencing proceedings up to 24.12.73 is irrelevant.

The last sentence places a maximum on the possible extension of the period. Up to this maximum, the one year period of extension can itself be extended by circumstances which again invoke the application of this article.

MODIFICATION OF THE LIMITATION PERIOD

Article 22 (A/CN. 9/70, Annex I)

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.
2. The debtor may, at any time after the commencement of the limitation period prescribed in Articles 9 to 11, extend the limitation period by a declaration in writing to the creditor, provided that such declara-

tion shall in no event have effect beyond the end of 10 years from the date on which the period would otherwise expire or have expired in accordance with Articles 8 to 11.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 21 (Final draft)

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed. In no event shall the period of limitation be extended beyond the end of four years from the date on which it would otherwise have expired in accordance with the provisions of this Convention.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

Commentary

Article 21.1 is prompted by two considerations. Since the limitation period is regarded as a matter of public policy, it is undesirable that parties should be permitted to modify it. Further, if the power to modify were granted, it would enable the stronger party to modify the period to his own benefit.

The exception provided in Article 21.2 is made with two cases in mind. The first is where the parties are in negotiation over a dispute towards the end of the limitation period, and they wish to continue negotiations without prejudice to their legal rights. The second is where the resolution of a dispute between the parties may depend on some external event (e. g. the decision of a 'test case') and it is desired that the legal *status quo* be preserved until the happening of this event. If not for this provision, parties placed in these situations would be forced into litigation.

The limitation period can only be extended after it has commenced to run, i. e. the contract has not only been concluded, but a claim has also fallen due. At this stage the stronger party would not be in a position to coerce the weaker party. If power to modify before this time was permitted, the stronger party could coerce the weaker party. The requirement that the declaration should be in writing has been made in the interests of certainty.

The maximum period beyond which the extension cannot be extended is specified. But there is nothing to prevent the extension from being for a lesser period.

The extension will normally take place from the date of the declaration, though presumably it is open to the debtor to fix any date for the extension, provided such date is within the period of limitation, e. g. A, the debtor, by declaration dated 1.1.74, declares that the limitation period which would otherwise expire on 1.1.75, is extended for one year from that date. The extension will take effect from that date and not from 1.1.74.

The parties cannot by agreement shorten the period of limitation. There has been support for the view that this should be permitted after the period of limitation has commenced running, at which stage it is felt that the stronger party will not be able to coerce the weaker party.

21.3 is intended to provide for two situations. Firstly, certain contracts of sale provide that the exercise of a claim

depends upon the performance by one party of an act other than the institution of judicial proceedings within a period of time, e. g. that the buyer can only make a claim in respect of defective goods if he gives notice of such a claim to the other party within two weeks of discovery of the defect. Provided such a clause is valid under the applicable law, its validity is not affected by this article. The intention here appears to be that the debtor cannot by declaration under 21.2 alter the duration of such a period. This is perhaps inserted out of an abundance of caution, since such a period would not normally be construed as "the limitation period" within the meaning of 21.2. Secondly, certain contracts contain a clause that the acquisition or enforcement of a right is dependent upon the act of one party submitting the controversy to arbitration within a certain period of time. The validity of such a clause is not to be affected by this article.

An alternative version of 21.3 which may be considered would be :

> "3. No declaration under sub-paragraph 2 shall have any effect upon a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law."

LIMIT OF EXTENSION AND MODIFICATION OF THE LIMITATION PERIOD

Article 22 (Final draft)

[Notwithstanding the provisions of Articles 12 to 21 of this Convention, no legal proceedings shall in any event be brought after the expiration of ten years from the date on which the limitation period commences to run under Articles 9 and 11, or after the expiration of eight years from the date on which the limitation period commences to run under Article 10]

Commentary

This article provides that one important objective of a limitation law, namely, the achievement of finality in legal relations, ultimately prevails over considerations which have been invoked to give a party an extension of the original period in other articles. Some of these articles contain their own overall maximum, and these will normally operate. But where the maximum possible under those articles is greater than the maximum fixed by this article the latter maximum will prevail. Such a provision was not included in the earlier draft.

This provision is one on which no consensus has been reached. Since overall maximum periods have been provided in Articles 18, 20 and 21 on which a consensus has been reached, the difference of opinion appears to relate to possibilities of indefinite extension contained in other articles. While in particular cases the extension provided for is desirable, it is doubtful whether the possibility of indefinite extension is desirable. This article may, therefore, be acceptable.

The fact that the overall limitation is *ten* years in respect of Articles 9 and 11, and *eight* years in respect of Article 10, is probably a concession to the view expressed by some representatives during the debates that in the case of claims arising out of defects or lack of conformity a period of limitation shorter than in other cases was desirable.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23 (A/CN. 9/70. Annex I)

Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23 (Final draft)

Expiration of the limitation period shall be taken into cosideration in any legal proceedings only at the request of a party to such proceedings.

Commentary

During the course of the debates at the fifth session there was a divergence of view on the desirability of this article. There are two possible views :—

(a) That the article should remain.

(b) That the article should be deleted and replaced by one which empowers (or casts a duty on) the tribunal to raise the question of its own motion, when the parties did not do so.

In favour of (a) it has been argued that by laying down some rule it creates uniformity; at present municipal legal systems vary on the question. Again, although the limitation of stale claims is a matter of public policy, a debtor to whom a plea of prescription is available will almost always raise it, and the requirements of public policy will be satisfied. Also, the alternative contained in (b) has disadvantages (these will be considered below). As against (a) it is argued that it stultifies public policy by permitting the parties to agitate stale claims. The policy contained in Article 21 which in general does not allow the limitation period to be modified is also negated by this provision. Further, national laws may differ as to the stage at which a request for consideration that the limitation period has expired can be made. If it is possible to make the request at a late stage of the proceedings, this will introduce an element of uncertainty.

In favour of (b) it is argued that this promotes public policy by always limiting stale claims, and that it is undesirable to permit the parties to impose on a tribunal the burden of investigating such claims. Against (b) it is argued that it would impose on the tribunal the difficult task of investigating a claim which neither party wishes to be investigated.

The final decision has been to retain Article 23, but to permit a reservation under Article 35 that a State shall not be compelled to apply the provisions of Article 23. The possibility of many reservations will detract from the uniformity sought to

be achieved by the Convention, and an attempt to reach consensus on this matter is desirable.

Article 24 (A/CN. 9/70. Annex I)

(1) Subject to the provisions of paragraph 2 of this article and of Article 23, no claim which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, the creditor may rely on his claim as a defence for the purpose of set-off against a claim asserted by the other party :

(a) if both claims relate to the same contract ; or

(b) if the claims could have been set-off at any time before the date on which the limitation period expired.

Article 24 (Final draft)

1. Subject to the provisions of Article 23 and of paragraph (2) of this article, no claim which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done :

(a) If both claims relate to a contract or contracts concluded in the course of the same transaction ; or

(b) If the claims could have been set-off at any time before the date on which the limitation period expired.

Commentary

Article 24.1 lays down the basic purpose of the law of limitation. A claim would beome barred by limitation after the expiration of the applicable limitation period for that claim. This is nowhere explicitly stated, but can be clearly gathered from the articles considered together. Since Article 24.1 is, *inter alia*, made subject to Article 23, the result is that if a party does not raise the question of limitation, the claim can be recognized or enforced in legal proceedings (since expiration of the limitation period is not taken into consideration). A claim which is not recognized presumably cannot be enforced and a claim which is enforced must presumably be recognized. Perhaps both words are used out of an abundance of caution.

24.2 deals with the situation where a party makes a claim within the limitation period, but the party against whom this claim is made also has a claim which he wishes to use as a defence or set-off. The latter party is permitted to do this unconditionally even after the expiration of the limitation period in respect of his claim, where he seeks to rely on the claim *as a defence*. The basis of this rule is that the considerations of public policy which operate in favour of preventing the agitation of stale claims are outweighed by the unfairness to a debtor who will suffer loss by being unable to interpose a possible valid defence merely because of the expiration of time. Since this Convention only applies to an international contract of sale which conforms to certain conditions. clearly the claim which is raised as a defence must also relate to such a contract. But it does not appear to be necessary that the claim *by way of defence* (as opposed to a claim by way of set-off) and the claim by way of attack should relate to contracts concluded in the course of the same transaction.

e.g. A and B enter into an international contract of sale, and a claim becomes due to B against A on this contract on 1.1.73. They enter into a second independent international contract of sale on 1.2.77, and a claim becomes due to A against B on the second contract on 1.6.77. A commences legal proceedings against B on the second

contract on 1.1.80. If the applicable law permits this, B can on 1.2.80 rely on his claim as a defence, though the limitation period in regard to this claim expired by 1.1.77.

The ability to use a claim as a defence, therefore, can continue under 24.2 despite the expiration of the limitation period, subject to the limitation laid down by Article 22. However, as has been noted, no consensus was reached on that article.

Where the claim is relied on *as a set-off*, certain conditions have to be satisfied. These are set out in 24.2 (a) and 24.2 (b). Two examples may be given clarifying the different situations to which (a) and (b) apply.

(i) A and B enter into two international contracts of sale in the course of the same transaction. A claim becomes due to B against A on 1.1.73 on the first contract. The limitation period on this expires on 1.1.77. A claim becomes due to A against B on 1.3.77 on the second contract. B can under 24.2 (a) use his claim under the first contract as a set-off in proceedings instituted by A against him on the second contract. But 24.2 (b) is not applicable as the claims could not have been set-off before 1.1.77.

(ii) A and B enter into two international contracts of sale but not in the course of the same transaction. A claim accrues to B against A under the first contract on 1.1.73. This claim is prescribed on 1.1.77. A claim accrues to A against B on 1.1.75. A commences legal proceedings against B on 1.1.78. B can rely on his claim as a set-off under 24 (b) because the respective claims could have been set off between 1.1.75 and 1.1.77. But 24.2 (a) has no application because the contracts were not concluded in the course of the same transaction.

A claim to set-off would be a species of defence, but claims may be relied on as defence without invoking set-off, e.g. a claim for rectification of the contract.

Where a single contract is involved, it is clear that the claim by way of attack and the claim by way of defence or set-off must relate to a contract of international sale of goods. Otherwise, the draft Convention will not apply. Where, however, 24.2 is sought to be applied to several contracts, the question arises whether all such contracts must be international contracts of sale. The question can be illustrated as follows :—

(a) A and B enter into two contracts not in the course of the same transaction. The first is not an international contract of sale, but the second is. A claim falls due to B against A on the international contract, which is prescribed by 1.1.75. A claim falls due to A against B on the other contract on 1.2.75, and A institutes legal proceedings. If the applicable law permits this, can B rely on his claim *as a defence* in this action, even though the claim by way of attack is not based on an international contract ?

(b) A and B enter into two contracts in the course of the same transaction. The first is not an international contract of sale, but the second is. A claim arises to B against A on the international contract, which is prescribed by 1.1.75. A claim arises to A against B on the other contract on 1.2.75, and A institutes legal proceedings. If the applicable law permits this, can B rely on his claim *by way of set-off* in this action, even though the claim by way of attack is not based on an international contract ?

It would appear that the ability to use a claim by way of defence or set-off should be permitted only where the contracts involved are all international contracts. Otherwise two different regimes of limitation would apply within the same action. The desired result can perhaps be achieved by inserting the words "relating to an international contract of sale" between the words "claim" and "asserted" in the body of 24.2.

Article 25 (A/CN. 9/70. Annex I)

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be

entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

Article 25 (Final draft)

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

Commentary

It has been said that this article "was addressed to a situation where a party performed a contract after the expiry of the limitation period-and then realized that there was no legal requirement for him to do what he had done, with the result that he sued for restitution. Article 25 was not designed to have any effect on claims for restitution based on other grounds, such as, that performance had been obtained by fraud". The intention is to prevent a restitutionary claim *based solely* on the ground that, unknown to the performer, performance was not due because the limitation period had expired. It may be considered whether the substitution of other words for "thereby" (e.g. "on that account alone") may not make this intention clearer.

The phrase "even if he did not know" suggests that *a fortiori* if he did know he cannot recover.

Article 26 (A/CN. 9/70. Annex I)

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

Article 26 (Final draft)

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

Commentary

The object of this article is to avoid possible divergent interpretations on the question whether the obligation to pay interest on the principal debt is an independent obligation and, therefore outside the scope of the draft Convention. It would, therefore, appear that even if the obligation to pay interest was undertaken in an independent contract, the draft Convention would apply.

CALCULATION OF THE PERIOD

Article 27 (A/CN. 9/70. Annex I)

The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month.

CALCULATION OF THE PERIOD

Article 27 (Final Draft)

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month of the limitation period.
2. The limitation period shall be calculated by reference to the calendar of the place where the legal proceedings are instituted.

Commentary

The precise point of time when the limitation period expires can be very important. It will depend on the point of commencement of the period, the duration of the period, and the method of calculating the duration. The present article does not define the method of calculation, but states the result of the

method, leaving the method to be inferred. Taking a simple case :—

(1) A claim becomes due on 1.1.74. Article 9 applies to the claim, and the limitation period commences on that day.

(2) The limitation period applicable is four years (Article 8). This would be calculated at the rate of 365 days as constituting an year, or 366 days in a leap year.

(3) If Articles 8 and 9 only were applied, the claim would appear to be barred by limitation at the end of 31.12.78.

(4) By reason of this Article, however, it expires at the end of 1.1.79, i.e. four years and one day after it commenced to run.

The method of calculation which would achieve this result would be to leave out of account the first day on which the period commenced to run, and this appears to be what is intended by the present article (A/C N. 9/70/Add. 1, p. 63). However, this may be construed as at variance with Article 9.

It may be asked whether Article 27 applies to the calculation of all periods of time specified in the draft Convention for the commencement of legal proceedings (e.g. to the periods of one year specified in Articles 15, 16 and 17). This would depend upon whether such periods are included within the phrase "the limitation period" as used in the draft Convention. In some contexts it is clear that the extended or new period is to be classified as a "limitation period" (e.g. Articles 18 and 19, "new limitation period"; Articles 20 and 21 - extended limitation period), but in others (e.g. Articles 15, 16 and 17) it is not. It may be desirable that the matter should be put beyond doubt. However, it is probable that the periods of one year are intended to be included within the term. The result would be that if a period of one year commenced on, e.g. 1.1.74, it would end at the end of 1.1.75.

Article 27.2 appears to be an attempt to provide a solution to a difficult problem which occurs when a particular time

and date at one place corresponds to a different time and date at another place, e.g. a breach of contract occurs at 6 p.m. on 8th April in London. At this time, it is 4.00 a.m. on the 9th in Sydney, Australia. Which point of time does an Australian court take into account as the commencing point in calculating the limitation period ? Under 27.2 the date of commencement would be the 9th April in an Australian court (but would be 8th April in an English court).

Article 28 (A/CN. 9/70. Annex I)

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in Article 12 or asserts a claim as envisaged in Article 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

Article 28 (Final draft)

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in Article 12 or asserts a claim as envisaged in Article 14, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

Commentary

This provision is self-explanatory. It is not extended to cover arbitration proceedings because official holiday and *dies non juridici* are not generally an impediment to the more informal manner in which arbitration proceedings are commenced. (vide Article 13 (2)).

Article 35 (A/CN. 9/70 Annex I)

(1) Any State may declare, at the time of the deposit of its instrument of ratification or accession to the present Convention, that it shall not be compelled to apply the provisions of Articles 12, 14, 15, 16 or 18(1) (b) of this Convention where the relevant acts or circumstances took place outside the jurisdiction of that State.

(2) Any State which has not made a declaration under paragraph 1 of this article may at any time declare that it will not be compelled to apply the provisions of the articles referred to in that paragraph where the relevant acts or circumstances took place within the jurisdiction of a State which had made a declaration under that paragraph.

(3) Any State which makes a declaration under paragraph 1 or 2 of this article shall specify the particular article or articles of this Convention in respect of which the declaration is made.

INTERNATIONAL EFFECT

Article 29 (Final draft)

A contracting State shall give effect to acts or circumstances referred to in Articles 12, 13, 14, 15, 17 and 18 which take place in another contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstance as soon as possible.

Commentary

This article seeks to give an "international effect" to certain acts and circumstances. The purpose is to create a legal regime for the contracting States whereby acts performed in one contracting State would have the identical legal consequences in all other contracting States as they have in the State in which they are performed. The provision promotes uniformity of legal consequences, inasmuch as the relative position of debtor and

creditor in relation to limitation remains the same in all contracting States. From the fact that Article 35 of the first draft permitted a State by reservation to *exclude* the 'international effect' of Articles 12, 14, 15, 16 and 18 (1) (b), the inference is that these articles were otherwise to have 'international effect' in that draft. Article 29 now expressly confirms this effect, and the present draft Convention contains no provision permitting a reservation excluding this effect. The emphasis on international effect' has, therefore, been taken one step further. The view that 'adherence to the Convention by some States would be facilitated if they could, by declaration, limit the 'international effect' that results from certain of the articles of the Uniform Law has not prevailed.

Article 16 is excluded from the ambit of this article because it specifically deals with the problem for which this article makes general provision.

The creditor can obtain the advantage given by Article 29 only if he takes the steps mentioned in the article.

The article appears only to operate as between creditor and debtor, e.g.

> A sues B in State X (a contracting State) on a contract on which B and C are jointly liable. A gives C notice as required by Article 17.1, and it is clear that the limitation period will cease to run against C in State X. However, Article 29 will not operate as C is not a "debtor" — "a party against whom a creditor asserts a claim" — Article 1.3 (c). Therefore A's acts may not be given effect to against C in other contracting States.

It may be considered whether this article should be amended so that the operation of Article 17.1 as against C is given international effect. The article is designed to have a two-fold effect :

(1) That the other contracting States recognize the effect in the State, where they take place, of the acts or circumstances in question.

(2) That the other contracting States recognize that the acts or circumstances have identical legal effect in their own legal systems.

Some difficulties involved in the application of this article may be considered : Firstly, it sometimes requires for its application the investigation by the courts of one State of the municipal law of another State (e.g. was the act performed by a creditor recognized as commencing judicial proceedings ? — Article 12; did an act performed by a creditor have the effect of recommencing the period of limitation ? — Article 18). This is often a difficult procedure. Secondly, the phrases "reasonable steps" and "as soon as possible" in the proviso may create some uncertainty. The specification of a time-limit may be considered.

The exclusion of the circumstances mentioned in Article 20 (i.e. '*force majeure*') from the ambit of Article 29 is reasonable, because even if a creditor is prevented by the circumstances mentioned in Article 20 from causing the limitation period to cease to run in one contracting State, there is nothing to prevent him from causing the limitation period to cease to run in another contracting State. Thereupon, Article 29 will come into operation and make the period cease to run in the contracting State where he was prevented from causing the limitation period to cease to run. In any event as regards that State Article 20 will have its own protective effect. It is highly unlikely that circumstances will occur preventing a creditor from causing the limitation period to cease to run in all contracting States.

The exclusion of Article 19 is more debatable. It is not clear that, taken by itself, an acknowledgment under Article 19 has 'international effect'. If this is intended, it can perhaps be made explicit.

PART II IMPLEMENTATION

Article 29 (A/CN. 9/70. Annex I)

(1) Each contracting State shall, in accordance with its constitutional procedure, give to the provisions of Part I of this Convention the force of law, not later than the date of the entry into force of this Convention in respect of that State.

(2) Each contracting State shall communicate to the Secretary-General of the United Nations the text whereby it has given effect to this Convention.

Article 30 (Final Draft)

Subject to the provisions of Article 31, each contracting State shall take such steps as may be necessary under its constitution or law to give the provisions of Part I of this Convention the force of law not later than the date of the entry into force of this Convention in respect of that State]

Commentary

This article has been one on which no consensus was reached.

Under the constitutional law of certain States a treaty acquires municipal legal effect *ipso facto* when it is entered into. In other States, municipal legislation is required to achieve this effect. The phrase "such steps as *may* be necessary" is designed to accommodate both systems of law. The requirement that such steps, where necessary, should be taken by a State before the entry into force of the Convention in respect of that State is desirable from a practical point of view.

The article is also affirmation of the intention that the Convention is to apply as municipal law. The scope of applicability as municipal law depends on other provisions

Since the draft Convention is intended to secure uniformity, it is intended that Part I is to become operative as municipal

law without modification. Permissible reservations are set out in Part III. It is not very clear why no consensus was reached on this provision. If the reason is that some States desire to enact Part I of the Convention, not in the identical form drafted, but in a modified form, this will seriously detract from the uniformity sought to be achieved by the Convention, and would not be desirable.

Article 31 (Final draft)

[In the case of a federal or non-unitary State, the following provisions shall apply :

(a) With respect to those articles of this Convention that come within the legislative-jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.]

Commentary

This article is designed to secure the objects of Article 30 in relation to a federal or non-unitary State. It provides for the

case where legislative competence on the subject-matter of the Convention is divided, and the treaty making authority does not have the necessary competence. There was no corresponding provision to provide for a federal State in the earlier draft, and this article is an attempt to fill the lacuna.

On this article also there has been no consensus.

Article 30 (A/CN. 9/70, Annex I)

Each contracting State shall apply the provisions of the Uniform Law to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 32 (Final draft)

Each contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

Commentary

The point of time when a contracting State is to apply the provisions of the Convention has to be clearly fixed. The starting point selected avoids possible problems concerning retrospective operation.

PART III. DECLARATIONS AND RESERVATIONS

Article 31 (A/CN. 9/70. Annex I)

(1) Two or more contracting States may at any time declare that any contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of Article 3 of this Convention, because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.

(2) Any contracting State may at any time declare with reference to such State and one or more non-contracting States that a contract of sale between a seller having a place of business in one of these States a and a buyer having a place of business in another of these States shall not be considered international within the meaning of Article 3 of this Convention because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.

(3) If a State which is the object of a declaration made under paragraph 2 of this article subsequently ratified or accedes to this Convention, the declaration shall not remain in effect unless the ratifying or acceding State declares that it will accept it.

Article 33 (Final draft)

1. Two or more contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and buyer having a place of business in another of these States shall not be considered international within the meaning of Article 2 of this Convention, because they apply the same or closely related legal rules which in the absence of such a declaration would be governed by this Convention.

2. If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of Article 2 shall apply.

Commentary

The purpose of this Article is to enable contracting States which had already achieved regional unification in regard to their laws on limitation to continue to have the advantages of such unification and also to become parties to the Convention. The question of excluding the operation of the Convention in contracts with parties having their places of business in non-contracting States (Article 31 (2) of the earlier draft) no longer arises since such contracts are already excluded from the ambit of the Convention under the present Article 3.

Article 32 (A/CN. 9/70. Annex I)

A contracting State may declare. at the time of the time of the deposit of its instrument of ratification or accession. that it will not apply the provisions of the Uniform Law to actions for annulment of the contract.

Article 34 (Final draft)

A contracting State may declare, at the time of deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

Commentary

There was a difference of view as to whether actions for annulment of the contract should or should not be governed by the Convention. This article is intended for those States who are of the view that such actions should be excluded.

Article 35 (Final draft)

Any state may declare, at the time of the deposit of its instrument of ratification or accession to this Convention. that it shall not be compelled to apply the provisions of Article 23 of this Convention.

Commentary

This article is intended to provide for the difference of opinion existing in regard to Article 23. One view is that it is desirable that the question of limitation or prescription should be raised by a tribunal *ex mero motu* even if the parties have not raised the question. States which hold this view can make a reservation under this article. The arguments for and against Article 23 have been discussed under that article.

Article 33 (A/CN. 9/70. Annex I)

Any State which has ratified the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964, or which has acceded to that Convention, may at any time declare :

(a) that, by way of derogation from Article 3, paragraph 1, of this Convention, it will apply the provisions of Article 1, paragraph 1, of the Uniform Law annexed to the Convention of 1 July 1964 ;

(b) that, in the event of conflict between the provisions of the Uniform Law annexed to the Convention of 1 July 1964, and the provisions of this Convention, it will apply the provisions of the Uniform Law annexed to the Convention of 1 July 1964.

Article 34 (A/CN. 9/70. Annex I)

(1) Any State which has previously ratified or acceded to one or more conventions on the conflict of laws affecting limitation in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification or accession to the present convention, declare that it will apply the Uniform Law in cases governed by one of those previous conventions only if that convention itself leads to the application of the Uniform Law.

(2) Any State which makes a declaration under paragraph (1) of this article should specify the conventions referred to in that declaration.

Article 36 (Final draft)

1. This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning limitation of legal proceedings or prescription of rights in respect of international sales, provided that the seller and buyer have their places of business in States parties to such a Convention.

2. If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of Article 2 shall apply.

Commentary

This article is necessitated by the fact that there are at present three texts which must be reconciled as far as possible :-

(1) The present draft Convention.

(2) The annex to the Convention relating to a Uniform Law on the International Sale of Goods done at the Hague, 1 July 1964 (ULIS).

(3) The revision of that annex presently undertaken by UNCITRAL (Revised ULIS).

At least two possible conflicts arise in relation to these texts. It has been suggested that Article 49 of ULIS deals with the subject of limitation and conflicts with the provisions of the present draft Convention. Further, both Conventions do not apply in identical circumstances to an international contract of sale. The result is that where a State has ratified or acceded to ULIS. an international sale which comes within the ambit of ULIS may fail to be governed by this draft Convention.

Under the present article, this draft Convention gives way to other conventions containing provisions relating to limitation or prescription, provided that the seller and buyer have their places of business in States parties to the other conventions. The result is that this draft Convention gives way only in a narrow class of case, e.g.,

A (the buyer) has his place of business at the time of conclusion of the contract in State X, and B (the seller) in State Y. If State X and State Y are both parties to this draft Convention, and to another Convention dealing with limitation or prescription, this Convention gives way. If either State is not a party to this Convention, this Convention will not apply and no conflict can arise. If either State is not a party to the other Convention, this article will not operate and this Convention will prevail.

It may be considered whether the proviso should not be made more definite by specifying the time at which the seller and buyer must have their places of business in States parties to a different Convention. For example,

A (the buyer) has his place of business in State X, and B (the seller) in State Y. At the time of the conclusion of the contract both States are parties to this Convention which therefore applies. However, only State X is a party to another Convention which also deals with limitation. At the time of legal proceedings, however, State Y has also acceded to the other Convention.

Formal and final clauses of the Final Draft were not considered by the Commission and it was agreed that they should be submitted for consideration to the Conference of Plenipotentiaries. Hence, the texts of these articles have not been reproduced here.

(iii) REPORT OF THE STANDING SUB-COMMITTEE ON INTERNATIONAL SALE OF GOODS ON THE WORK DONE BY IT DURING THE FOURTEENTH SESSION

1. The Standing Sub-Committee on International Sale of Goods composed of Egypt, Ghana, India, Japan, Nigeria, Pakistan and Sri Lanka held its first meeting on the 10th of January 1973. In the absence of the representative of Pakistan, the representative of Japan, Dr. K. Nishimura acted as Chairman. The representative of Nigeria, Mr. K. B. Olukolu acted as Rapporteur.

A letter dated the 4th of January 1973 from the Legal Counsel of the United Nations to the Secretary-General informing the Committee of a resolution of the General Assembly of the United Nations, No. 2929 (XXVII), to convene the United Nations Conference on Prescription (Limitation) in the International Sale of Goods in 1974 was brought to the notice of the Sub-Committee. The letter also called for comments and proposals from the Committee on the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods, and requested that these should reach the United Nations Secretariat not later than the 30th of June 1973.

The Sub-Committee at its subsequent meetings held on the 13th, 15th and 17th January examined the provisions of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods. Professor K. Sono, of the Secretariat of UNCITRAL, first introduced the Draft Convention to the Sub-Committee by explaining the reasons for its drafting, the structure of the Convention, and the meaning of its provisions. The commentary prepared by the UNCITRAL Secretariat on the Draft Convention (A/CN.9/73) was also placed before the Sub-Committee.

The Sub-Committee expressed its appreciation for the active participation of Professor K. Sono of UNCITRAL and Dr. Mario Matteucci of UNIDROIT and the preparation of the

comments on the Draft Convention by the Secretariat of the Committee which provided a useful basis for the discussion, making it possible for the Sub-Committee to make a close examination of the Draft Convention in the short period at its disposal. The Sub-Committee appreciated the effort of the UNCITRAL to unify and harmonize various national rules of prescription (limitations) which presently constitute obstacles to the development of international trade because of conflicts and divergencies among such existing rules. The Sub-Committee examined the Draft Convention carefully within the time assigned to it and generally approved the approach of the Draft Convention as a workable compromise. However, the Sub-Committee was of the view that the following points needed to be considered at the United Nations Conference.

Article 1

In regard to Article 1 (1), it was considered that the words "the rights of the buyer and seller against each other *relating to a contract of international sale of goods*" were of such wide application that they were capable of being interpreted to include certain types of claims in tort or delict as between the buyer and the seller concerning the contract. It was considered that since claims in delict or tort based upon death of, or personal injury to, any person, and certain other claims are excluded by Article 5 from the sphere of the Convention, actions in tort or delict relating to a contract of international sale of goods may be permitted to come within the sphere of the Convention without any difficulties arising (cf. A/CN. 9/73, para. 6 of commentary to Art. 1).

It is also considered that there is some uncertainty in the definition of the word 'person' contained in Article 1 (3) (f). The Sub-Committee is of the view that this may be clarified by adding certain words contained in the commentary (A/CN. 9/73, para. 11 of commentary to Art 1). The definition would then read as follows :—

"1 (3) (f) "Person" includes corporation, company, association, or entity, whether private or public, which can sue or be sued in its own name under its national law".

Articles 2 and 3

(a) It is considered that if the restricted sphere of application of the Draft Convention is to be maintained, it would be more logical if the limitation in regard to different contracting States contained in Article 3 (1) should be imposed in Article 2 (1). Article 2 (1) would then read :

> "2 (1) For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different contracting States". (Article 3 (1) could, then, be deleted).

(b) However, the possibility of a wider application of the Draft Convention may be considered desirable. Thus, where the rules of the forum permit, it may not conflict with the purpose of the Convention to allow that forum to apply the Convention to govern a contract of international sale of goods even when one or both parties do not have their place or places of business in a contracting State. To achieve this purpose, the Sub-Committee is of the view that the word 'only' in Article 3 (1) should be deleted.

(c) It is also suggested that Article 2 (2) may be simplified. In a case where a party has places of business in more than one State, the present draft states that his principal place of business is to be regarded as his place of business. But if he has another place of business which has a closer relationship to the contract and its performance than the principal place of business, such a place of business is said to prevail over the principal place of business and is regarded as his place of business. Further, different interpretations are possible of the phrase "principal place of business", and it appears that what is ultimately regarded as his place of business is that place of business which has the closest relationship to the contract. For these reasons the Sub-Committee suggests that the article should be amended to read as follows :

> "2 (2) Where a party to a contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of the article

> and of Article 3 shall be that place of business which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract".

Article 7

Article 7 provides a principle to be applied in interpreting and applying the provisions of the Convention. It is considered that some principle should be provided for a case which arises in regard to which no provision has been made in the Convention or can be inferred therefrom. The Sub-Committee proposes that where such a case occurs, the judge shall be under a duty to decide in accordance with a principle such as justice, equity and good conscience.

Article 10

The Sub-Committee is of the view that the provisions of Article 10 (1) and 10 (2) could be amalgamated and simplified without changing their effect. Further, the starting point mentioned in Article 10 (1) (i. e. the date on which the goods are actually handed over to the buyer) may be difficult to apply in a case where the buyer refuses to accept the goods although the seller had placed the goods at the disposition of the buyer. Therefore, the Sub-committee is of the view that the words 'placed at the disposition of the buyer' should be substituted for the words "actually handed over to the buyer". The amalgamated Article 10 (1) and 10 (2) would then read as follows :—

> "10 (1) The limitation period in respect of a claim arising from a defect or lack of uniformity shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, whichever is the earlier, provided that the limitation period shall not exceed beyond eight years from the date on which the goods are placed at the disposition of the buyer." (Article 10 (2) could then be deleted).

Article 11

Article 11 (1) is not intended to govern the situation, under some legal systems, whereby circumstances such as repu-

diation, bankruptcy and the like make the contract automatically terminate before performance is due. However, the present wording may be construed as including such a case. In order to make the intention clear. the wording may be changed as follows :-

"11 (1) If, in circumstances provided for by the law applicable to the contract, it is *lawfully terminated by virtue of a declaration made by one party* before the performance is due, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not terminated by virtue of such a declaration before performance becomes due, the limitation period shall commence on the date on which performance is due".

Article 12

The Sub-Committee is of the view that the United Nations Conference on Prescription should give further consideration to the effect of Article 12 (2) on other provisions, particularly in relation to the approaches adopted in Article 10 with regard to claims arising from non-conformity of the goods. The problems could best be illustrated by the following examples :-

(i) A, the seller on 1st January 1974 hands over to B, the buyer, goods containing defects which can be discovered when the goods are handed over. B does not pay the price, neither does he assert a claim against A in respect of the defects. On 1st December 1975 A brings an action for the price. B makes a counterclaim in this action on 1st January 1977. Is B's claim out of time by reason of Article 10(1) because it is brought more than two years after the goods have been handed over) or within time by reason of Article 12(2) (because it is deemed to have been performed on 1st December 1975, within two years) ?

(ii) A, the seller, sells and hands over goods to B' the buyer, on 1st January 1973. The goods contain defects which cannot be discovered at the time of handing over. B does not pay the price, and A institutes proceedings for the price on 30th December 1976. B discovers the defects on 1st October 1977 and makes a counter-claim. Does B's counter-claim relate back to 30th December 1976 by reason of Article 12(2) ? If it does, it will relate back to a point of time before the claim fell due.

(iii) A, the seller, sells and hands over goods to B, the buyer on 1st January 1973. The goods contain defects which cannot be discovered at the time of handing over. B does not pay the price, and A institutes proceedings for the price on 30th December 1976. The proceedings are protracted and on 1st December 1980, B discovers the defects. He makes a counter-claim on 1st February 1981. Is the claim out of time by reason of the proviso of Article 10(2), (because more than eight years have elapsed from the date the goods were handed over) or within time by the operation of Article 12(2) (because it relates back to 30th December 1976).

Articles 15 and 16

(a) There are various articles in the Draft Convention which provide for the cessation, extension and calculation of the limitation period. It is not clear whether the periods of one year referred to in Articles 15(2) and 16(1) are to be classified as 'the limitation period' so as to attract these provisions, although the intention of the draftsman was probably in the affirmative. This may be clarified by describing these periods as "an additional limitation period of one year".

(b) Article 15(1) deals with a case where the legal proceedings have ended "without a final decision binding on the merits of the claim". However, Article 16 (1), applies to a case where legal proceedings have ended with "a decision binding on the merits of his claim", the word 'final' being omitted. Perhaps this was an inadvertent omission. It is the view of the

Sub-Committee that there should be uniformity to avoid possible difficulties in applying these provisions.

Article 17

The Sub-Committee is of the view that, in order to make the intention of Article 17(1) clearer, the phrase "in respect of the claim asserted" should be inserted between the words "the limitation period" and "shall".

Article 18

The approach of Article 18(1) is to make a new limitation period of *four years* commence to run afresh upon the performance of the acts specified in Article 18(1). This may be in conflict with the policy behind Article 10 which provides a shorter limitation period (two years) for certain claims. To create harmony within the Convention, the Sub-Committee suggests that the phrase "a new limitation period of four years" in Article 18(1) be changed to the following phrase :

> "a limitation period as provided in Article 8 shall commence to run afresh".

Article 19

For the same reasons stated in regard to Article 18(1), the Sub-Committee is of the view that the phrase "a new limitation period of four years shall commence to run" in Article 19(1) should be replaced by the following phrase :

> "a limitation period as provided in Article 8 shall commence to run afresh".

Article 22

It is the view of the Sub-Committee that this article is desirable and should be contained in the Convention. In the absence of an overall cut-off point, the period might be substantially prolonged to such an extent that the purpose of prescription is defeated.

Article 30

It is the view of the Sub-Committee that Article 30 needed to be carefully considered by the United Nations Conference, in the light of the various constitutional procedures in different States for implementing international conventions.

Article 36

The Sub-Committee is of the view that the test contained in the proviso to Article 36 could be made more definite, by specifying the time at which the seller and buyer must have their places of business in States parties to a different convention. The problem created by this Article can be identified by the following example :-

> A (the buyer) has his place of business in State X, and B (the seller) in State Y. At the time of the conclusion of the contract both States are parties to this Convention which, therefore, applies. However, only State X is a party to another convention which also deals with limitation. After the institution of legal proceedings, however, State Y has also acceded to the other convention,

With regard to the future programme of the Sub-Committee, it was noted that the Secretariat of the UNCITRAL intended to prepare an analytical compilation of the comments and proposals sent by Governments and interested international organisations some time after the 30th of June 1973. Since the analytical compilation, which would be circulated to member governments and Secretariat of the Committee, may disclose future matters for consideration, the Sub-Committee is of the view that this subject should be taken up again at the next session of the Committee, which will be held shortly before the United Nations Conference on Prescription (Limitation) on International Sale of Goods. In this connection, the Sub-Committee requests the Secretariat of the Committee to examine the analytical compilation and to place any necessary comments at the next session of the Committee.

VII. ORGANISATION OF LEGAL ADVISORY SERVICES ON INTERNATIONAL LAW

(i) INTRODUCTORY NOTE

At the tenth session of the Committee, held in Karachi in January 1969, it had been decided to take up for discussion at one of the sessions of the Committee the question of *Organisation of Legal Advisory Services in International Law* as being a matter of common concern on which exchange of views and information would be useful in order to enable the governments of Asian-African States to benefit from each other's experiences in the field.

Since information available on the Organisation of Legal Advisory Services on International Law questions in Asian-African States was extremely limited, the Committee's Secretariat addressed a communication to the governments of all Asian-African States, and in response thereto replies were received from sixteen governments, namely Botswana, Dahomey, Indonesia, Iran, Japan, Jordan, Kenya, Kuwait, Malawi, Nepal, Pakistan, the Philippines, Syrian Arab Republic, Togo, Uganda and Zambia. These replies alongwith a short general note, prepared by the Secretariat, were placed before the Committee at its fourteenth session held in New Delhi in January 1973.

At the New Delhi session, the subject was taken up in the plenary meetings held on the 15th and the 18th of January 1973 when the Delegates of Arab Republic of Egypt, India, Indonesia, Iran, Malaysia, Republic of Korea and Sri Lanka and the Observer for the United States of America made statements outlining the system of legal advice on international legal questions prevalent in their respective countries. At that session, a suggestion was mooted for holding of periodic meetings of Foreign Office legal staffs of the member States under the auspices of the Committee. The Commonwealth Secretariat also expressed a desire to be associated with any future meeting of Foreign Office Legal Advisers that may be organised by this Committee.

In the light of discussions at the New Delhi session, the Committee's Secretariat prepared an analytical note on the basis

of the information available with the Secretariat on the system prevalent in Britain, the United States of America and twenty-two Asian-African countries. This note has been circulated to all the Asian-African governments and will be modified in the light of observations that may be received. Thereafter, it will be placed before the proposed Conference of Legal Advisers to serve as a basis of discussion.

(ii) NOTE PREPARED BY THE COMMITTEE'S SECRETARIAT ON ORGANISATION OF LEGAL ADVISORY SERVICES ON INTERNATIONAL LAW

Introduction

Although international law has been known and respected through the ages, it is only in more recent years that international law has come to occupy a pivotal position in the relations between nations comprising the entire gamut of a State's sphere of activities. It was not so long ago that international relations in the true sense were confined to a few States in Europe which alone were deemed competent to decree by agreement among themselves as to what they would regard to be the law applicable in relations between nations. With the birth of new nations in the present century and especially since World War II, the era following decolonisation and the ever-increasing complexities of international relations, international law has come to play a dominant role in the affairs of nations. The establishment of the United Nations itself postulates international law to be the basis for relations among its member States, and this has largely contributed towards the growing tendency on the part of governments to rely more and more on international law and practice in support of their policies and actions.

International law, in the modern sense, not only touches upon the political aspects of a State's relations with other States but embraces the field of trade and commerce, communications, transport etc. International conferences have become the order of the day at which governments have to be represented; there are in force voluminous treaties which are being multiplied every day to regulate the conduct of nations in different spheres which require to be interpreted and applied. In addition, there are the usual questions which frequently arise concerning the protection of the interests of the nationals of a State in other States, border disputes, refugee situations, utilisation of the resources of the State, protection of a country's diplomatic and consular

representatives abroad many other problems which arise in the day-to-day functioning of a government. All this means that not only the Foreign Office but many other government departments also have to be kept abreast of the correct position and the most recent developments in international law relating to their sphere of activity. In modern time a government cannot function without competent legal advice on international law questions since in the international community of today State's action is always liable to be criticised or challenged as being contrary to the norms of international law and no State, however powerful, can afford to ignore world opinion. The newly independent States which had limited experience of international law or relations during the period of colonial domination had to face difficulties in finding men and material from indigenous sources to fill their role in world affairs, but most of these countries have now been able to cross over such initial hurdles. It is indeed remarkable that many of the countries in Asia, Africa and the Latin Americas have not only been able to organise adequate legal advisory services to meet their own requirements but have been able to make substantial contribution to the growth and development of international law in recent years and in providing competent staff for international organisations.

Organisation of Advisory Services

A brief survey of the practices obtaining in different countries of the world in the matter of organisation of legal advisory services on international law reveals three distinct patterns, namely (i) linking of the advisory services on international law with the general legal services of the government; (ii) establishment of a separate International Law Division in the Foreign Office and linking the same with the regular Foreign Service for the purpose of manning the posts in the International Law Division; and (iii) establishment of a specialist Section or Division in the Foreign Office charged with rendering of international law opinions and manned by specialist officers who are not members of the regular Foreign Service. Some countries have a mixed system, that is to say, whilst maintaining a small International Law Section in the Foreign Office, the ultimate responsibility for

rendering advice is vested in the Attorney-General or the principal law officer of the government.

(*i*) *Linking of the advisory services on international law with the general legal services of the government*

This pattern appears to be in vogue in some countries in Asia and several African countries which were formerly parts of the British Empire. The reason for this practice is not far to seek since even under the colonial rule these territories had fairly well organised government departments charged with the task of rendering legal advice to all government departments. This was usually headed by an Attorney-General or a Minister of Justice and qualified legal officials were recruited to man posts in this department. When the colonial rule ended, there was already a well established department known in various countries as the Department of Law or the Department of Justice, or the Attorney-General's Department or Chambers which was charged with the rendering of legal advice to the government on all matters. International law was naturally included within the competence of this Department. It may be stated that even in England until the year 1885 the responsibility for rendering international law opinions vested with the Law Officers of the Crown, and in France the entire legal advisory service including that on international legal questions was centralised in the *Consiel d' Etat*. To begin with, the Legal Departments in the newly independent countries hardly had any person conversant with international law and consequently they had to rely heavily on outside sources. But gradually new officers with specialised knowledge and training in international law were recruited to deal specially with international law questions, even where the government had decided to retain the system of centralised Law Department to deal with all legal questions including questions on international law. In some of the Asian-African countries even though small international law sections have been established in Foreign Offices, certain broad links are still retained with the Attorney-General's Department or the Ministry of Justice which is charged with rendering of legal advice to Government Departments. According to information available with us, this pattern is followed in the following countries :—

Botswana : There is no legal department in the Foreign Office of Botswana. Legal advice is obtained, whenever the need arises, from the Attorney-General's Chambers. The Attorney-General is consulted invariably on all matters relating to international legal questions and his advice thereon in normal circumstances is absolute.

Malaysia: Under the Constitution of Malaysia,the Attorney-General is the advisor to the Government on legal matters, and, therefore, concentration of all governmental legal advice is in the Attorney-General's Chambers. Officers of the Chamber who belong to Judicial and Legal Service are sent from time to time for post-graduate courses in public international law and these officers on their return act as legal advisers on international law. In the Foreign Office also there is a career diplomat with legal qualifications who deals with all matters relating to treaties.

Nepal : Legal problems on international law are dealt with by the "International Law Opinion Section" of the Ministry of Law and Justice. The Section, at present, has a strength of two Under-Secretaries, two Section Officers and other ancillary staff. The Section works under the direction, control and guidance of the Joint Secretary and the Secretary. Most of the officers of the Section have obtained higher degrees or specialised training in international law. All the officers belong to the Judicial Service of the His Majesty's Government which forms a distinct cadre of the civil services. The primary function of the Section is to provide expert legal advisory service to His Majesty's Government, its various Ministries and Departments and to bring to bear coordination and harmonisation into and to chanellise the work of various Ministries in their international legal dealings. The advice given, though not necessarily binding as are all legal advice, carries with it considerable weight with the receiving Ministries who very rarely act contrary to the advice so given. The Section acts as the central depositary of all treaties and agreements to which Nepal is a party. Officers of the Ministry have also to prepare for and participate in international conferences and seminars on international law.

Nigeria : In Nigeria, the Chief Law Officer of the Federal Government is the Attorney-General of the Federation who is

also the political head of the Federal Ministry of Justice. The Solicitor-General of the Federation is the head of the Permanent Law Officers who work under the general direction and control of the Attorney-General in the offering of legal advice to all departments of the Federal Government on all legal questions. The Federal Ministry of Justice has two Divisions concerned with providing legal advice on the conduct of foreign affairs, namely (i) the Industrial and Mercantile Law Division; and (ii) the Public International Law and Comparative Law Division. The former Division is headed by a Principal Crown Counsel who is assisted by a Senior Crown Counsel and some Crown Counsel. The bulk of the work of this Division comes from the Ministry of Commerce and Industry, which is responsible *inter alia* for External Trade, Industrial Development and Industrial Research. The Public International Law and Comparative Law Division is also headed by a Principal Crown Counsel with a complement of one Senior Crown Counsel and a number of Crown Counsel. This Division is responsible for providing legal advice to the Ministry of Foreign Affairs and Commonwealth Relations on the conduct of relations with other governments, international organisations (including United Nations) and nationals of other countries. In the course of its work this Division provides a Legal Officer as a member of the Nigerian team in any negotiations on foreign affairs with any other government. Occasionally when trade agreements are negotiated, the legal member of the Nigerian team is provided by the Industrial and Mercantile Law Division. The Public International Law and Comparative Law Division is a repositary of all the international agreements or conventions entered into or acceded to by Nigeria. It also keeps copies of all such agreements or conventions under which Nigeria inherited rights or obligations on the attainment of independence.

As regards procedure, there are two ways for obtaining legal advice by the Ministries. One is by addressing a letter to the Solicitor-General of the Federation setting out the problem and requesting advice thereon. This is a common practice, especially in minor matters. The other method is by addressing a note to the Solicitor-General through the file of the Ministry concerned. This method will usually consist in writing a self-contained note setting out the facts of the matter and asking for

legal advice on specific points. This mode is normally adopted in important matters. Within the Ministry of Justice itself, such letters or files are assigned to the relevant Division for action. Generally, routine matters are settled at the head of the Division level, but more important matters are usually brought to the attention of the Solicitor-General or his deputy or even for the information of the Attorney-General (Commissioner of Justice). All international agreements and conventions are, as a rule, cleared with the Attorney-General before they are considered by the Federal Executive Council.

Uganda : In Uganda, legal advice on international law matters is tendered by the Ministry of Justice. However, there is also a legal section in the Ministry of Foreign Affairs called the "Economic, Legal and Cultural Division". This Division is normally manned by a person with legal qualifications, but sometimes any Foreign Service officer could be assigned to head this Division. In either case, reference is always made to the Ministry of Justice for expert advice.*

Zambia : In Zambia legal advisory service to the Government is centralised, i.e. there is no attachment of legal advisers to Government Ministries. The Legal Advisor on International Law is a section in the Ministry of Legal Affairs which is headed by the Minister for Legal Affairs and the Attorney-General. The Section which consists of only two lawyers advises the Government for and on behalf of the Minister for Legal Affairs and the Attorney-General. Legal advisory service being centralised the initiative is always taken by Government Ministries. Besides advising, the Legal Advisors appear in courts of law in cases involving the Government not necessarily in matters touching international law.

Merits of the System

The Governments which follow this system consider it to be advantageous on account of the fact that under the pattern of

* It is, however, the intention of the Ministry of Foreign Affairs to establish a self contained Legal Division manned by qualified lawyers in international law.

distribution of their governmental functions the ultimate responsibility for rendering legal advice on all matters rests with the Minister of Justice or the Attorney-General who is the Principal Law Officer of the Government. Legislation which requires to be enacted for giving force to treaties is also his responsibility. Since the Minister of Justice or the Attorney-General is in a position to co-ordinate the work of all Government Departments in the legal sphere, it is found to be advantageous to have the international law advising function to be also vested in the Department under his charge, particularly as a good many Government Departments apart from the Foreign Office are today directly concerned with international law questions.

The other reason in support of this system, which is sometimes put forward, is that the Attorney-General's Department or the Ministry of Justice acts independently of the administrative Ministries and occupies practically the position of independent legal advisers to those Departments. As a consequence, it is stated, the Attorney-General's Department is able to bring about objectivity and independence in the examination of international law problems which may not be possible if the legal advisers become part and parcel of the administrative Ministries.

The third reason, which is given in support of the system, is that international law cannot be wholly divorced from municipal legal systems, and as a consequence, it is better to have the entire legal advisory service organised in the same Department under the control of the Attorney-General or the Minister of Justice.

An additional reason, which appears to have substance in several cases, is the question of prospects of the persons who are appointed to work on international legal questions. It is said that if the officers who have to deal with international law problems were to be included in a separate Division in the Foreign Ministry, their chances of promotion would be few and far between, especially in the smaller Foreign Offices of the newly independent countries. On the other hand, they could well look forward to reach the top of the ladder if they were to be integrated with the general legal advisory services of the government. This is a

fairly important consideration because it is difficult to expect an officer to give his best if he had little or no chance of promotion and his counterpart in the general legal advisory side had all the prospects before him.

Notwithstanding these considerations, there seems to be a general trend in several countries to switch over to the pattern of having specialist divisions in Foreign Offices, and this shows that the Governments tend to regard the latter system to be more advantageous from their point of view. It is often said that international law calls for a great deal of specialisation and is so inextricably mixed up with policy considerations of the Government that a Legal Adviser is best able to serve his Government if he were a part and parcel of the Ministry of Foreign Affairs and responsible to the Minister in charge.

(ii) Establishment of an International Law Division in the Foreign Office linked to the regular Foreign Service

The second pattern which is gradually gaining ground in many countries is to have a department of international law within the Foreign Office itself and to man the posts by officers of the Foreign Service who may be posted on a tour of duty in the International Law Division. In countries where this pattern is followed, regular members of the Foreign Service who have had a University degree or training in International Law are eligible to be posted to the International Law Division. The head of the Division usually has the rank of an Ambassador or Minister Counsellor who is assisted by other Foreign Service officers of varying ranks depending on their number and the size of the Division. In addition to the diplomatic officers, a few lawyers are sometimes included on a permanent basis who are not liable to be transferred. The International Law Division which is directly responsible to the Minister for Foreign Affairs, is often sub-divided in two or three sections to deal with international law advisory work, treaties, codification and development of international law which section is usually charged with the examination of drafts of international conventions and preparations for international legal conferences. In larger Foreign Offices individual officers of the International Law Division are

assigned specific departments so that the officer concerned could act as the legal adviser of the department assigned to him subject to the overall supervision of the head of the Division. According to our information the countries which follow this pattern are :

Arab Republic of Egypt : In Egypt, legal advising on international law problems is vested in the Office of the Legal Adviser in the Minisiry of Foreign Affairs. The functions of this department as set out in Article 2 of the Ministerial Decree No. 959 of 1960 are as under :—

i) to study international problems with a view to considering the international problems of the Arab Republic of Egypt from the point of view of international law;

ii) to participate in the presentation of the position of the Arab Republic of Egypt in international conferences;

iii) to prepare drafts of treaties and agreements to be concluded by the Arab Republic of Egypt and take the necessary measures for their conclusion, promulgation, publication and registration with international organisations as well as the necessary procedure for the abrogation and termination of these treaties and agreements in accordance with the provisions of the Decree of the Council of Ministers dated September 21, 1955;

iv) to study, prepare, and draft the subjects and questions referred to it by the Minister of Foreign Affairs.

The Department of Legal Affairs and Treaties is an integral part of the Ministry of Foreign Affairs and its Foreign Service. The officers alternate between the Department and the Egyptian diplomatic missions abroad. Assignments to the Department are made from among lawyers in the Ministry who have had some post-graduate training in international law at home or abroad or those who have served in Egyptian permanent missions to international organisations.

Dahomey : Questions pertaining to international law are dealt with by the Department of Political and Legal Affairs of the Ministry of Foreign Affairs. The Department is managed by professional diplomats. Occasionally the Department consults with the Ministry of Justice.

Indonesia : International legal problems are mostly handled or channelled through the Directorate of Legal Affairs which is an integral part of the Department of Foreign Affairs. The Directorate is headed by the Director of Legal Affairs. At present, the Directorate comprises a secretariat and three divisions, namely (i) The Division for International Law Affairs; (ii) The Division for Treaty Affairs; and (iii) The Division for Codification and Law Development Affairs. Besides the administrative staff, the Directorate has a staff of ten lawyers most of whom belong to regular Foreign Service and they are subject to rotation system. The Directorate deals with legal matters and/or legal aspects of matters including international legal problems/aspects in the advisory as well as executive capacity. The Directorate is invited by other Departments and Agencies to discuss international matters and legal problems with international legal aspects in order to find a solution or determine an attitude. The weight attached to the opinions of legal adviser normally varies depending upon whether the issue at hand is of an overriding legal or political character.

Iran : International legal problems are dealt with by the Legal Department of the Ministry of Foreign Affairs. It has a staff of ten officers including the Director all of whom are law school graduates and belong to the general cadre of the Foreign Service. The Ministry and its Legal Department are assisted by three senior legal advisers who are either law school professors or private lawyers who render their services to the Ministry on a part-time basis. The Legal Department is ordinarily engaged in handling the legal problems dealt with by the Ministry. The opinions expressed by the Department are generally adhered to, unless overruled in the light of exceptional circumstances. Preparatory work for conferences on international legal questions are handled by the Legal Department in consultation with the

Ministry's Department of International Organisations and other Agencies.

Japan : Advising the Government on legal aspects of its international activities is the primary function of the Treaties Bureau of the Ministry of Foreign Affairs. The Treaties Bureau is split into three divisions, namely (i) Treaties Division ; (ii) International Conventions Division; and (iii) Legal Affairs Division. The first two Divisions take charge of conclusion of treaties and other international agreements. The Legal Affairs Division takes charge of the following :—

(1) Affairs concerning the disposition of matters in international law and of other International matters; (2) Affairs concerning the International Court of Justice and the Permanent Court of Arbitration; and (3) Affairs concerning research on treaties, international law, and domestic and foreign laws relating to foreign affairs, and concerning arrangement and compilation of the materials necessary for the aforesaid purposes. Structurally the Treaties Bureau is comprised of a Director-General, Division Heads, some career diplomats and their assistants. Officers of the Bureau enjoy the same status as Foreign Service Officers and advance in their position as general career diplomats. University professors who are experts in their fields are also called upon for their assistance. In most cases where the Ministry of Foreign Affairs seeks an expert opinion, a recognized scholar is asked to take up the question. In some cases several scholars are asked their opinions separately. In a few cases, several scholars are invited by the Ministry of Foreign Affairs to offer opinions on a specific question through joint discussion in their meeting with the Treaties Bureau officials. Furthermore, the Ministry of Foreign Affairs holds a regular study meeting where the Ministry officials and university professors make a report alternatively on some current international legal questions. The report of the Ministry's officials usually attaches importance to the presentation of related documents and materials and their explanation. The report of university professors lays emphasis on theoretical analysis of these questions.

The Ministry of Foreign Affairs has various other bureaus which are divided according to their functions, such as the

United Nations Bureau, the Economic Affairs Bureau etc. and bureaus according to areas, such as the Asian Affairs Bureau, the European Affairs Burecu, etc. When legal questions arise in connection with the activities of any of these bureaus, legal opinion of the Legal Affairs Division is asked as a rule.

Ministries other than the Ministry of Foreign Affairs have their own departments which research into and give opinions on legal questions arising in connection with the functions under their jurisdiction. However, when international legal questions, particularly questions on the interpretation of treaties concerned or of international law in general, arise in connection with their functions, these Ministries ask the opinion of the Ministry of Foreign Affairs on such questions. Upon these requests, legal opinions are given by the Ministry of Foreign Affairs, particularly by the Legal Affairs Division.

Jordan : International legal questions are dealt with by the Legal Department of the Ministry of Foreign Affairs, from where they are sent either to the Cabinet or to the Ministry of Justice for their opinion or for implementation, if necessary. The Legal Department is administered by the head of that Department who is at the level of the rank of Ambassador and holds a legal degree and is assisted by a qualified staff. All legal matters in the Ministry of Foreign Affairs are referred to the Legal Department for its opinion which serves as a guide for the Ministry but it is not necessarily binding. Most of the Ministries and Government Institutions have their own legal consultants and the preparation for international conferences are arranged by the concerned Ministry of Government institution.

Kuwait : Legal problems concerning international affairs are handled primarily by the Legal Department in the Ministry of Foreign Affairs. The Department of Legal Advice and Legislation is also competent to render opinion *inter alia* on international legal matters upon request from the Council of Ministers or Department of State. The Legal Department is staffed with officers belonging to the general cadre of Foreign Service whose minimum training is a Bachelor of Law degree. In addition to the head of the Department, there has normally been a strength

of seven legal officers. Opinions given by the Department are given due weight. The Legal Department also undertakes preparatory work for international conferences on international legal questions.

The Philippines : In general, international legal problems are handled by the Office of Legal Affairs which is a unit of the Department of Foreign Affairs and is manned by officers of the Foreign Service who take their regular turn of posting abroad. However, in specially difficult or important cases recourse may be had to the Department of Justice whose Secretary (Minister) is the official legal adviser of the Government, or even to legal experts who are not in Government service. The Office of Legal Affairs is headed by an officer with the rank and title of Assistant Secretary, usually equivalent, depending upon the holder, to the rank of Chief of Mission or Minister Plenipotentiary. The qualifications required for officers of the Department are those of a member of the Philippine Bar and the Foreign Service. The Office of Legal Affairs is split into three divisions, namely (i) Law Division; (ii) Treaties Division; and (iii) Division of Transport and Telecommunication, each of which is headed by a Chief who is assisted by subordinate staffs. Legal issues are referred to the Office of Legal Affairs as a matter of routine. Its advice may, of course, be overruled by the Secretary of Foreign Affairs or of Justice. Philippines position papers are drafted by the Office of Legal Affairs in consultation with the Office of U. N. Affairs and International Organisations in preparation for international conferences.

Republic of Korea : In the Republic of Korea, the work of legal advising on international law matters is the responsibility of the Legal Division of the Foreign Office. The officers of this Division belong to the regular Foreign Service. The Division works in an advisory as well as executive capacity in dealing with international legal affairs. Its functions range broadly from the conclusion and interpretation of treaties including participation in the negotiations, settlement of international disputes, preparation for the international law conferences to the legal advisory work on international law. Legal opinions given by it are given appropriate weight at every stage of policy making in

particular regard to compliance with international law. Legal advice may also be sought from outside experts.

Syrian Arab Republic : International legal problems are dealt with, in general, in the Ministry of Foreign Affairs within the Department of "the Legal Department and International Treaties". The Department has at present three diplomatic officers and is headed by a Director who has the rank of an Ambassador. The Director as also the other officers of the Department all have studied law in the University. International legal problems are sometimes and in special cases dealt with by the professors of international law of the Syrian Universities under the auspices of the Ministry of Foreign Affairs.

Togo : Problems related to international law are dealt with by the Directorate of Political and Legal Affairs in the Ministry of External Affairs in consultation with the Procureur-General of the Republic. This Department is composed of a Director and an Assistant Director, both of whom are lawyers, and a few associates.

Merits of the system

This system is also practised by Canada and a number of Latin American States. The countries which follow this pattern consider that the subtle admixture of legal and political factors which comprise the actual work of the International Law Division requires the skill and experience of officers trained both in law and diplomacy and for this reason they favour a system whereby legally qualified Foreign Service officers alternate between the Legal Division and diplomatic missions abroad and occasionally other Divisions in the Foreign Office. Thus the system provides them with practical knowledge and experience in international relations. The basis for this policy is the belief that it helps to prevent the separation, both physical and intellectual, which occurs between Legal Advisers on the one hand and policy makers on the other if the Legal Advisers are divorced from the mainstream of foreign policy planning.

It also affords promotional opportunities as officers are not obliged to remain for long periods at a fixed rank which can

occur if they have to remain all the time in the Department of International Law alone. It also creates the possibility of recruiting trained persons in the Foreign Service; it helps to train a large number of Foreign Service officers in the field of international law which is important, particularly having regard to the fact that a Foreign Service officer today has to deal with a certain number of legal questions even when he is posted in a diplomatic mission abroad. Apart from this, it avoids the tendency within the Foreign Office to treat the legal advisers as specialists to be consulted only on technical questions rather than as day to day policy formulators. Moreover, it also safeguards against the psychological factor which sometimes is found in the attitude of regular Foreign Service officers in regard to the specialist in the Legal Division as some kind of a poorer cousin.

One great snag in this system, however, appears to be that it often leads to lack of continuity. It has frequently happened that due to normal promotions and transfers, a situation may arise where all the officers of the Department are new and may not be aware of the decisions which had been taken by their predecessors in the past without spending a good deal of time in looking up back papers. Another problem which arises is that Foreign Service officers who may be called upon to deal with legal work at a particular stage are more often engaged in the course of their tours of duty in other types of work and they may not be fully conversant with the latest developments in the field. Moreover, international law problems not only arise in the Foreign Office, but in various other Governments also and one may often be faced with the task of coordination between such Departments and the Foreign Office.

(*iii*) *Establishment of a Specialist Division in the Foreign Office*

The third method which has found favour in some countries is to have a specialist division within the Foreign Office to deal with all matters concerning international law and treaties and to man the Division with specialists who are not members of the regular Foreign Service. Britain adopted this system when

she decided to have a regular set up in the Foreign Office for dealing with international legal problems. In the United States of America the pattern is very much similar. Within the Asian-African region, according to information available with us, this system has been adopted in :—

India : In India, legal advice on international legal problems is rendered by the Legal & Treaties Division, a specialist Division of the Ministry of External Affairs. It renders advice not only to the Foreign Office but to other Ministries/Departments also concerned with international legal questions. The Division is manned by qualified legal experts who constitute an *ex cadre* personnel, i.e. they belong neither to the regular Foreign Service nor to the general legal advisory service of the Government. Apart from tendering advice on questions of international law, officers of the Division participate in treaty negotiation and enforcement, preparation of briefs on international legal questions when litigation arises in respect thereof either before national courts or arbitral tribunals, the International Court of Justice and other international organisations and assistance in the formation of foreign policy even on political matters either in consonance with the tenets of established legal order or affecting minimal changes therein.

The Legal and Treaties Division is headed by a Legal Adviser (with the rank of Joint Secretary) who is assisted by directors, deputy directors, four assistant legal advisers and ten law officers.

Pakistan : International legal problems are handled by a specialist division in the Foreign Office called the "Legal and Treaties Branch". The Legal and Treaties Branch is a part of the Ministry of Foreign Affairs and has no connection with the Ministry of Law. Law Advice is sought by the political desks as and when any problem arises in their work. It is also sought by other Ministries/Division of Government regarding their problems of international law. As a rule advice given is generally acted upon

The Legal & Treaties Branch is composed of the following :—(1) Legal Adviser—Joint Secretary—Director General;

two Deputy Legal Advisers (rank Deputy Secretary) and one Assistant Legal Adviser and one Section Officer. The posts of legal officers are *ex cadre* posts and they do not belong to the regular Foreign Service. Post-graduate qualification in international law and some experience in the field is regarded necessary.

Preparatory work for international conferences on international legal questions is done by the Legal & Treaties Branch in consultation with the Ministries/Divisions of the Government most directly concerned with the matter administratively. If the subject is such as not to concern any other Division of the Government, the preparatory work and policy directions are formulated within the Ministry of Foreign Affairs itself.

Sri Lanka : Legal advice on international law questions is given by the Legal Division of the Ministry of Defence and Foreign Affairs, which was established as a specialist division in 1963. The Legal Division furnishes legal advice not only to all Branches of the Ministry of Defence and Foreign Affairs, but also to all other Ministries and Departments involved in foreign transactions covering such subjects as shipping, foreign loans, civil aviation, tourism, etc. This specialist division, which is the repository of the Government's treaty commitments, is consulted on a regular basis in the drafting, interpretation, execution and administration of treaties in which Sri Lanka is a party. Its advice is also sought concerning initiatives taken by Sri Lanka within the United Nations, the Specialised Agencies and other international organisations. In recognition of the fact, that most international political initiatives have a legal aspect and are often couched in legal terms, formulation of foreign policy within the Foreign Office is carried out in consultation with the Legal Division.

The Legal Division of the Foreign Ministry exists side by side with the Government's general advisory service which in Sri Lanka is the Attorney-General's Department. Foreign Office legal specialists consult Attorney-General's Department as and when necessary in national interest. Correspondingly, the Attorney-General's Department seeks the advice and assistance

of the Legal Division of the Foreign Ministry on international law questions.

Merits of the system

Persons who are normally recruited to posts in such specialist divisions are those with experience in law practice or teaching who are prepared to take up international law advising as a career. This qualification assists them in understanding the practical aspects of the questions that arise from time to time not only in the Foreign Office but also in the various other Departments of the Government, because international law questions arise not only in Foreign Offices but they do arise at the same time in various other departments that deal with foreign countries and foreign problems in their own right separately. Thus, legal advisory service is not only the problem of foreign policy in the political sense, but also foreign policy in the technical, functional, economic, commercial and other spheres. Therefore, the particular merit of this system is that it leads to specialisation in a field where specialisation has become so important and ensures continuity with the result that the work can be far more expeditiously disposed of. Also, international affairs, foreign policy and international law are today so closely inter-related that it becomes essential having regard to the multifarious problems that arise in the Foreign Office from day to day that expert legal advice be available, as it were, from counsel "within the house".

Further, the sources of international law are frequently difficult to determine and much of international law even at present remains in a formative stage. The formation of international law is, however, a process capable of direction through constant State practice. The maintenance of consistency in the State practice, desirable in itself, is also a means of establishing norms of customary international law felt to be desirable by a particular State. It requires a specialist in constant touch with the practice of his own and other States to remain familiar with the sources of international law and current trends in the development of international law. For that reason Foreign Ministry is the 'location of choice' for the practising international lawyer called upon to advise his Government on a regular basis.

The proponents of this system also hold that as the highly specialised field, it has not been found to fit readily into the scheme of a State's general legal advisory service. It is often the case that international law questions cannot be resolved by reference to a clear-cut universally recognised and readily accessible rules as in domestic law, and general legal advisory services the world over have traditionally shown a reluctance to give opinions in these circumstances on what often appear to them to be questions of international policy rather than law. Further, career prospects in a State's general legal advisory service tend not to encourage specialisation to the degree called for by the field of public international law. The line of ascent in the career of a member of a State's general legal advisory service may be expected to run through its traditional hierarchy of positions to the highest courts in the land. The arena of the international law specialist lies elsewhere, and the rewards of a career of intense specialisation lie in a totally different direction. It is in the milieu of international negotiations, claims and counter-claims and in becoming part of international law that he would seek fulfilment, and the Foreign Ministry is the only institution which would in most countries offer entry to and opportunities for advancement in this particular field.

The one drawback in this system is that in smaller Foreign Offices the specialists who staff the International Law Division may lack prospects for promotion and it is often frustrating for persons employed as specialists to find that officers in the Foreign Office who are much less qualified going up to top posts only by reason of their being members of regular Foreign Service. This is a situation which needs to be tackled and if it can be solved by providing enough opportunities for the law specialists, this may perhaps prove to be the best system. But at the same time it is feared that if these law specialists become a part of the Foreign Service and they go on diplomatic missions, they may or may not mostly remain legal. They may acquire diplomatic skills but at the expense of their law skills. It is, therefore, suggested that the International Law Division must

continue to be a specialist division with a separate cadre of its own, and in regard to promotions, it should supply the same prospects as the regular Foreign Service. More precisely, "separate but equal" should be the rule rather than the exception.

(iv) Mixed System

Some countries have a mixed system, that is to say, whilst maintaining a small international law section in the Foreign Office the ultimate responsibility for rendering advice on international legal questions is vested in the Attorney-General or the Principal Law Officer of the Government. This pattern is in vogue in Kenya and Malawi, subject to certain variations.

Kenya : International legal problems in Kenya are handled by two departments which act in co-operation. These are (i) The Attorney-General's Chambers which, constitutionally, is the Advisor to the Government on all legal matters, both domestic and international; and (ii) the Legal Division of the Ministry of Foreign Affairs. Almost all issues of international law are channelled through the Ministry of Foreign Affairs. Once a document is received which requires either Government comments or action, the Legal Division of the Ministry of Foreign Affairs studies the document, prepares the comments and forwards the same to the Attorney-General's chambers for their comments. After the exchange of comments, a final paper is prepared to incorporate the views of the two departments, and that constitutes the legal position of the Government on the subject. The method of obtaining legal advice is the exchange of comments by the two departments producing one view on the subject. In case of difference of opinion on a particular legal point, the view of the Attorney-General becomes final.

At present, the Legal Division has four lawyers who are civil servants. The Attorney-General's Chambers also assign certain lawyers in the Chambers to deal with issues on international law.

The preparation for international conferences of legal questions is largely done by the Legal Division of the Ministry of Foreign Affairs in consultation with the Attorney-General's Chambers.

Malawi : International legal problems are not handled by any particular Ministry in Malawi. The competence to deal with the same has been distributed among the various Ministries depending upon their sphere of interest. In general, however, the Attorney-General's Chambers are responsible for all legal advice to the Government, be it on domestic issues or on international legal problems. One such exception is that all international boundary problems are the concern of the Treaties Officer in the Ministry of External Affairs. Further, most straightforward technical subjects such as air services agreements (where air law might be involved), the law of the sea (e.g. Geneva Conventions of 1958 and the Third Law of the Sea Conference) are fields in which the Treaties Officer advises the relevant Government department on the legal implications involved without involving the Attorney-General's Chambers. However, the Treaties Officer himself is seconded from the Attorney-General's Chambers and is ultimately answerable to the Attorney-General although he ordinarily works in the Ministry of External Affairs.

The method of obtaining legal advice is as follows : Ordinarily, the Ministry of External Affairs refers anything that might have legal implications to the Treaties Officer but where advice is sought on complex issues which necessitate amending domestic legislation, then either the Permanent Secretary for External Affairs or where necessary, the Treaties Officer, on his own initiative when he is not quite sure about his opinion, refers the problem to the Attorney-General.

The method of dealing with preparatory work for international conferences on international legal questions is first by consulting the Attorney-General on whether the domestic law is compatible with the subject under discussion, and secondly, consultations with the particular Ministry which is concerned with the subject under discussion. For example, anything that concerns Patents and related matters would be referred to the Registrar-General's Department since the Registrar is directly responsible for patents, trade marks and designs. If need be, the Registrar and his subordinates would meet and discuss the subject of the Conference with officials of the Ministry of External

Affairs and representatives of the Attorney-General's Chambers so as to formulate a unified method of approach.

II. Nature of work in the International Law Division

(i) *Advisory Functions*

The primary and most important function of an International Law Division is to render advice to the Government on issues affecting its foreign policy and other questions which involve some international law elements. In so far as the Foreign Office is concerned, a good deal of its work involving relations with other States often involves, directly or indirectly, questions of international law or practice and consultations with the legal advisers become necessary before the Minister can decide upon the action that is to be taken in a particular case or cases. It has now become an almost invariable practice for the Minister to consult his legal advisers before making a policy statement, both in and outside the Parliament, and particularly so when it contains a reference to any acts or omissions on the part of some other State or States. Apart from purely routine communications between the Foreign Office and its diplomatic missions and consular posts abroad and the internal administration of the Foreign Service, there is hardly any matter which does not require consultation with the legal advisers. This is the reason why in larger Foreign Offices, such as in Britain or the United States, the Legal Adviser's Department is organised into branches corresponding to the organisation of the Foreign Office as a whole in various territorial and specialist divisions so that any problem arising in a particular division of the Foreign Office can be immediately referred to the Legal Adviser concerned. Beginning with questions relating to a country's frontiers, utilisation of its natural resources like the waters of an international river or the sea adjacent to its coast, treatment of foreign nationals in its territory, protection of its citizens abroad, examination of policies and practices of other States, the work of the Legal Adviser's Department extends even to such relatively minor matters as customs privileges of a diplomat and granting or refusal of passports. If a Government wishes to make a representation to a foreign Government or lodge a protest, the

Foreign Office has to be satisfied that its stand is correct in accordance with the norms of international law and naturally the Legal Adviser has to be consulted before the Government takes any action.

Although the desirability and the need for frequent consultations with the International Law Division are well recognised, practice varies from State to State regarding the stage at which legal advisers are to be consulted and the method adopted for referring problems to the International Law Division. Experience shows that whilst the majority of the legal issues which arise in the work of a Foreign Office are relatively easy to tackle, there are some problems which need consideration and scrutiny at the highest level or necessitate a great deal of research. In the countries which maintain an International Law Division in the Foreign Office, consultation between the Foreign Service officers and the Legal Department on most of the questions become a routine matter and advice is tendered sometimes verbally and at times by recording short minutes on the case file. This is particularly so in those Foreign Offices where the legal adviser is kept in the picture at all stages and the telegrams and communications received from missions or posts abroad are either endorsed or circulated for information to the Legal Department. In the more complicated cases which may require not only the attention of the legal adviser of the Foreign Office, but may call for a reference to the Principal Law Officer of the Government, a more formal procedure is often resorted to which involves preparation of a comprehensive statement of the case in the concerned political division of the Foreign Office giving the history of the case, background information, issues involved, the possible repercussions of the suggested action etc. A good many of the matters which have to be dealt within the Foreign Office require expeditious disposal and this is possible if the legal adviser has a specialised knowledge of his subject and is kept in the picture regularly in relation to the work of the Foreign Office as a whole and is not regarded as an outsider to be consulted only when a problem arises.

Apart from the Foreign Office, as already stated, there are a large number of other departments whose work at some

stage or the other involves questions of international law. Thus, for example, the Ministry of Interior is very much concerned with the question of the protection and treatment of aliens, granting of asylum, extradition of fugitive offenders etc. whilst the Treasury or the Ministry of Finance would be directly responsible for questions relating to foreign aid, customs administration, taxation, and development programmes with foreign collaboration. The Ministries or Departments of Trade and Commerce are generally responsible for implementation of bilateral and multilateral trade agreements whilst the Ministries of Aviation, Transport and Communications would be concerned with matters relating to air transit agreements, shipping and other means of transportation, broadcasting, postal services, etc. The Ministry or the Department of Defence is also concerned with international law in the matter of use or deployment of the armed forces including passage of warships and aircraft.

A few of the governments like the United States or the United Kingdom have separate legal advisers for some of those departments who deal with questions concerning both municipal and international law. The method of consulting the departmental legal adviser in such cases is very much similar to the system set out above adopted by larger Foreign Offices, that is to say, the legal adviser is kept in the picture in the day-to-day functioning of the department. Since matters relating to these departments cannot be handled in an isolated fashion and may involve the general policy of the Government in foreign affairs, the legal advisers of the department concerned are known generally to keep closely in touch and act in consultation with the Foreign Office legal department. In a vast majority of the countries, however, these departments normally seek advice from the general legal advisory department which is organised under the Attorney-General or the Minister of Justice. The Attorney-General's department may at times post resident legal advisers in the Ministries or Departments concerned but they form part and parcel of the general legal advisory services.

From the information available, it is not very clear as to how international law problems arising in the various departments which are serviced by the general legal advisory department under the Attorney-General are handled, and what is the relationship of that department with the Foreign Office legal adviser in relation to the international law problems where a separate international law department is maintained in the Foreign Office. It is desirable that if international law problems arising in the departments other than the Foreign Office are to be handled by a different set of legal advisers, close co-ordination would be necessary between them and the Foreign Office legal adviser in cases when the Foreign Office has a legal department of its own.

(ii) Treaty-making and interpretation

Another important branch of the work of the International Law Division is treaty-making and their interpretation. As a matter of fact, a good deal of advisory work not only in the Foreign Office but also in other Government Departments involves interpretation of treaties. Consequently, if the legal adviser is associated with the negotiation and conclusion of treaties, he is better suited to render advice on problems which may involve interpretation of that treaty. The practice in the Arab Republic of Egypt, Britain, Dahomey, India, Indonesia, Iran, Japan, Jordan, Kuwait, Pakistan, Philippines, Republic of Korea, Syria and Togo is usually to associate an officer of the Foreign Office legal department from the early stages of negotiations irrespective of the fact that the treaty may directly be related to the work of some other government department. Experience has shown that in matters of drafting as well as on substantive issues, the legal adviser's viewpoint should be set forth at the outset as it is often difficult to rectify a defect once the parties have come to an agreement after hard bargaining. It may be worthwhile to adopt this practice, especially in connection with the conclusion of political treaties and more important trade agreements.

Preparation of full powers and steps for ratification of treaties are generally taken practically in all countries in the Treaties Section of the Foreign Office. The Treaties Section is usually one of the wings of the Legal Adviser's Department where the Foreign Office maintains a legal department of its own.

(iii) *Preparation of Court Cases*

Although handling of litigation and preparation of court cases on behalf of the Government is generally the responsibility of a centralised department like the Treasury Solicitor in Britain or the Department of Justice in the United States and in the Attorney-General's Department or the Ministry of Justice in the case of Botswana, Kenya, Malaysia, Malawi, Nepal, Uganda, Zambia and most other countries, it is now generally accepted that the conduct of cases before the International Court of Justice or International Arbitral Tribunals should vest with the legal department of the Foreign Office. The legal Advisers of the U.S. State Department and of the British Foreign Office often act as the Agent for their Governments before the International Court of Justice and it is normally the practice for many other States to accredit either an Ambassador or their Foreign Office legal adviser as the Agent. Preparation of a case before the International Court of Justice or an international arbitral tribunal not only requires the collection of a good deal of factual data and legal material on the question at issue, but it also necessitates submission of detailed briefs containing arguments prior to the oral hearing. This is normally done in the International Law Section of the Foreign Office. A number of international organisations have their own committees or tribunals like the International Civil Aviation Organisation or the International Labour Organisation for settlement of disputes. Presentation of cases before such committees or tribunals is similar to that of conducting cases before the International Court of Justice or international tribunals. This work is also gradually being taken over by the Foreign Office legal adviser though other Government departments may be more directly concerned with the subject-matter of the dispute. Cases involving international law before national courts and tribunals are usually handled by the department which is normally concerned with Government litigation, but here again the Foreign Office legal adviser is often associated with the preparation of the case.

In Britain, one of the functions which the Foreign Office legal adviser performs in regard to cases before the local courts is to consider the question of issue of certificates when the court

desires to be informed of the status of a foreign State or a foreign sovereign or a person claiming to be entitled to immunity from the jurisdiction of the court. In the United States though such a certificate is issued in the form of a suggestion by the Department of Justice, it is so done usually at the instance of the Foreign Office legal adviser. In the newly independent countries, the practice of issuing certificates has yet to be developed, but there is no doubt that when the courts adopt the practice of accepting such certificates, the task would fall on the legal adviser of the Foreign Office to determine judicially in each case whether or not to issue a certificate in a particular case.

(iv) *Codification and development of International Law*

One important aspect of the work of the International Law Division which has arisen in recent years relates to codification and development of international law. It is well known that since the establishment of the United Nations and the creation of the International Law Commission, a systematic attempt is being made to progressively develop rules of international law in order to suit modern conditions and in the context of an international community composed of independent nations all over the world. An attempt is also being made to codify and formulate principles of international law on some of the important topics in the form of law-making conventions so as to do away with nebulous and customary rules which may or may not be acceptable to all nations. This involves careful examination of formulations made by the International Law Commission as also preparatory work for participation in international conferences where the work of codification in the form of conventions normally takes place. In recent years, the Law of the Sea, Diplomatic and Consular Relations, the Law of Treaties are some of the subjects which have necessitated close attention of every Foreign Office and the task has naturally fallen on the legal adviser's department. Apart from the Sixth Committee of the United Nations and the International Law Commission, there are various other forums where international law is being codified or progressively developed, such as within the Organisation of African Unity, the Organisation of American States, the Council of Europe and various other forums. The United Nations

Commission on International Trade Law and the United Nations Commission on Trade and Development are handling legal questions in the field of trade and commerce and the work of these bodies, though in the specialised field of trade, would need examination by the legal adviser's department in conjunction with the legal advisers of the departments which are directly involved.

III. Status of the Legal Adviser and his role in policy making

The status of a legal adviser in practically every country all over the world has usually been kept at a high level so that by reason of his position in the Government, he is able to effectively participate in policy formulations. Thus, the Attorney-General or the Minister of Justice is normally a person of cabinet rank who is called in to advise the Government on important issues and is associated with the policy formulations of the Government as a whole. This trend is equally reflected in the rank and status which is given to the Foreign Office legal adviser. Thus, in the United Kingdom, the first incumbent of the post of legal adviser in the Foreign Office was given the rank of an Under Secretary of State who directly dealt with the Secretary of State for Foreign Affairs. In the United States of America, the Legal Adviser of the Department of State also enjoys almost a similar status. In the Foreign Offices of the newly independent countries, the Legal Adviser is a person of the rank of an ambassador and at times that of a Minister Counsellor or a Secretary or a Joint Secretary. It is essential that this status for the legal adviser of the Foreign Office should be maintained which is commensurate with the importance of international law in the international relations of a country as a whole. It is desirable and necessary that the legal adviser should be in a position to offer independent and authoritative advice which should be given due weight by the policy-making departments of the Foreign Office and this can be so if the legal adviser is a person of high rank and directly responsible to the Minister. In view of the fact that international law is inextricably linked up with formulation of foreign policy, it is important that the legal adviser should be consulted at all stages of policy formulation and closely associated with policy making. In the countries where the Government

maintain the tradition of being guided by the advice of the legal advisers, the general practice is invariably to associate him with policy making and any tendency to make the legal adviser an instrument for justifying the decision of administrative officials is generally frowned upon. Nevertheless, the influence which the legal adviser may be expected to bring to bear on the policy formulation would depend upon his own personality, his relationship with the policy making departments of the Foreign Office and his own experience and knowledge in the field of international law.

IV. Recruitment and training of personnel for international law advisory service

As already stated, the recruitment and training of personnel depends largely on the pattern of organisation of the international law advisory service in each Government. In cases where this forms a part of the general legal service, the usual method of recruitment is through regular civil service channels. Under this system, the new entrants to the service are taken on after a qualifying test and the minimum basic requirement is a university degree in law or its equivalent. The period of training comes in during the probationary period following upon his entry into the service though certain Governments have schemes for sending their officers for specialised course of training in international law at recognised institutions or universities.

In the countries where the international law advisory service is linked with the regular foreign service : officers are recruited through regular examinations or other modes of selection prescribed for entry into the regular Foreign Service. Out of these new entrants, persons who possess academic degree in law or are otherwise trained on the subject are earmarked for being posted to the legal division in the course of their career. Apart from a certain basic training which they receive in the International Law Division itself, it is very seldom that such officers are required to undergo any specialised training outside the Foreign Office. It has, however, been found that several officers either take study leave in order to obtain a higher degree in international law or take advantage of a posting in a convenient place to acquire such higher qualification in order to better their prospects.

In the third category of cases, that is where the Foreign Office maintains a specialist division composed of persons who wish to make international law advising as their career, new entrants are usually brought in who have at lenst a Masters Degree in Law or equivalent professional qualification coupled with a certain amount of experience in law practice or teaching. The emphasis here is not only on high academic qualifications but also on a degree of maturity gained out of experience so that they may be in a position to handle the job of a specialist in international law. Some of the Foreign Offices which adopt this pattern for their international law advisory services are known to take in university professors on secondment or persons from law practice for limited periods to man the more senior posts in the department. This facilitates availability of the services of experienced persons from time to time who may be reluctant to join Government service as a career or to subject themselves to postings and transfers outside their country

V Advice from outside sources

It has been seen that even in most developed countries eminent lawyers from outside the Government are often called in and their advice sought in connection with presentation of court cases or in specific fields which require specialised knowledge and study. In Britain prior to 1885 the Foreign Office generally sought advice from various experts who were practising advocates and even the office of the Queen's Advocate was held by persons who were not regular member of the Government. Even in recent years, the British Foreign Office has not given up the practice of consulting eminent professors or of engaging as counsel legal practitioners for the presentation of their cases before the International Court of Justice or arbitral tribunals. In the United States, professors from various law schools are often requested to serve in the State Department in advisory capacities on specified fields and for specific periods. In the newly independent countries which had little or no experience in the field of international law, Governments had to rely heavily on outside lawyers not only from their own countries but also from abroad in connection with presentation of their cases before international forums as also for general advisory work on

international law. In Iran, Japan, Philippines, Republic of Korea and Syria, where the legal department in the Foreign Office is manned by regular members of the Foreign Service, the association of specialist professors has been a regular feature.

It is apparent that, however well organised a legal adviser's department in the foreign Office may be, it would have to depend on the skill and advocacy of experienced lawyers if the government's case has to be adequately presented before the International Court of Justice, arbitral tribunals or other forums. This is hardly likely to be available within the department and the government would have to depend on outside lawyer for this purpose. Apart from this, some of the fields in international law have become so specialised that it would need all the skill of a recognised expert on that particular branch to tackle the matter when an intricate problem arises. Moreover, the preparation of a case or the presentation of a Government's viewpoint may need such time-consuming process which the Foreign Office legal adviser may not be able to devote. The experience of Japan in utilising the services of professors in this kind of work has proved to be extremely fruitful. Apart from this, several countries have adopted the practice of including professors and outside lawyers in their delegations to conferences which involve drawing up of law making conventions. The need for the services of persons from these sources is all the more when the legal adviser's department of the Foreign Office is manned by regular Foreign Service officers who rotate between the Foreign Office and diplomatic posts abroad.

VI Library facilities

There can be little doubt that no legal adviser can effectively discharge his duties in advising his Government unless he is in possession of the tools of his trade, that is, an adequate and well-equipped library. In this regard the newly independent countries are somewhat at a disadvantage since they have not had the opportunity to build up a collection of books and materials on international law in the past and have to do so practically from the scrap. Very often, as pointed out by the Delegate of India during the New Delhi session (January 1973),

on account of the lack of proper library facilities and upkeep of archives more time is taken in locating the relevant materials than in tendering the advice. Further, it is often the case that books and journals which were published sometime ago are not readily available; and it is often difficult to make a choice since so much material in various languages is scattered over so many places. One of the sources which the legal adviser often needs to refer to is the 'back papers', that is, policy statements or previous opinions given on an identical or similar issue which are not usually available in published form. In older Foreign Offices there is usually the practice of indexing such 'back papers' so that they are readily available to the legal advisers whenever the occasion arises. The newly independent countries naturally lack this source since they were not directly concerned with foreign affairs during the colonial period. Occasions have been known to arise when legal advisers have had to make long trips to a European country to consult either old treatises on international law or look up 'back papers' in the Foreign Offices of their former colonial rulers. Fortunately, in many fields the law is being so much revised and codified that an adequate supply of United Nations material and current legal journals are likely to fill the void which may be found due to non-availability of classical works and 'back papers'.

VIII. THE PROTECTION AND INVIOLABILITY OF DIPLOMATIC AGENTS AND OTHER PERSONS ENTITLED TO SPECIAL PROTECTION UNDER INTERNATIONAL LAW

(i) INTRODUCTORY NOTE

During its twenty-third session held in 1971 the International Law Commission received a communication from the Security Council drawing its attention to a request received from the representative of the Netherlands concerning the need for action to ensure the protection and inviolability of diplomatic agents in view of the increasing number of incidents that were taking place in various parts of the world. The Commission decided at that session that if the U. N. General Assembly so requested, it would prepare at its 1972 session a set of draft articles on this subject with a view to submitting the same to the twenty-seventh session of the General Assembly.

By resolution 2780 (XXVI) of 3 December 1971, the General Assembly requested the International Law Commission to study the question as soon as possible and to prepare a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law. The General Assembly also requested the Secretary-General to invite comments from member States on this subject.

In pursuance of the aforesaid decision, the Commission took up this work during its 1972 session on the basis of a working paper prepared by Mr. Kearney (the then Chairman of the Commission) containing certain draft articles and the observations that were received from 24 member States. The Commission had also before it the text of a Draft Convention, known as the 'Rome Draft', a working paper containing the text of a Draft Convention submitted to the twenty-sixth session of the General Assembly by the Delegation of Uruguay, the text of the OAS Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and related Extortions that are of International Significance, signed at Washington in February 1971, the Convention for the Suppression of

Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, and the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1971.

The Commission gave detailed consideration to the subject at its 1972 session and provisionally adopted a set of 12 draft articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons, which was submitted by the Commission to the General Assembly. The Commission in transmitting the draft articles to the General Assembly indicated that it was up to the General Assembly to decide whether in view of the urgency of the matter the articles should be submitted forthwith to an international conference for consideration or return the same to the Commission for further study in the light of governmental comments. The General Assembly during its twenty-seventh session decided that the question should be included in the agenda of its twenty-eighth session, to be held during 1973, with a view to the elaboration of a Convention.

Under Article 3(a) of its Statutes, the Asian-African Legal Consultative Committee is required to consider the work of the International Law Commission and to give its comments thereon with a view to assisting the member governments of the Committee in examining the draft articles prepared by the Commission. Pursuant to the aforesaid mandate of the Committee, the Committee's Secretariat prepared certain comments on the draft articles on protection and inviolability of diplomats prepared by the Commission and placed it before the Committee at its fourteenth session held in New Delhi in January 1973.

The draft articles prepared by the Commission were based on the fundamental premise that certain categories of officials characterised as 'internationally protected persons' were entitled to special protection, and towards that end the draft articles provided that acts enumerated in Article 2 thereof be regarded as crimes by all States under their municipal laws; and that the

offender be prosecuted and punished by any State irrespective of the place of commission of the offence or the nationality of the accused person. The draft articles also imposed an obligation on the State where the alleged offender might be found either to extradite him or to proceed against him under its own laws.

The main question which the Secretariat urged the Committee to consider in respect of the draft articles was : which State or States should be competent or obliged to deal with the offender in order to effectuate in the best possible manner, the intention behind the proposed Convention and also with a view to eliminate causes of friction between States whilst implementing the provisions of the Convention ? The Secretariat pointed out that one possible view was that the State where the offence had been committed should be the only State competent and that State ought to under an obligation to prosecute and punish the offender and the State where the offender might be found should be under a legal obligation to extradite the offender. Another view was that the offender should be prosecuted and punished by the State where he was found. The third view, which in fact had been adopted by the Commission, was that every State was entitled to punish the offender and the State where the offender was found would have the option either to extradite him or to deal with him itself under its own laws.

Another question which the Secretariat posed for consideration of the Committee was whether crimes committed out of political motive should be treated any differently for the purposes of the proposed Convention. The Commission had proceeded on the basis that it should not be so.

At the New Delhi session, this matter was taken up in the fifth plenary meeting held on the 13th of January 1973 Although certain observations of a preliminary nature were made during the discussions in the Committee, it was not in a position to examine the draft articles and to give its views thereon since some of the Delegates expressed the view that the governments should have sufficient time to consider carefully the

draft articles prepared by the Commission in view of the complexity of the subject and the delicate nature of the matter covered by the draft articles. It was, however, decided that the comments prepared by the Secretariat should be circulated to the member governments so that they could be taken into account by the governments whilst considering the draft articles. The comments on the draft articles were also transmitted to the United Nations in response to the invitation extended by the General Assembly in its resolution 2926 (XXVII) of 29 November 1972.

(ii) COMMENTS PREPARED BY THE SECRETARIAT OF THE COMMITTEE ON THE DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE INTERNATIONAL LAW COMMISSION

Article 1

TEXT AS PREPARED BY THE

International Law Commission)

For the purposes of the present articles :

1. "Internationally protected person" means :

   (a) A Head of State or a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

   (b) any official of either a State or an international organisation who is entitled pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organisation, as well as members of his family who are likewise entitled to special protection.

2. "Alleged offender" means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in Article 2.

3. "International organisation" means an inter-governmental organisation.

This article fulfils a two-fold purpose, namely, it gives specific meanings to certain expressions attributed for the purposes of the draft articles and secondly, by so doing it determines the scope of the applicability of the provisions of the draft articles. This is in accordance with the practice followed in

many of the conventions adopted under the auspices of the United Nations.

The corresponding provision in the I.L.C. working paper prepared by Mr. Kearney is Article 3. Similar provisions have been incorporated in the conventions dealing with allied matters.

Paragraph 1 of this article defines what is meant by the term "internationally protected persons" thus determining the exact coverage of the scope of the draft articles in accordance with the mandate of the Commission. contained in paragraph 2 Part III of the General Assembly Resolution 2780 (XXVI) dated the 3rd December 1971. This paragraph differentiates between the two categories of persons who, in the view of the Commission, are to be accorded special protection. Sub-paragraph (a) specifically refers to the special protection to be accorded to Heads of States or Heads of Governments regardless of the nature of their visit, whether official, unofficial or private. While the Commission refrained from specifically mentioning "presidential collegiate" in this sub-paragraph. it interpreted the sub-para to include members of an organ which functioned in the capacity of Head of State or Government in collegiate fashion (See paragraph 2 of the Commentary to the draft articles prepared by the Commission). This position could perhaps be clarified by an Explanatory note to this article.

This principle of inviolability of Heads of States and diplomatic agents stemming from the fact that they were considered sacrosanct has long been acknowledged by classical international law as essential to the conduct of relations among sovereign States (See Oppenheim, 8th Edition, Vol. I, p. 789). In the case of States, inviolability is based on the principle of *par in parem non habet imperium* while in the case of diplomatic agents on the principle of *functional necessity* for fulfilling their duty. Special protection in classical international law did not only imply safety of their persons but included inflicting of severe punishment for offenders (See Hudson, *Cases on International Law*, p. 780, Hackworth's *Digest* Vol. IV, page 398). In the modern context the position or Heads of Governments should

be taken to be at par with Heads of States for the purposes of immunity under international law in view of the fact that when the doctrine of immunity for the Heads of States was evolved, the Heads of States in fact also were the Heads of their Governments. The Commission is, therefore, fully justified in including these categories of persons among these entitled to special protection. The visits of Heads of States and Governments are very frequent in modern times and it is necessary to ensure that full protection is afforded to them. We should, therefore, accept this provision in the I.L.C. Draft.

There is, however, one point which needs to be considered. The Minister for Foreign Affairs has always enjoyed a special position under international law as he is the person through whom International affairs of a State are conducted. (See Oppenheim, Vol. I, p. 764). In traditional international law the Foreign Minister was accordingly entitled to special protection. It is, therefore, suggested that the Minister for Foreign Affairs should also be included in sub-paragraph (a). In the Working Paper prepared by Mr. Kearney all Ministers of Government were brought in at par with Heads of States and Governments in paragraph 1 of Article 3 of his draft, The Commission does not appear to have accepted this position. While there may be little justification to bring in all Ministers within this category, the position of the Foreign Minister is different and has been so regarded in international law. We, therefore, recommend that "Minister for Foreign Affairs" be included in sub-paragraph (a) of this Article.

Sub-paragraph (b) defines other persons who are to be regarded as "internationally protected persons". Persons falling under this category are officials of either a State or an international organization entitled to special protection under international law or an international agreement, while on functional duty for the State or the international organization as the case may be. Members of the family of such officials are also included in this sub-paragraph for receiving special protection.

In formulating the text of sub-paragraph (b) the Commission decided in favour of the descriptive method of approach rather than an enumerative approach as being the best way of conveying the broadest scope possible

for the application of the draft articles. Mr. Kearney in his Working Paper had followed an enumerative approach in paragraph 3 of his draft. The Commission in adopting the descriptive method appears to have been influenced by article 2 of the O.A.S. Convention and Article 1 of the Rome draft which were before the Commission. We recommend that the method of approach adopted by the Commission be regarded as correct.

The Commission in its commentary to this article explains that the accordance of special protection to categories of persons mentioned in sub-paragraph (b) is connected with the performance of official functions. Thus a diplomatic agent on vacation in a State other than the host or the receiving State would not ordinarily be entitled to special protection. We recommend that this position be accepted as correct.

The Commission in its commentary has explained that the preposition "for" used in this sub-paragraph relates to the special protection to be afforded by a receiving or host State and the preposition "because of" refers to that afforded by a State of transit. The Commission has also explained that the special protection envisaged here applies to all officials who are entitled to inviolability as well as those entitled to a more limited concept of protection. We feel that this position may be clarified by an explanatory note to this article.

The use of both expressions "general international law" and "international agreement" in sub-paragraph (b) was adopted by the Commission to enable the broadest scope of application of the draft; for example, if the expression "general international law" was not mentioned, diplomatic agents of States not party to the Vienna Convention on Diplomatic Relations might be considered as excluded from the application of sub-paragraph (b). The draft also takes account of the new progressive trend in international law which includes the protection of members of special missions.

The Commission in its *Commentary* on this sub-paragraph explains that it intended to cover within the purview of sub-paragraph (b) diplomatic agents and members of the administrative and technical staff of the mission within the meaning of the

Vienna Convention on Diplomatic Relations; consular officials and their staff within the meaning of the Vienna Convention on Consular Relations; officials of the United Nations within the meaning of Articles V and VII of the Convention on the Privileges and Immunities of the United Nations; experts on missions for the United Nations within the meaning of Article VI of the aforesaid Convention: and officials of specialised agencies within the meaning of Articles VI and VIII of the Convention on the Privileges and Immunities of Specialised Agencies. The *Commentary* further states that Heads of special missions and members of their diplomatic, administrative and technical staff and Heads of Delegations, other delegates together with members of their diplomatic, administrative and technical staff are also to be included within the category mentioned in sub-paragraph (b). It also appears from the I.L.C's *Commentary* to paragraph 3 of this article that officials of regional and other inter-governmental organisations are also included in the category covered by sub-paragraph (b) of paragraph 1 of this article.

On a close examination of this sub-paragraph we find that whilst there would be no difficulty in according special protection to diplomatic and consular officers together with their administrative and technical staff (as they would be covered either by the Vienna Conventions or general principles of international law) and persons connected with the United Nations and Specialised Agencies either as delegates or as officials or specialists who are covered by the two United Nations Conventions mentioned above, some difficulty may be experienced about the position of persons who are included in delegations to *ad hoc* conferences or are sent to foreign countries either on goodwill visits or for transaction of governmental business such as negotiating agreements of various characters. The Convention on special Missions adopted in 1969 has yet to be ratified by many States, and it is possible to visualise some cases which may not be covered by this Convention.

Having regard to the modern tendency and practice of nations to send official delegations for important governmental business which are often headed by Ministers of Cabinet rank, we consider that a specific provision should be made in the draft

articles which would clearly and without any doubt whatsoever provide for special protection of such persons in this Convention. There can be no doubt that the protection of Cabinet Ministers and important officials who are sent on such delegations is of equal, if not greater, importance to the home States than the protection of their diplomatic agents. In fact, Mr. Kearney in his Working Paper had specifically provided for protection of this category of persons in Article 3(2) (g) of his draft even though in Article 3(2) (c) he had separately included the categories of persons who would be entitled to personal inviolability under the Convention on Special Missions.

We recommend that a provision similar to Article 3 (2) (g) of Mr. Kearney's Working Paper should be included as sub-paragraph (c) in paragraph 1 of Article 1 of the International Law Commission's draft, at least by way of abundant caution, even though it may be possible to take the view that they are already included in sub-paragraph (b) of that article.

Paragraph 2 of this Article defines the expression "alleged offender". The definition ought to be acceptable but we may point out that difficulties could arise in its practical application when a State may choose to proceed under this Convention. This paragraph provides that there must be grounds to believe that a person has committed a crime of the prescribed category - and it ought to be so. But the question is who has to be satisfied about the existence of the grounds and in what manner — should it be subjective satisfaction of the Authority or should it be examined objectively ? Unless this matter is clarified in the draft, possible conflicts may arise in certain cases between two or more States and particularly the State of nationality when a State may choose to proceed against a person on its own satisfaction that grounds do exist for trying him as an alleged offender.

Paragraph 3 defines what is an "international organization" within the meaning of the draft articles. In its *Commentary*, the Commission has clarified that "international organizations" include not only those of a universal character but also regional and other inter-governmental organisations. For the reasons given in the *Commentary*, this provision should be acceptable.

A question arose before the Commission whether the expression "international organisations" should include non-governmental organisations of a certain character such as the International Red Cross by reason of the fact that the officials of such non-governmental organisations had to perform functions which were in certain cases more important than those performed by officials of governmental organisations. The Commission did not accept this proposal in view of the fact that it would be difficult to draw a line, if non-governmental organisations were also to be included. In the circumstances, we may accept the recommendations of the Commission although it might have been desirable to include officials of the International Red Cross within the category of persons entitled to special protection.

Article 2

(Text as adopted by the Commission)

"The international commission, regardless of motive of :

(a) a violent attack upon the person or liberty of an internationally protected person,

(b) a violent attack upon the official premises or the private accommodation of an internationally protected person likely to endanger his person or liberty,

(c) a threat to commit any such attack,

(d) an attempt to commit such attack, and

(e) participation as an accomplice in any such attack, shall be made by each State party a crime under its internal law, whether the commission of the crime occurs within or outside of its territory.

2. Each State party shall make these crimes punishable by severe penalties which take into account the aggravated nature of the offence.

3. Each State party shall take such measure as may be necessary to establish its jurisdiction over these crimes."

This article deals with two distinct though related matters, namely, (a) the determination *ratione materiae* of the scope of

the draft articles by setting out the nature of the crime to which the Convention will apply, and (b) the obligation of the States parties to the Convention to prosecute and punish those crimes.

Articles 1, 2 and 4 of the Working Paper prepared by Mr. Kearney covered the subject-matter of the present draft article. Similar, though not identical, provisions were also incorporated in the Rome draft, the O.A.S. Convention and the draft Convention prepared by the Delegation of Uruguay.

Paragraph 1 of this article makes it the obligation of a State party to the Convention to regard the acts enumerated in this paragraph as crimes under its internal law *irrespective of whether the commission of the act takes place within or outside its territory*. A further obligation is imposed upon States to treat such acts as crimes *regardless of the motives* of the offender in committing the offence.

Two questions need consideration in regard to this paragraph, namely: (i) Should a State be obliged to treat the acts enumerated in this paragraph as crimes under its own internal law even though they are committed outside its territory with a view to punishing the offender, and (ii) whether the motive of the offender ought to be disregarded in treating the specified acts as crimes.

Under customary international law, a State is competent to regard a particular act or omission as a crime under its internal law when it is committed in its own territory and to punish the offender if the crime has been committed within its territory regardless of the nationality of the offender. A State is also competent to punish its own nationals for their acts or omissions which would be regarded as crimes under its internal law even though the same are committed outside its territory. The article as provisionally adopted by the Commission, however, contemplates that every State would regard the acts specified in paragraph 1 of this article, wherever they may be committed, as crimes under its internal law so that the offender may be punished irrespective of the place of the commission of the offence and irrespective of his nationality. This position, though

somewhat inconsistent with the doctrine that 'crime is local', has been applied in the case of *piracy jure gentium* and in respect of war crimes.

It may be argued that if the proposed Convention is to have any effective force, it is necessary that all States must regard the acts specified in paragraph 1 of this article as crimes under its internal law irrespective of the place of the commission of the offence on the same footing as piracy or war crimes and as such punishable by every State irrespective of the place of the commission of the offence. It may be said that international co-operation is essential for suppression of acts of terrorism against internationally protected persons and the same can be achieved best in the manner contemplated in this draft article. On the other hand, it may be argued that international law places an obligation on every State to prosecute and punish the offender whenever acts of the nature mentioned in this article are committed in its territory and that the scope of the proposed Convention ought to be limited to emphasizing that obligation. Thus, it may be contended that the State where the acts enumerated in this paragraph have been committed should regard such acts as crimes and deal with the offender in the usual manner, namely, by apprehending and punishing him if he is found in its territory or by taking out extradition proceedings if the offender has taken refuge in the territory of some other State; and on this basis it would be quite unnecessary to provide that a State must regard the acts as crimes even if they are committed outside its territory. In any view of the matter, there should be no objection to accepting the recommendations of the International Law Commission that the acts enumerated in this paragraph shall be made by each State a crime under its internal law because that will ensure that every State would regard acts of this character as crimes if they are committed within its territory and to that extent the provisions of this article would have served a very useful purpose. As already stated, the point which needs careful consideration is whether the expression used in this paragraph "*whether the commission of the crime occurs within or outside of its territory*" should or should not be retained. In the first view of the matter, this has to be retained whilst in the second view, this should be omitted.

As regard the second point which requires consideration with regard to this paragraph, namely, whether the concept embodied in the expression "*regardless of motive*" should be acceptable, the Commission in its *Commentary* has explained that "regardless of motive" does not mean unintentional. The *Commentary* states that if an offence has been committed without any intention on the part of the offender, such as, traffic accidents or when the identity of the person is not known, the provisions of this article shall not apply. What is sought to be conveyed by the expression "regardless of motive" is that if the offender commits an act out of political or similar other motive, that would still be regarded as a crime. In other words, what the Commission has done is to exclude the possibility of the application of the doctrine which generally holds good in extradition law that political offenders are not to be extradited. This position has been more specifically and clearly set out in article 2 of the Working Paper prepared by Mr. Kearney.

There are two views possible on this question. On the one hand, it may be argued that the entire object of the Convention would be defeated if offences committed out of political motive are excluded from its purview. It may be further argued that the person of the Head of State, the Head of Government and other persons entitled to immunity under international law or international conventions are so sacrosanct or that their need for special protection on account of functional necessity is so important that crimes committed against their persons, for whatever motives may be, need to be punished and that the concept of "political offence" should be excluded from the scope of the provisions of these articles. It is well known that crimes are sometimes committed against such persons by offenders who wish thereby to ventilate their grievances against the home State of the person entitled to protection or at times even to embarrass their own government by attempting to establish that the government is incapable of securing the guarantees which they are required to ensure under international law or international conventions. Consequently, it may be stated that if offences of this character were to be excluded, then the immunities of the Heads of States, Heads of Governments and other privileged persons would become so imperfect that it may fetter relations

between nations. It is also to be noted that under the various municipal systems the motives of the offender in committing a criminal act is hardly of any consequence and the perpetrator of the crime is to be punished according to the gravity of the crime and not on the basis of his motive.

On the other hand, it may be stated that the crimes enumerated in this article are not ordinary offences since according to the provisions of the Commission's draft States are expected to punish the offender irrespective of the place of commission of the offence and the nationality of the offender. In such a case the principles applicable to extradition law ought to be applicable. It may, therefore, be unjust that the principle which has held the field for a considerable period of time that a person who commits a crime out of political motive ought not be extradited is a wholesome principle which ought be applicable, and there is no reason why it should be excluded in the case where the victim happens to be a person falling within the category mentioned in article 1 of this Convention. It may be pointed out that there are numerous instances where courts have refused to extradite persons who were alleged to have committed serious offences in another State once the Court was satisfied that the offence was committed out of political motive and if the person was to be sent back, he was certain to be condemned for his revolutionary activities. We cannot overlook the fact that even today certain parts of Asia and Africa are either under colonial domination or subjected to rule of alien people and it may be urged that it would be unjust to subscribe to any principle which would have the effect of curtailing the right of the people to free themselves or to work for a government of their own.

The International Law Commission in its *Commentary* to this article has clearly explained the scope and meaning of the contents of sub-paragraphs (a) to (e) of paragraph 1 of this article. The domestic legislations of various States on the law of crimes often contain different terms with different connotations and the Commission appears to have made a distinct contribution in finding expressions which are reasonably well understood in various municipal legislations. It is difficult to suggest any

improvement in the wording of these sub-paragraphs but the acceptability of some of the provisions would very much depend on what decision is taken on the two major questions discussed above. For example, it may be possible for some States to agree to treat all the acts enumerated in sub-paragraphs (a) to (e) as crimes when committed in their territory but they may not be prepared to treat (c) or (d) and possibly (e) as crimes if the obligation is to regard these acts as crimes even when committed outside their territories.

Sub-paragraphs (a) and (b) of paragraph 1 of this article are concerned with violent attacks either upon the person or liberty of an internationally protected person or upon the official premises or the private accommodation of such a person which is likely to endanger his person or liberty. Sub-paragraphs (c), (d) and (e) incorporate a series of ancillary offences, namely, a threat or an attempt to commit a violent attack or participation as an accomplice therein. The Montreal, the Hague and the O. A. S. Conventions as well as Uruguay's Working Paper and the Rome draft had followed the method of enumerating specific offences which were to be regarded as crimes under those Conventions but the Commission has adopted a different approach for reasons stated in the commentary to this article. The Commission has explained that it had decided to use the general expression "violent attack" in order to provide substantial coverage of serious offences and at the same time to avoid the difficulties which arise in connection with the listing of specific crimes in a Convention intended for adoption by a large number of States. The Commission has explained that it would be open to each individual State which becomes a party to the Convention to enumerate in its own legislation the various offences which would fall under its own legal system within the concept of violent attack upon the person or liberty or upon official premises or accommodation. We consider the approach of the Commission to be preferable in the circumstances.

Sub-paragraph (a) refers to a violent attack upon the person or liberty of an internationally protected person such as murder, wounding or kidnapping. Sub-paragraph (b) refers to a violent attack upon the official premises or the private

accommodation of an internationally protected person likely to endanger his person or liberty. The principle embodied in this sub-paragraph is new and is not to be found in the O. A. S. Convention, the Uruguay's Working Paper or the Rome Draft. The Commission has explained that it was imperative to make specific reference to such actions in a separate paragraph in view of the frequency of acts like throwing of bombs at or forcible entry into the premises of diplomatic missions, and of discharging of fire-arms at the residence of an Ambassador. The Commission has, however, stated that sub-paragraph (b) was not intended to include minor intrusion.

Sub-paragraphs (c), (d) and (e) refer respectively to a threat, an attempt to commit a violent attack under (a) and (b), and participation as an accomplice in any such acts. It may be stated that Article 1 of the Hague Convention incorporates the concept of threat whilst the Montreal Convention, Uruguay's Working Paper and the Rome Draft include the other two concepts incorporated in these sub-paragraphs.

The word "intentional" was expressly used by the Commission to stress the fact that the offender must be aware of the status of the internationally protected person enjoyed by the victim and also to avoid the application of the article in cases not falling within the scope of the paragraph such as injury in an accident resulting from negligence. Article (1) of the Montreal Convention includes a similar provision.

Paragraph 2 of this article provides that the crimes set forth in paragraph 1 should be made in internal laws of each State party to the proposed Convention as "crimes punishable by severe penalties which take into account the aggravated nature of the offence". The Hague and Montreal Conventions also provide that the offences covered by those two instruments should attract severe penalties. There can be no doubt that violent attacks against those persons who are the instrumentalities of States for conducting relations among nations constitute a grave threat to world peace and security and that the perpetrators of such crimes deserve to be severely punished in cases where their acts are regarded by the international community as

crimes. The expression "severe penalties" used in paragraph 2 of this article, however, may be regarded as somewhat vague because what may be regarded as severe penalty in one country may not be regarded as severe in another country. If one were to proceed on the traditional basis that a State's obligation was to punish crimes committed within its territories, then the provisions of paragraph 2 would be quite appropriate because a person committing a crime within the territory of a State would be dealt with in accordance with the standard applied by that State as to severe penalties. But if it is the intention that the crimes committed even outside the territory of a State should be punished by every State, then certain uniformity in the standard of punishment would be required to be prescribed. For example, in the case of piracy or war crimes, the standard of punishment to be meted out by each State is fairly uniform; and if it is the intention that the crimes of the nature enumerated in this article should be punished by all States on the same basis as piracy or war crimes, then a more specific provision would be necessary in regard to the measure of punishment.

The scope of *paragraph 3* of this article is not very clear although similar provisions are found in the Hague and Montreal Conventions and in the Rome Draft. Paragraph 1 of this article is comprehensive enough in as much as it provides that each State shall regard the categories of acts specified therein as crimes under its internal laws, and if that is so, it will certainly have jurisdiction over those crimes. The Commission considered the provisions of paragraph 3 to be necessary in order to remove any possible doubts but it appears to us that if paragraph 3 is retained, it may be rather confusing and the interpretation of paragraph 1 itself may be in some doubt. We would, therefore, suggest the deletion of paragraph 3 from this article in view of the very specific provisions of paragraph 1 itself.

Article 3

(Text as adopted by the Commission)

States party shall co-operate in the prevention of the crimes set forth in Article 2 by :

(a) taking measures to prevent the preparation in their respective territories for the commission of those crimes either in their own or in other territories;

(b) exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

The provisions of this article. according to the Commission, are intended to result in more effective measures for the prevention of the crimes set out in Article 2 of the draft. The corresponding provision in Mr. Kearney's working paper is Article 6, and substantially the same provisions have been made in Article 2, paragraphs (a) and (b) of the O. A. S. Convention and Article 9, paragraphs (a) and (b) of Uruguay draft.

There can be no doubt that it is a matter of considerable importance to ensure that States do take measures to prevent the commission of crimes of the nature covered by the Convention and this is perhaps more important than the punishment of the offender. But the questions which arise for consideration are whether the principle embodied in this article can reasonably be said to be applicable to the situation and also whether this article is not laying somewhat of an undue burden on the States.

The well-known rules concerning State responsibility enjoin upon States to prevent their territory from being used for unlawful or subversive activities against another State and that doctrine appears to have been imported in paragraph (a) of this article. Although the commission of a crime against a State functionary of the category set out in Article 1 can perhaps be regarded as an injury to the home State of the protected person, nevertheless it is doubtful whether the doctrine of State responsibility which enjoins a State to prevent its territory from being used for unlawful activities against another State can be applicable to a situation where a State itself is under an obligation to treat such acts as crimes under its own laws and to punish the offender for the same. There can be no objection if an obligation is cast on a State to take measures for prevention of crimes within its own territory, but to impose an obligation on a State that it should take measures to prevent commission of such crimes in the territory of another State may be too heavy a burden and lead to unnecessary controversy between two or more States.

For example, the home State of an internationally protected person who is the victim of a violent attack may blame the State in whose territory the crime was committed whilst the latter may pass on the blame to a third State alleging that the crime was really organised in the territory of that third State. From a practical point of view it would be more effective to provide that each State shall take measures to prevent the commission of the crimes in its own territory.

Paragraph (*b*) of this article is directed to ensuring international co-operation for prevention of such crimes when they are planned and organised on a basis whereunder criminal acts are committed systematically by members of a group in more than one country. In such cases, preventive action can be taken only by co-ordination and exchange of information among the States concerned and for this reason we consider the provisions of paragraph (b) to be appropriate.

Article 4

(Text as adopted by the Commission)

"The State party in which one or more of the crimes set forth in Article 2 have been committed shall, if it has reason to believe that an alleged offender has fled from its territory, communicate to all other States party all the pertinent facts regarding the crime committed and all available information regarding identity of the alleged offender."

This article deals with the case where the crime has been committed and the alleged offender has fled from the territory of the State where the crime had been committed. Under the provisions of this article, the State where the crime has been committed is under an obligation to communicate to all other States party to the Convention the relevant facts and information regarding the commission of the offence and the identity of the alleged offender. The principle embodied in this article does not have an equivalent either in the Montreal, the Hague or the O. A. S. Convention nor is there a corresponding provision in

Mr. Kearney's Working Paper. The reason behind the provisions of this article appears to flow from the provisions of Article 2 which imposes an obligation on each State to punish a crime against an internationally protected person irrespective of the place of the commission of the offence or the nationality of the offender. If such an obligation were to be cast on the States it could effectively be carried out only if information was available regarding the commission of the offence and the identity of the offender from the State where the crime was committed.

We have already discussed under Article 2 the arguments for and against having a provision which imposes an obligation on States to punish crimes committed outside its own territory. The provisions of this article, however, would be appropriate even if a view is taken that only the State where the crime is committed should be competent to punish the offender because that State would need to know where the offender is before sending a request for extradition.

We would, therefore, recommend that the provisions of this article should be acceptable.

Article 5

(Text as adopted by the Commission)

1. The State party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for prosecution or extradition. Such measures shall be immediately notified to the State where the crime was committed, the State or States of which the alleged offender is a national, the State or States of which the internationally protected person concerned is a national and all interested States.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is

a national and to be visited by a representative of that State.

This article lays down what action is to be taken when the alleged offender is found on the territory of a State party to the Convention following the commission of any of the crimes set forth in Article 2. The Commission in its commentary has clarified that action in accordance with the provisions of this article would be taken only when there are grounds to believe that the alleged offender has committed one or more of the crimes. This article reproduces substantially the provisions of Article 6 of the Hague and Montreal Conventions. The principles embodied in this article are also to be found in several articles of Mr. Kearney's Working Paper.

Paragraph 1 of this article postulates that the alleged offender may either be tried and punished in the State where he is found or he can be extradited to the State where the offence has been committed or even a third State, though the obligation imposed by this article is merely to ensure that the alleged offender does not escape from the territory of the State where he is found. We have already discussed under Article 2 the merits of the proposition that crimes covered by this Convention shall be punishable by all States on the basis of which the Commission's draft articles have been adopted. We have also suggested an alternative basis that the crime shall be punished only by the State in whose territory it has been committed. Even if the latter view were to prevail, the provisions of this paragraph would be appropriate because pending finalization of extradition proceedings it is necessary to secure the presence of the alleged offender in the territory of the State where he is found. The principles embodied in this paragraph should, therefore, be acceptable.

An important question which would need to be examined both in regard to this paragraph and Article 6 of the draft articles is : what should be the criteria for determining the cases where the alleged offender should be tried in the State where he is found and the cases where he should be extradited ? If the view is accepted that it is only the State in whose territory the

crime had been committed should be the State competent to punish the offender, no complication would arise because in that event, the obligation of the State where the offender is found is merely to extradite him and he can be held in that State until the extradition proceedings had been finalized. But if the basis of the Commission's draft is accepted, that is, every State is competent to punish the offender irrespective of where the crime is committed or the nationality of the offender, it would be necessary to formulate certain principles whereby any possible disputes may be resolved where more than one State, and particularly the State where the offender is found and the State where the crime has been committed wish to try and punish the offender. Since the acts specified in Article 2 are to be regarded as crimes under internal laws of each State and the standard of punishment to be awarded under different laws are bound to vary, it may be of some consequence to the offender where he is to be tried. Can be claim that he should be punished in the State where he is found or can he claim that he should be extradited ? Principles would, therefore, need to be formulated for determining the matter when the accused person makes a formal request that he should be tried in that particular country or if he requests that he should be extradited to the State where the alleged offence has been committed or to the State of his nationality.

There is one other matter which needs to be examined in connection with paragraph 1 of this article, that is, the requirement of notification to all interested States in addition to the State where the crime has been committed, the State of the nationality of the alleged offender and the State of the nationality of the internationally protected person. How is a State to find out which are the other interested States and what is the criteria for judging this matter ? We feel that the words "and all interested States" should be omitted from this paragraph.

Paragraph 2 of this article, which is designed to safeguard the rights of the alleged offender, is very similar to those found in a large number of bilateral or multilateral consular agreements. Although this paragraph contains a healthy provision for safeguarding the interests of the accused person, what needs

to be considered is how to afford such safeguards to a person who is either stateless or whose country is under colonial domination or under the rule of an alien people. The person may be a refugee from his homeland and does not wish to avail of the services of his home State for protecting his interests; there may be cases where the home State does not wish to give him protection. Some provision ought to be made for notification in the case of such a person either to a competent organ of the United Nations or such other authority as may be agreed upon by States parties to the Convention.

Article 6

(Text as adopted by the Commission)

The State party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

This article proceeds on the basis that every State has the right and the obligation to prosecute an offender for crimes enumerated in Article 2 irrespective of the place of the commission of the offence. The basic question as to whether this should be so or whether the State in whose territory the crime has been committed should alone be competent to prosecute the offender has already been discussed above, and the applicability or otherwise of this article would depend upon the attitude of States on that basic question. If the view is held that the State where the crime is committed should alone be competent to prosecute the offender, then the obligation of other States would merely be to extradite him and no obligation or competence would devolve to prosecute the offender by such States.

From the manner in which this article has been worded it seems that the primary obligation of the State where the alleged offender is found is to extradite him though the article is not at all clear as to which State the offender is to be extradited. An

option is, however, given to that State to proceed against the alleged offender in accordance with the laws of that State. The right of option under this article is wholly that of the State where the offender is found and the only obligation on that State is that if it decides not to extradite the alleged offender, then it must proceed forthwith against the alleged offender, by sending the case to its competent authorities for the purpose of prosecution. Once the option has been exercised by the State and the case is sent to its competent authorities, there is clearly no further obligation to extradite the offender even if the competent authorities of that State find that there is no case for prosecution or when he is acquitted by a court of law.

The Commission in its *Commentary* has explained that no obligation is created under this article for a State to punish or to prefer a charge against the offender. Its obligation is discharged once it submits the case to its competent authorities for the purpose of prosecution, and it will be up to those authorities to decide whether to prosecute the alleged offender or not. The Commission clarifies that if the action is taken in good faith, the decision which those authorities may take regarding initiation of criminal proceedings or the eventual acquittal of the alleged offender is immaterial.

The principles embodied in this article are also to be found in Article 5 of the O.A.S. Convention, Article 7 of the Hague and Montreal Conventions, Article 4 of the Rome Draft and Article 5 of the Uruguay's Working Paper. Similar provisions have also been made in Articles 10, 11 and 12 of Mr. Kearney's Working Paper.

If one were to proceed on the basis that every State is competent to prosecute the offender, which alone can be the basis of acceptance of this article, it appears to be somewhat doubtful whether the provisions of this article would serve the object of the Convention that the perpetrators of the crimes enumerated in Article 2 are to be severely punished. In any event, this article in its present form is likely to lead to considerable friction between States. As already stated no criteria has been laid down for the exercise of option by the State, that

is, whether to extradite the alleged offender or to proceed against him locally. Furthermore, the accused person does not seem to have any choice in the matter. Disputes may arise in cases where the State where the offence has been committed wishes to extradite the alleged offender and the authorities of the State where the alleged offender is found decide to proceed against him in their own courts and the offender is acquitted for want of evidence even though the State has acted in good faith in exercising its option. One could perhaps justify the provisions of this article on the ground that under extradition law, political offenders are not normally extradited and in such a case the State where the offender is found would be obliged to prosecute him, but then the draft articles themselves appear to proceed on the basis that the concept of political offence is not to be recognised.

If this article is to be retained we would suggest for consideration of the governments certain modifications by which an objective test should be introduced for the exercise of the option by the State concerned. The test to be laid down could very well be that the alleged offender should as a general rule be extradited if the State where the offence has been committed requests for his extradition, but if any other State wishes to extradite him, then the option could be exercised at the discretion of the State where the offender is found. The option could also be exercised with the agreement of the State where the offence has been committed or in the cases where it is clear that evidence would be more easily available in the State where the alleged offender is found than in the State where the offence has been committed. An exception to the general rule could also be made where the State is satisfied that if the offender were to be extradited, he would be subjected to inhuman or degrading punishment in the State which has requested for his extradition.

Article 7

(Text as adopted by the Commission)

1. To the extent that the crimes set forth in Article 2 are not listed as extraditable offences in any extradition treaty existing between States party they shall be deemed to have been included as such therein. States party undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it has no extradition treaty, it may, if it decides to extradite, consider the present articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the procedural provisions of the law of the requested State.

3. States party which do not make extradition conditional on the existence of a treaty shall recognise the crimes as extraditable offences between themselves subject to the procedural provisions of the law of the requested State.

4. An extradition request from the State in which the crimes were committed shall have priority over other such requests if received by the State party in whose territory the alleged offender has been found within six months after the communication required under paragraph 1 of Article 5 has been made.

This article is connected with Article 7 and applies when a State decides to extradite the alleged offender. The provisions of this article with minor modifications will still be appropriate even if the view is held that a State where the offence has been committed is the only one competent to deal with the offender because extradition proceedings will have to be initiated in order to bring back the alleged offender to the place of his prosecution. This article would be inapplicable only on a possible view that the alleged offender must be punished by the State where he is found and that he need not be extradited at all.

Under the current international practice, some States extradite offenders only when a extradition treaty exists between

the requested State and the requesting State whilst certain other States are prepared to extradite offenders even in the absence of a treaty. Both the categories of States, however, require that the offence for which the extradition has been requested is an extraditable offence under the laws of both the requested and the requesting States. The object of this article serves the purpose of providing a legal basis for extradition of the offenders in accordance with existing law and practice. Similar provisions are to be found in the O.A.S., the Hague and Montreal Conventions as also in the Rome Draft and in the Uruguay's Working Paper.

Paragraph 1 of this article is applicable when the States concerned either have an extradition treaty in force between them or when they subsequently enter into such a treaty. The Commission in its *Commentary* has pointed out that most of the crimes described in Article 2 are serious common crimes under internal law of practically all States and as such would normally be listed in existing extradition treaties under such categories as murder, kidnapping, bombing, breaking and entering and the like. This paragraph is, therefore, intended to cover any possible case where any particular offence or offences might not have been so listed in the existing extradition treaties.

Paragraph 2 of this article covers the case of States party to the Convention which make extradition conditional on the existence of an extradition treaty and where no such treaty exists at the time when extradition is requested. The words in this paragraph "if it decides to extradite" follow from the provisions of Article 6 which gives the State concerned an option in the matter. Whether or not these words should be retained would depend upon the view that may be taken on Article 6. The provision made in this paragraph that "extradition shall be subject to the procedural provisions of the law of the requested State" is in a accordance with normal extradition practice and should be accepted. This provision, however, appears to be confined to procedural aspects only and takes no note of substantial matters which some countries follow in principle, that is, non-extradition of political offenders. Whether a provision should

be made to cover such cases is a matter which needs consideration.

Paragraph 3 of this article cover the situation between those States which do not make extradition conditional on the existence of a treaty. Here also extradition is made subject to procedural provisions of the law of the requested State.

Paragraph 4 deals with the case where conflicting requests for extradition have been made and it provides that among such requests priority is to be given to the request of a State in which the crimes are committed. This provision has been found to be necessary in view of the general principle adopted in the draft articles that every State has a right to prosecute and punish the offender irrespective of where the crime has been committed. Whether or not this provision should be retained would depend upon the major question as to whether the offender is to be dealt with only by the State where the offence has been committed or by all States irrespective of the place of the commission of the offence or the nationality of the offender.

Article 8

(As adopted by the Commission)

> Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in Article 2 shall be guaranteed fair treatment at all stages of the proceedings.

This article incorporates the principles of natural justice which are known to all civilised canons of jurisprudence and includes certain guarantees available to a detained or accused person under various legal systems. The Commission in its *Commentary* to this article has stated that the provisions of Article 8 are intended to safeguard the rights of the alleged offender from the moment he is found until the time when a final decision is taken on his case. We are of the view that this clarification, which is stated in the *Commentary*, should find a place in the article itself since the proposed Convention, when

it is adopted, would contain only the provisions which are set out in the text of the article and it is rather important to clearly state in the text of the article itself that the guarantees should be available at all stages.

The Commission has also explained in its *Commentary* that it had preferred to use the expression "fair treatment" because it was more comprehensive than the expressions which are normally found in the Constitution of States and their municipal laws such as "due process", "fair hearing" or "fair trial". The views expressed by the Commission on this matter appear to be correct because the expressions "fair hearing" or "fair trial" are often linked with the actual trial of the accused person and may not cover the period of his detention during investigation and pending trial. The expression "due process" is found in the Constitution of the United States of America and certain other municipal systems. The American courts have given a very broad meaning to the expression "due process" which would cover within its scope all the guarantees which should normally be available to a person accused of an offence or who is detained at all stages. The expression may, however, not be quite clearly understood in all countries without the assistance of judicial interpretation as available in the United States. It may consequently lead to some doubt if the expression "due process" were to be used in this article. We would, therefore, support the text of Article 8 as provisionally adopted by the Commission, subject to the addition of a clause which would clarify that the treatment guaranteed under this article is to be made available at all stages from the time of apprehension of the alleged offender until the final disposal of the case against him.

Article 9

(Text as adopted by the Commission)

> The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in Article 2 shall be, in each State party, that fixed for the most serious crimes under its internal law.

In order to appreciate the scope of this article it is necessary to clarify that under certain systems of penal law an

offender cannot be prosecuted or punished if a period of time as prescribed by law has elapsed between the commission of the crime and the prosecution of the offender, that is to say, an offender becomes immune from prosecution at the expiry of the specified time-limit prescribed by the relevant law. The period prescribed varies according to the gravity of the offence and the usual practice adopted by States is to provide for a longer period of limitation for graver offences. The concept of a time-limit for prosecution of an offender is, however, not recognised in the Common Law system which is applicable in Britain, United States, some of the former British territories in Asia and Africa and other countries in the Commonwealth. Under the Common Law system an offender may be prosecuted and punished whenever he is found irrespective of any time lag between the commission of the offence and the prosecution of the offender. In the countries which recognise in principle a period beyond which prosecution is not permissible, the time-limit is not uniform and varies from country to country.

We find the provisions of this article in its present form to be unacceptable in a situation where the alleged offender can be prosecuted and punished by all States irrespective of the place of the commission of the offence which concept forms the basis of the Commission's draft articles. In view of the fact that in some States there would be no period of limitation during which the offender may be prosecuted and also in view of the fact that the period of limitation for prosecution of the offender would vary from State to State, a siutation may arise where the offender becomes immune from prosecution in the State whilst he remains liable to be prosecuted and punished in another. Conflicts between States may arise from such a situation where a State may demand extradition of the alleged offender but under the laws of the State where the alleged offender has been found, he is immune from prosecution. If the basis on which the Commission's draft articles have been adopted is to be accepted, namely, that all the States are competent to punish the offender, it would be necessary to prescribe in this article itself definite periods of limitation which would be universally applicable in all States, rather than leave the matter to be governed by the municipal law of each State.

If, on the other hand, the view prevails that the offender is to be prosecuted and punished only by he State where the offence has been committed or by the State where he is found, the provisions of this article may be regarded as acceptable.

Thc Commission in its *Commentary* has explained that the period of limitation prescribed in this article is the time within which prosecution is to be instituted and that it does not refer to any limitation as regards punishment. This is clear enough from the wording of the article itself.

Article 10

(Text as adopted by the Commission)

1. States party shall afford one another the greatest measure of assistance in connexion with proceedings brought in respect of the crimes set forth in Article 2, including the supply of all evidence at their disposal necessary for the prosecution.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

This article envisages co-operation between States party to the Convention in connection with criminal proceedings brought in respect of the crimes set forth in Article 2 by imposing an obligation to afford one another the greatest measure of judicial assistance. This article is of considerable importance and in keeping with the general objectives behind the provisions of the draft articles. It is clear that if the alleged offender is to be tried in a State in which the crime was committed, it is necessary to make testimony available to the court hearing the case. Apart from this it is possible that some of the evidence required may be available in third States.

Even if it is decided that the crime is to be punished only by the State where it is committed, the provisions of this article would still be appropriate as evidence may be in possession of the State where the offender is found or even in third States.

We accordingly recommend that the provisions of this article in its present form be accepted.

Article 11

(Text as adopted by the Commission)

The final outcome of the legal proceedings regarding the alleged offender shall be communicated by the State party where the proceedings are conducted to the Secretary-General of the United Nations who shall transmit the information to the other States party.

The provisions of this article become necessary mainly in the context that all States are entitled to prosecute and punish the alleged offender for the crimes enumerated in Article 2 of the draft articles. Once a person has been prosecuted and punished by a State, he should not be placed in jeopardy for a second time in respect of the commission of that very offence. In order to ensure that no State proceeds against that person a second time either by demanding his extradition or by dealing with him when he is found in its territory, the provision for the notification to all States is necessary. Apart from the provisions of Article 11, we feel that a specific provision should be made in the Convention that no person shall be punished twice for the same offence. This is a principle which is recognised in the Constitutions and municipal law of many States and we would suggest that a specific article be incorporated in the draft articles providing for protection of a person against double jeopardy. Such an article may be incorporated as Article 11-A. The protection against double jeopardy is so important and almost universally acceptable that a specific and separate article needs to be incorporated in the draft articles to deal with the matter.

Article 12

(Text prepared by the Commission)

Alternative A

1. Any dispute between the parties arising out of the application or interpretation of the present articles

that is not settled through negotiation may be brought by any State party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present articles.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six

months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six month time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

Alternative B

1. Any dispute between two or more parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other parties shall not be bound by the preceding paragraph with respect to any parties having made such reservation.

3. Any party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

This article contains provisions regarding settlement of disputes which may arise out of the application or interpretation of the provisions of the draft Convention. The Commission has

made two alternative formulations which provide respectively for the reference of the dispute to conciliation (Alternative A) or to an optional form of arbitration (Alternative B).

It is now the general practice to include a provision for settlement of disputes in multilateral conventions and consequently such a provision ought to be included in any Convention which may be adopted for the purpose of protection and inviolability of diplomatic agents. The Commission has limited itself to suggesting a conciliation and an arbitration procedure as embodied in Alternatives A and B since in the light of current experience, they represent the largest measure of agreement that would appear to exist among governments on the question of settlement of disputes.

Alternative A is on similar lines as Article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto which found support from a substantial number of Asian-African Delegations. Alternative B practically reproduces the text of Article 14 of the Montreal Convention. The texts of both the alternatives, whichever is approved in principle, would need certain changes but we have refrained from making any suggestions at present in view of the fact that the governments should first decide on the principle underlying the two alternatives and the formulation of the texts would very much depend on the decision on this basic question.

it is adopted, would contain only the provisions which are set out in the text of the article and it is rather important to clearly state in the text of the article itself that the guarantees should be available at all stages.

The Commission has also explained in its *Commentary* that it had preferred to use the expression "fair treatment" because it was more comprehensive than the expressions which are normally found in the Constitution of States and their municipal laws such as "due process", "fair hearing" or "fair trial". The views expressed by the Commission on this matter appear to be correct because the expressions "fair hearing" or "fair trial" are often linked with the actual trial of the accused person and may not cover the period of his detention during investigation and pending trial. The expression "due process" is found in the Constitution of the United States of America and certain other municipal systems. The American courts have given a very broad meaning to the expression "due process" which would cover within its scope all the guarantees which should normally be available to a person accused of an offence or who is detained at all stages. The expression may, however, not be quite clearly understood in all countries without the assistance of judicial interpretation as available in the United States. It may consequently lead to some doubt if the expression "due process" were to be used in this article. We would, therefore, support the text of Article 8 as provisionally adopted by the Commission, subject to the addition of a clause which would clarify that the treatment guaranteed under this article is to be made available at all stages from the time of apprehension of the alleged offender until the final disposal of the case against him.

Article 9

(Text as adopted by the Commission)

> The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in Article 2 shall be, in each State party, that fixed for the most serious crimes under its internal law.

In order to appreciate the scope of this article it is necessary to clarify that under certain systems of penal law an

offender cannot be prosecuted or punished if a period of time as prescribed by law has elapsed between the commission of the crime and the prosecution of the offender, that is to say, an offender becomes immune from prosecution at the expiry of the specified time-limit prescribed by the relevant law. The period prescribed varies according to the gravity of the offence and the usual practice adopted by States is to provide for a longer period of limitation for graver offences. The concept of a time-limit for prosecution of an offender is, however, not recognised in the Common Law system which is applicable in Britain, United States, some of the former British territories in Asia and Africa and other countries in the Commonwealth. Under the Common Law system an offender may be prosecuted and punished whenever he is found irrespective of any time lag between the commission of the offence and the prosecution of the offender. In the countries which recognise in principle a period beyond which prosecution is not permissible, the time-limit is not uniform and varies from country to country.

We find the provisions of this article in its present form to be unacceptable in a situation where the alleged offender can be prosecuted and punished by all States irrespective of the place of the commission of the offence which concept forms the basis of the Commission's draft articles. In view of the fact that in some States there would be no period of limitation during which the offender may be prosecuted and also in view of the fact that the period of limitation for prosecution of the offender would vary from State to State, a siutation may arise where the offender becomes immune from prosecution in the State whilst he remains liable to be prosecuted and punished in another. Conflicts between States may arise from such a situation where a State may demand extradition of the alleged offender but under the laws of the State where the alleged offender has been found, he is immune from prosecution. If the basis on which the Commission's draft articles have been adopted is to be accepted, namely, that all the States are competent to punish the offender, it would be necessary to prescribe in this article itself definite periods of limitation which would be universally applicable in all States, rather than leave the matter to be governed by the municipal law of each State.

If, on the other hand, the view prevails that the offender is to be prosecuted and punished only by he State where the offence has been committed or by the State where he is found, the provisions of this article may be regarded as acceptable.

Thc Commission in its *Commentary* has explained that the period of limitation prescribed in this article is the time within which prosecution is to be instituted and that it does not refer to any limitation as regards punishment. This is clear enough from the wording of the article itself.

Article 10

(Text as adopted by the Commission)

1. States party shall afford one another the greatest measure of assistance in connexion with proceedings brought in respect of the crimes set forth in Article 2, including the supply of all evidence at their disposal necessary for the prosecution.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

This article envisages co-operation between States party to the Convention in connection with criminal proceedings brought in respect of the crimes set forth in Article 2 by imposing an obligation to afford one another the greatest measure of judicial assistance. This article is of considerable importance and in keeping with the general objectives behind the provisions of the draft articles. It is clear that if the alleged offender is to be tried in a State in which the crime was committed, it is necessary to make testimony available to the court hearing the case. Apart from this it is possible that some of the evidence required may be available in third States.

Even if it is decided that the crime is to be punished only by the State where it is committed, the provisions of this article would still be appropriate as evidence may be in possession of the State where the offender is found or even in third States.

We accordingly recommend that the provisions of this article in its present form be accepted.

Article 11

(Text as adopted by the Commission)

The final outcome of the legal proceedings regarding the alleged offender shall be communicated by the State party where the proceedings are conducted to the Secretary-General of the United Nations who shall transmit the information to the other States party.

The provisions of this article become necessary mainly in the context that all States are entitled to prosecute and punish the alleged offender for the crimes enumerated in Article 2 of the draft articles. Once a person has been prosecuted and punished by a State, he should not be placed in jeopardy for a second time in respect of the commission of that very offence. In order to ensure that no State proceeds against that person a second time either by demanding his extradition or by dealing with him when he is found in its territory, the provision for the notification to all States is necessary. Apart from the provisions of Article 11, we feel that a specific provision should be made in the Convention that no person shall be punished twice for the same offence. This is a principle which is recognised in the Constitutions and municipal law of many States and we would suggest that a specific article be incorporated in the draft articles providing for protection of a person against double jeopardy. Such an article may be incorporated as Article 11-A. The protection against double jeopardy is so important and almost universally acceptable that a specific and separate article needs to be incorporated in the draft articles to deal with the matter.

Article 12

(Text prepared by the Commission)

Alternative A

1. Any dispute between the parties arising out of the application or interpretation of the present articles

that is not settled through negotiation may be brought by any State party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present articles.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six

months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six month time-limit may be extended by decision of the commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

Alternative B

1. Any dispute between two or more parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other parties shall not be bound by the preceding paragraph with respect to any parties having made such reservation.

3. Any party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

This article contains provisions regarding settlement of disputes which may arise out of the application or interpretation of the provisions of the draft Convention. The Commission has

made two alternative formulations which provide respectively for the reference of the dispute to conciliation (Alternative A) or to an optional form of arbitration (Alternative B).

It is now the general practice to include a provision for settlement of disputes in multilateral conventions and consequently such a provision ought to be included in any Convention which may be adopted for the purpose of protection and inviolability of diplomatic agents. The Commission has limited itself to suggesting a conciliation and an arbitration procedure as embodied in Alternatives A and B since in the light of current experience, they represent the largest measure of agreement that would appear to exist among governments on the question of settlement of disputes.

Alternative A is on similar lines as Article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto which found support from a substantial number of Asian-African Delegations. Alternative B practically reproduces the text of Article 14 of the Montreal Convention. The texts of both the alternatives, whichever is approved in principle, would need certain changes but we have refrained from making any suggestions at present in view of the fact that the governments should first decide on the principle underlying the two alternatives and the formulation of the texts would very much depend on the decision on this basic question.