THE WORK OF THE INTERNATIONAL LAW COMMISSION

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FOREWORD

The United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, established under General Assembly resolution 2099 (XX) of 20 December 1965, includes among its goals the dissemination of information about international law and activities in this field. In connection with this goal, the first edition of the present publication was prepared by the Secretariat in 1966. The second, third, fourth, fifth, sixth, and seventh editions were produced in 1972, 1980, 1988, 1996, 2004, and 2007, respectively, further to requests of the International Law Commission which were endorsed by the General Assembly. The present, eighth edition, brings up to date the previous edition by incorporating therein a summary of the latest developments of the work of the Commission, as well as texts of new Commission drafts. This edition reflects developments as of 31 December 2011.

Under Article 13, paragraph 1, of the Charter of the United Nations, the General Assembly is required to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." As a means for the discharge of these responsibilities, the General Assembly, in 1947, established the International Law Commission.

The present publication is intended to provide a general introduction to the work of the International Law Commission, with sufficient references to facilitate further research. Accordingly, the publication contains, in Part I, a brief historical outline of the various attempts at the development and codification of international law up to the inception of the Commission's work and, in Part II, an account of the organization, programme and methods of work of the Commission, with particular reference to the Statute under which the Commission functions. Finally, Part III is devoted to brief descriptions of the various topics and sub-topics of international law considered by the International Law Commission. An account is also given of the actions decided upon by the General Assembly following the consideration of the topics or subtopics by the Commission, and of the results achieved by diplomatic conferences convened by the General Assembly to consider drafts prepared by the Commission or by the General Assembly itself.

Annexes are appended, containing the text of the Commission's Statute, a list of present and former members of the Commission, the

text of the decision of the Swiss Federal Council regarding the juridical status of the members of the Commission at the place of its permanent seat at the United Nations Office at Geneva, an indication of the periods in which topics were considered by the Commission, and, where appropriate, the texts of multilateral conventions adopted by diplomatic conferences convened under the auspices of the United Nations or the General Assembly itself, or the texts, including draft articles, finalized by the Commission. The multilateral conventions contained in annex V, as well as the texts finalized by the International Law Commission, contained in annex VI, appear in volume II.[1]

[1] Final reports by the Commission to the General Assembly on a topic or sub-topic that did not contain draft articles (e.g., reservations to multilateral conventions), contained draft articles that were superceded by the Commission's later work (draft articles on arbitral procedure) or were to be regarded as suggestions (present statelessness) are not reproduced in the annexes. The conclusions of the Study Group on the Fragmentation of International Law are reproduced because of their significance in the broader international legal community. In addition, the Rome Statute of the International Criminal Court is not reproduced in the annexes since it was adopted on the basis of the text of the Preparatory Committee for an International Criminal Court which was a further elaboration of the Commission's draft Statute for an International Criminal Court. The latter is reproduced because of its historical significance and its relevance as part of the legislative history of the Rome Statute of the International Criminal Court.

PART I

ORIGIN AND BACKGROUND OF THE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW

1. Historical antecedents

The idea of developing international law through the restatement of existing rules or through the formulation of new rules is not of recent origin. In the last quarter of the eighteenth century Jeremy Bentham proposed a codification of the whole of international law, though in a utopian spirit.[2] Since his time, numerous attempts at codification have been made by private individuals, by learned societies and by Governments.

Enthusiasm for the "codification movement"—the name sometimes given to such attempts—generally stems from the belief that written international law would remove the uncertainties of customary international law by filling existing gaps in the law, as well as by giving precision to abstract general principles whose practical application is not settled.

While it is true that only concrete texts accepted by Governments can directly constitute a body of written international law, private codification efforts, that is, the research and proposals put forward by various societies, institutions and individual writers, have also had a considerable effect on the development of international law. Particularly noteworthy are the various draft codes and proposals prepared by the *Institut de Droit International,* the International Law Association (both founded in 1873) and the Harvard Research in International Law (established in 1927), which have facilitated the work of various diplomatic conferences convened to adopt general multilateral conventions of a law-making nature.[3]

Intergovernmental regulation of legal questions of general and permanent interest may be said to have originated at the Congress of Vienna (1814–15), where provisions relating to the regime of international rivers, the abolition of the slave trade and the rank of diplomatic agents were adopted by the signatory Powers of the Treaty of Paris of

[2] In his *Principles of International Law* (written in the period 1786–1789), Bentham envisaged that an international code, which should be based on a detailed application of his principle of utility to the relations between nations, would not fail to provide a scheme for an everlasting peace. However, he made little effort to base his plans for such a code upon the existing law of nations.

[3] See document A/AC.10/25, "Note on the private codification of public international law."

1814. Since then, international legal rules have been developed at diplomatic conferences on many other subjects, such as the laws of war on both land and sea, the pacific settlement of international disputes, the unification of private international law, the protection of intellectual property, the regulation of postal services and telecommunications, the regulation of maritime and aerial navigation and various other social and economic questions of international concern.[4]

Although many of these conventions were isolated events dealing with particular problems and in some cases applied only to certain geographic regions, a substantial number of them resulted from a sustained effort of Governments to develop international law by means of multilateral conventions at successive international conferences.

The protection of industrial property, for instance, has been the subject of successive conferences held since 1880, and the Paris Convention on the subject, first adopted on 20 March 1883, has been progressively revised six times and amended once.[5] Similarly, the codification of international humanitarian law contained in the four Geneva Conventions of 12 August 1949 regarding the protection of war victims and in the Protocols Additional to the Geneva Conventions of 8 June 1977 and 8 December 2005[6] is the direct descendant of the Geneva Red Cross Convention of 22 August 1864.[7]

The Hague Peace Conferences of 1899 and 1907, drawing upon the work and experience of preceding conferences on the laws of war and upon the previous practice of some Governments regarding the pacific settlement of international disputes, reached agreement on several important conventions and thus greatly stimulated the movement in favour of codifying international law. The Second Peace Conference of 1907, however, feeling the lack of adequate preparation for its deliberations, proposed that some two years before the probable date of the Third Peace Conference, a preparatory committee should be established "with the tasks of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a programme which the Governments should decide upon in sufficient time to enable it to

[4] See documents A/AC.10/5, "Historical survey of the development of international law and its codification by international conferences"; and A/AC.10/8, "Outline of the codification of international law in the inter-American system with special reference to the methods of codification."

[5] For the text of the Convention, see United Nations, *Treaty Series*, vol. 828, p. 107.

[6] For the text of the Conventions, see United Nations, *Treaty Series,* vol. 75, p. 2. For the text of the Protocols, see *ibid*., vol. 1125, pp. 3 and 609 and vol. 2404, p. 261.

[7] See Bevans, *Treaties and Other International Agreements of the United States of America*, 1776-1949, vol. 1, p. 7.

be carefully examined by the countries interested."[8] Arrangements for the Third Peace Conference were being made when the First World War broke out.

2. League of Nations Codification Conference

The intergovernmental effort to promote the codification and development of international law made a further important advance with the resolution of the Assembly of the League of Nations of 22 September 1924, envisaging the creation of a standing organ called the Committee of Experts for the Progressive Codification of International Law, which was to be composed so as to represent "the main forms of civilization and the principal legal systems of the world."[9] This Committee, consisting of seventeen experts, was to prepare a list of subjects "the regulation of which by international agreement" was most "desirable and realizable" and thereafter to examine the comments of Governments on this list and report on the questions which were "sufficiently ripe," as well as on the procedure to be followed in preparing for conferences for their solution. This was the first attempt on a worldwide basis to codify and develop whole fields of international law rather than simply regulating individual and specific legal problems.

After certain consultations with Governments and the League Council, the Assembly decided, in 1927, to convene a diplomatic conference to codify three topics out of the five that had been considered to be "ripe for international agreement" by the Committee of Experts, namely: (1) nationality, (2) territorial waters and (3) the responsibility of States for damage done in their territory to the person or property of foreigners.[10] The preparation of the conference was entrusted to a Preparatory Committee of five persons which was to draw up reports showing points of agreement or divergency which might serve as "bases of discussion," but not to draw up draft conventions as had been proposed by the Committee of Experts.

Delegates from forty-seven Governments participated in the Codification Conference which met at The Hague from 13 March to 12 April 1930; but the only international instruments which resulted from its work were

[8] See the Final Act of the Peace Conference of 1907, in J. B. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. II, pp. 289–291.

[9] League of Nations, *Official Journal, Special Supplement,* No. 21, p. 10.

[10] *Ibid*., No. 53, p. 9.

on the topic of nationality.[11] The Conference was unable to adopt any conventions on the topics of territorial water or State responsibility. Although the Conference provisionally approved certain draft articles on territorial waters which later exerted influence to the extent that Governments accepted them as a statement of existing international law, it failed to adopt even a single recommendation on the subject of State responsibility.

No further experiment in codification was made by the League of Nations after 1930. But on 25 September 1931, the League Assembly adopted an important resolution on the procedure of codification, the main theme of which was the strengthening of the influence of Governments at every stage of the codification process.[12] This underlying theme was subsequently incorporated in the Statute of the International Law Commission of the United Nations, together with certain other recommendations stated in the resolution, such as the preparation of draft conventions by an expert committee, and the close collaboration of international and national scientific institutes.

3. Drafting and implementation of Article 13, paragraph 1, of the Charter of the United Nations

The Governments participating in the drafting of the Charter of the United Nations were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law. As a corollary, they also rejected proposals to confer on the General Assembly the power to impose certain general conventions on States by some form of majority vote. There was, however, strong support for conferring on the General Assembly the more limited powers of study and recommendation, which led to the adoption of the following provision in Article 13, paragraph 1:[13]

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[11] On 12 April 1930, the Conference adopted the following instruments:

1. Convention on certain questions relating to the conflict of nationality laws (League of Nations, *Treaty Series,* vol. 179, p. 89);
2. Protocol relating to military obligations in certain cases of double nationality (*ibid*., vol. 178, p. 227);
3. Protocol relating to a certain case of statelessness (*ibid*., vol. 179, p. 115);
4. Special Protocol concerning statelessness (League of Nations document C.27.M.16.1931.V).

Except for No.4, the above instruments have been in force since 1937.

[12] League of Nations, *Official Journal, Special Supplement,* No. 92, p. 9.

[13] See *Documents of the United Nations Conference on International Organization, San Francisco, 1945,* vol. III, documents 1 and 2; vol. VIII, document 1151; and vol. IX, documents 203, 416, 507, 536, 571, 792, 795 and 848.

"1. The General Assembly shall initiate studies and make recommendations for the purpose of:

"a. . . . encouraging the progressive development of international law and its codification."

During the second part of its first session, the General Assembly, on 11 December 1946, adopted resolution 94 (I) establishing the Committee on the Progressive Development of International Law and its Codification, sometimes known as the "Committee of Seventeen." The Committee was directed to consider the procedures to be recommended for the discharge of the General Assembly's responsibilities under Article 13, paragraph 1.

The Committee held thirty meetings from 12 May to 17 June 1947 and adopted a report recommending the establishment of an international law commission and setting forth provisions designed to serve as the basis for its statute.[14]

Several important questions of principle relating to the organization, scope, functions and methods of an international law commission were thoroughly discussed by the Committee. Some members of the Committee saw no marked distinction between the progressive development of international law and its codification. In both cases, they observed, it would be necessary to conclude international conventions before the results were binding on States. Most of the other members, however, thought that there were differences of a substantive nature between codification and progressive development, although there were divergencies in the emphasis they placed on one or the other of the two concepts.[15]

As to the composition of an international law commission, the majority of the Committee favoured the idea that members should not be representatives of Governments but rather should serve in their individual capacities as persons of recognized competence in international law. While some members of the Committee stressed the scientific and non-political nature of the work to be performed by the proposed commission, the majority of the Committee took the view that the work of the commission should always be carried out in close cooperation with the political authorities of States and that actions in respect of the drafts prepared by the Commission should be decided upon by the General Assembly.

During the second session of the General Assembly, a large majority of the Sixth (Legal) Committee[16] favoured the setting up of an inter-

[14] See *Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1.*

[15] See the discussion on the methods of work in relation to the progressive development and codification of international law, at pp. 46-47 below.

[16] The Sixth Committee is the main committee of the General Assembly of the United Nations which is entrusted with the consideration of legal issues. See Rules of

national law commission, and a draft Statute of the International Law Commission was prepared by a subcommittee of the Sixth Committee.[17] On 21 November 1947, the General Assembly adopted resolution 174 (II), establishing the International Law Commission and approving its Statute. Since then, the Statute has been amended by six further resolutions of the General Assembly, adopted partly on the initiative of the Commission and partly on that of Governments.[18] The text of the Statute, as it now stands, is reproduced in annex I.

In accordance with the relevant provisions of the Statute (articles 3 to 10), the first elections to the International Law Commission took place on 3 November 1948, and the Commission opened the first of its annual sessions on 12 April 1949.

Procedure of the General Assembly, rule 98 (document A/520/Rev.17). Relevant information and documentation may be found on the official website of the Sixth Committee. See www.un.org/en/ga/sixth/.

[17] See *Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1g.*

[18] See General Assembly resolutions 485 (V) of 12 December 1950, 984 (X) and 985 (X) of 3 December 1955, 1103 (XI) of 18 December 1956, 1647 (XVI) of 6 November 1961 and 36/39 of 18 November 1981. The amendments relate to the expenses to be paid to the members of the Commission, the location of the Commission's meetings, the extension of the term of office of Commission members, the size of the Commission as well as the regional distribution of its membership (*see pages 18, 69-70, 17-18, 17 and 11, respectively*). In 1996, the Commission noted that its Statute, which was drafted shortly after the end of the Second World War, had never been the subject of a thorough review and revision. The Commission concluded that, on the whole, the Statute had been flexible enough to allow modifications in practice. At the same time, the Commission drew attention to some aspects of the Statute which warranted review and revision as the Commission approached its fiftieth year. The Commission recommended that consideration be given to consolidating and updating the Commission's Statute to coincide with the fiftieth anniversary of the Commission in 1999. See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 147 (*a*), 148 (*s*) and 241–243.

PART II

ORGANIZATION, PROGRAMME AND METHODS OF WORK OF THE INTERNATIONAL LAW COMMISSION

1. Object of the Commission

Article 1, paragraph 1, of the Statute of the International Law Commission provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification." Article 15 of the Statute makes a distinction "for convenience" between progressive development as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" and codification as meaning "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." In practice, the Commission's work on a topic usually involves some aspects of the progressive development as well as the codification of international law, with the balance between the two varying depending on the particular topic.[19]

Although the drafters of the Statute envisaged that somewhat different methods would be used in regard to progressive development, on the one hand, and codification, on the other, they thought it desirable to entrust both tasks to a single commission. Furthermore, they did not favour proposals for the setting up of separate commissions for public, for private and for penal international law. Thus article 1, paragraph 2, of the Statute states that the Commission "shall concern itself primarily with public international law, but is not precluded from entering the field of private international law."

For more than fifty years, however, the Commission has worked almost exclusively in the field of public international law.[20] In 1996, the Commission noted that in recent years it had not entered the field of private international law, except incidentally and in the course of work

[19] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 102, and *ibid*., *1996,* vol. II (Part Two), paras. 156 and 157. See also pp. 46-47 below.

[20] The Commission has not, however, always maintained a strict distinction between public and private international law, and has considered aspects of the latter category in some of its work. See, for example, its consideration of the topic "Jurisdictional immunities of States and their property."

on subjects of public international law; moreover, it seemed unlikely that the Commission would be called upon to do so having regard to the work of bodies such as UNCITRAL and the Hague Conference on Private International Law.[21]

The Commission has also worked extensively in the field of international criminal law, beginning with the formulation of the Nürnberg principles and the consideration of the question of international criminal jurisdiction at its first session, in 1949, which culminated in the completion of the draft Statute for an International Criminal Court at its forty-sixth session, in 1994, and the draft Code of Crimes against the Peace and Security of Mankind at its forty-eighth session, in 1996. The Commission took up a further criminal law topic with the inclusion in its programme of work of the topic "the obligation to extradite or prosecute (*aut dedere aut judicare*)," at its fifty-seventh session, in 2005.[22]

2. Members of the Commission

(a) Qualifications and nationality

Article 2, paragraph 1, of the Statute provides that the members of the Commission "shall be persons of recognized competence in international law." The members of the Commission are persons who possess recognized competence and qualifications in both doctrinal and practical aspects of international law.[23] The membership of the Commission often reflects a broad spectrum of expertise and practical experience within the field of international law, including international dispute settlement procedures.[24] Members are drawn from the various segments of the international legal community, such as academia, the diplomatic corps, government ministries and international organizations.[25] Since

[21] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 155.

[22] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

[23] See *Yearbook of the International Law Commission, 1974,* vol. II (Part One), document A/9610/Rev.1, para. 207.

[24] While the membership of the Commission, since its inception, has been overwhelmingly male (the first female candidates were nominated at the 1961 and 1991 elections), the General Assembly elected the first two female members of the Commission in 2001. Female members were elected in 2006 and 2011.

[25] In 1976, a Member State put forward the candidature of a staff member of the Office of the High Commissioner for Refugees for election to a vacancy in the International Law Commission. The Legal Counsel of the United Nations indicated that the election of a staff member to the Commission would be incompatible with the staff rules and regulations of the United Nations. The Legal Counsel added that a similar position was

the members are often persons working in the academic and diplomatic fields with outside professional responsibilities, the Commission is able to proceed with its work not in an ivory tower but in close touch with the realities of international life.[26] As in the case of the judges of the International Court of Justice, the members of the Commission sit in their individual capacity and not as representatives of their Governments.[27] In addition, the members of the Commission cannot be replaced by alternates or advisers.[28]

No two members of the Commission may be nationals of the same State (article 2, paragraph 2).[29] In case of dual nationality, a person is deemed to be a national of the State in which he or she ordinarily exercises civil and political rights (article 2, paragraph 3). Eligibility for election is not restricted to nationals of Member States of the United Nations, but no national of any non-member State has ever been elected to the Commission.[30] This possibility would seem to be diminishing as the membership of the United Nations increases and becomes almost universal.[31]

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taken by the Office of Legal Affairs of the United Nations in a case involving membership in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The question of incompatibility arose not under the provisions of the Commission's Statute but rather from the provisions of the staff regulations and rules of the United Nations and the relevant practice. The staff member withdrew his candidature. A staff member of a specialized agency was elected to the Commission by the General Assembly in 1991 and by the Commission in 2000 to fill a casual vacancy. A staff member of the World Bank was nominated for election to the Commission, in 2006, but was not elected.

[26] See *Yearbook of the International Law Commission, 1974*, vol. II (Part One), document A/9610/Rev.1, para. 210.

[27] See *ibid., 1979,* vol. II (Part One), document A/CN.4/325, para. 4.

[28] See *ibid., 1974,* vol. II (Part One), document A/9610/Rev.1, para. 210.

[29] The Statute does not address situations in which the nationality of a member of the Commission changes after the election. In one instance, the Commission had two members who both became nationals of the United Arab Republic after the first session of the quinquennium as a result of the formation of a union between Egypt and Syria on 22 February 1958, following the election of both members by the General Assembly in 1956. One of the members resigned. In another instance, the Commission had two members who both became nationals of Germany after the fourth session of the quinquennium as a result of the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, following the election of both members by the General Assembly in 1986. Both members continued to serve during the last year of the quinquennium and completed the term of office for which they were elected. Following the dissolution of Czechoslovakia into the Czech Republic and the Slovak Republic, as of 1 January 1993, the sitting member from Czechoslovakia continued to serve as a national of the Czech Republic.

[30] A national of Switzerland was nominated at the 1968 election (but not elected), even though Switzerland was not a member of the United Nations at the time.

[31] As of 31 December 2011, there were 193 States Members of the United Nations.

(b) Election

i. Election of the entire Commission

The Committee of Seventeen, which recommended the creation of the Commission (as described in Part I), had suggested similarity between the International Court of Justice and the Commission with regard to the method of election.[32] The General Assembly, however, rejected the suggestion for a system of election jointly by the General Assembly and by the Security Council since the Court was a special case which should not serve as a precedent for the appointment of the Commission and the work of codifying international law was entrusted to the General Assembly under Article 13 of the Charter of the United Nations.[33] Instead, it decided that candidates should be nominated exclusively by the Governments of States Members of the United Nations and that the election should be by the General Assembly alone (article 3). Each Member State may nominate a maximum of four candidates, of whom two may be nationals of the nominating State (article 4).[34]

The Secretary-General sends a letter to the Governments of Member States informing them of the upcoming election, indicating the geographical distribution of seats at the upcoming election, noting the relevant provisions of the Statute, and drawing attention to the deadline for the nomination of candidates. The names of candidates must be submitted in writing to the Secretary-General by the first of June of the election year (article 5).[35]

In exceptional circumstances a Government may substitute one candidate for another whom it has nominated not later than thirty days before the opening of the General Assembly (article 5).[36] The Secretary-

[32] See the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1,* para. 5.

[33] See document A/C.6/193, para. 7.

[34] While "double" nominations (i.e. a Member State nominating two of its nationals) were common in the earlier elections of the Commission (in 1948, 1953, 1956, 1961, 1966, 1971 and 1976), this option has not been exercised since then. At the first election, in 1948, article 4 was interpreted as permitting the nomination of a maximum of two nationals and two non-nationals. However, more than two non-nationals were nominated by some States at the elections held in every election from 1953 to 1991 and in 2001.

[35] In connection with the elections held in 1976, 1996, 2001, 2006 and 2011, the General Assembly decided to include the names of several individuals, whose nominations were received after the 1 June deadline, into a consolidated list of candidates for election to the Commission. See documents A/31/PV.60, A/51/PV.52, A/56/PV.31, A/61/PV.41 and A/66/PV.35.

[36] The General Assembly begins its regular session on the Tuesday of the third week in September, counting from the first week that contains at least one working day.

General communicates the names and the *curricula vitae* of the candidates to Governments of States Members (article 6). The Secretary-General also submits a list of all of the candidates duly nominated to the General Assembly for the purposes of the election (article 7).

Article 8 of the Statute (echoing Article 9 of the Statute of the International Court of Justice) provides that at the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required (that is, recognized competence in international law as stated in article 2) and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured (article 8).

In 1956, the Sixth Committee of the General Assembly reached an agreement regarding the allocation of seats among the regional groups to ensure distribution between different forms of civilization and legal systems in connection with increasing the membership of the Commission from fifteen to twenty-one.[37] In 1961, different views were expressed concerning the continuation of this arrangement when the membership of the Commission was increased from twenty-one to twenty-five.[38] In 1981, the General Assembly decided to amend the Commission's Statute in order to increase the membership of the Commission from twenty-five to thirty-four and to provide for the election of a maximum number of members for each regional group.[39]

Rule 1 of the Rules of Procedure of the General Assembly, document A/520/Rev.17. The substitution of a candidate has occurred twice in the history of the Commission. In 1981, the United States of America substituted its nomination of Mr. George Aldrich with that of Mr. Stephen McCaffrey. In 2011, Ecuador substituted its nomination of Mr. Vázquez-Bermúdez with that of Mr. Carlos Oswaldo Salgado Espinoza.

[37] See *Official Records of the General Assembly, Eleventh Session, Annexes,* agenda item 59, document A/3427, para. 13; and *ibid., Sixteenth session, Annexes,* agenda item 17, document A/4779, paras. 4 and 5.

[38] See *ibid., Sixteenth Session, Annexes,* agenda item 77, document A/4939, paras. 9–12; and document A/36/371, paras. 4–6.

[39] General Assembly resolution 36/39 of 18 November 1981 provides that the members of the Commission shall be elected according to the following pattern: eight nationals from African States; seven nationals from Asian States; three nationals from Eastern European States; six nationals from Latin American States; eight nationals from Western European and other States; one national from African States or Eastern European States in rotation; and one national from Asian States or Latin American States in rotation. (The name of the regional group of Latin American States was subsequently changed to Latin American and Caribbean States. See United Nations Journals No. 88/19 of 1 February 1988, No. 88/23 of 5 February 1988 and 88/24 of 8 February 1988. The Asian States regional group was subsequently changed to Asia-Pacific States. See United Nations Journal No. 2011/168 of 31 August 2011.) The two rotational seats were allocated to a national of an African State and a national of an Asia-Pacific State at the election held in 2011. See

The election is held by secret ballot.[40] Those candidates, up to the maximum number prescribed for each regional group, receiving the greatest number of votes and not less than a majority of the votes of the Member States present and voting[41] shall be declared elected (article 9, paragraph 1).[42] More than one ballot may be held if necessary until all members have been elected by the required majority.[43] In the case of a tie for a remaining seat, the General Assembly holds a special restricted ballot limited to those candidates (from the regional group to which the seat is allocated) who have obtained the required majority and an equal number of votes.[44]

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document A/66/88, paras. 6–8, and General Assembly decision 66/413 of 17 November 2011.

[40] Rule 92 of the Rules of Procedure of the General Assembly. The ballot paper is constituted of five sheets—one per regional group—containing the names of the candidates eligible for that round of balloting. Votes may only be cast for the candidates appearing on each sheet, and only up to the number of seats allocated to each region (i.e. a ballot containing less than that number would still be considered valid). A blank sheet is considered an abstention in relation to that regional group. A ballot containing more votes than the number of seats allocated to a regional group is considered invalid.

[41] Rule 125 of the Rules of Procedure of the General Assembly. For purposes of the election of the International Law Commission, "present and voting" means the number of valid ballot papers cast by Member States less invalid ballots and abstentions. See rule 126 of the Rules of Procedure of the General Assembly, applied *mutatis mutandis*.

[42] If more than one national of the same State receives a sufficient number of votes to be elected, then the candidate who receives the largest number of votes or, if the votes are equally divided, the elder or eldest candidate shall be elected (article 9, para. 2). This situation has never arisen in practice.

[43] Under rule 94 of the Rules of Procedure of the General Assembly, applied *mutatis mutandis,* further rounds of balloting are restricted to the candidates having obtained the greatest number of votes in the previous ballot and to a number not more than twice the number of seats remaining to be filled. Multiple rounds were held only at the elections in 1948 (2 rounds, held at the 154th and 155th plenary meetings), 1953 (4 rounds, 453rd and 454th plenary meetings), 1991 (2 rounds, see document A/46/PV.47), (2 rounds, see document A/56/PV.39) and in 2011 (2 rounds, see document A/66/PV.59).

[44] See rules 92–94 of the Rules of Procedure of the General Assembly, applied *mutatis mutandis*. A second round of balloting was held at the 2011 election, restricted to the two candidates who were tied for the remaining seat in the Latin American and Caribbean States Group. The candidate from Costa Rica subsequently obtained the required majority and the greatest number of votes, and was accordingly elected. See document A/66/PV.59. A second round of balloting was also held at the 2001 election, restricted to the two candidates who were tied for the remaining seat in the Asian Group. The candidate from Iran (Islamic Rep. of) subsequently obtained the required majority and the greatest number of votes, and was accordingly elected. See document A/56/PV.39. A tie also occurred in 1976, where two candidates were tied for the remaining seat in the Commission after the first round. The tie was broken through the withdrawal of one of the two candidates so as to honour a "gentleman's agreement" concerning the regional distribution of seats. The President of the General Assembly promptly declared the remaining candidate as having been duly elected to the Commission. See document A/31/PV.68.

ii. Election to fill casual vacancies

The Statute provides for a different election procedure to fill a vacancy that occurs during the interval between the regular elections by the General Assembly (the so-called "casual vacancies"). In such a situation, the Commission itself elects the new member to fill the vacancy for the remainder of the term having due regard to the provisions contained in articles 2 and 8 of the Statute (article 11).[45] Vacancies in the membership of the Commission may occur for various reasons, such as death, serious illness, appointment to a new position or election to the International Court of Justice.[46] The Secretariat includes an item concerning the filling of one or more casual vacancies as the first item on the provisional agenda of the Commission.[47] The Secretariat also issues a note announcing the existence of one or more casual vacancies and reproducing the relevant provisions of the Statute in the form of a document of the Commission for general distribution.

The Statute does not provide a nomination procedure for casual vacancies. In practice, the Secretariat may receive the submission of candidates

[45] Elections to fill casual vacancies on the Commission were held at the sessions in: 1952, 1954, 1955, 1958, 1959, 1960, 1961, 1964, 1965, 1970, 1973, 1974, 1976, 1977, 1979, 1981, 1982, 1985, 1990, 1994, 1995, 1999, 2000, 2002, 2003, 2006, 2008, 2009, 2010 and 2011.

[46] In some instances, the Commission member has given written notice of resignation usually in the form of a letter addressed to the Chairman and transmitted to the Chairman through the Secretary-General of the United Nations. This has often been the case when Commission members have been elected as judges of the International Court of Justice. Commission members have also submitted letters of resignation without indicating a reason. In other instances, the Commission has taken note of the factual events resulting in a vacancy and the Chairman has declared the existence of a vacancy. Even without an express determination by the Commission of the existence of a casual vacancy, the inclusion of such an item on the agenda adopted by the Commission may be seen as an implied determination by the Commission of the existence of a casual vacancy in the membership of the Commission at that particular session. No general rule or practice has developed in the context of the Commission as to the necessity to vacate a seat on the Commission upon election or appointment to another entity. The practice on this point has varied. For example, while in several instances, as mentioned above, Commission members have vacated their seats upon election to the International Court of Justice, a member who was elected to the International Tribunal for the Law of the Sea, as of 1 October 2005, continued to serve as a member of the International Law Commission for the remainder of his term (until the end of 2006). Generally, the propriety of a member retaining his or her seat on the Commission following election to another entity is governed by the conditions of service as an United Nations expert on mission (see document ST/SGB/2002/9); the rules or practice of the other entity; and the nature of the service in the other entity (for example, whether it is full-time or part-time).

[47] This is the practice when a vacancy occurs before the session, as has often been the case. If a vacancy occurs during the session, the Commission may decide to include an item concerning filling a casual vacancy in the agenda for that session or defer action to the following session.

from Governments of Member States or members of the Commission.[48] The Secretariat gives advance notice to Commission members of the candidatures received in the form of an information circular which is sent to members before the opening of the session. The Secretariat also issues a note containing the list of candidates as well as the curricula vitae of candidates in the form of a document of the Commission for general distribution, which is issued as an addendum to its previous note announcing the vacancy.[49] The Secretariat list of candidates includes the names of candidates[50] (with an indication of their national-

[48] At the fourth session, in 1952, the three persons elected by the Commission to fill casual vacancies were each proposed by a Commission member. The elections were held at public meetings. See *Yearbook of the International Law Commission, 1952*, vol. I, 136th meeting, paras. 5 and 10, and 183rd meeting, para. 1. At the eleventh session, in 1959, candidates were proposed by Commission members during the election to fill a casual vacancy. In a private meeting at that session, the Commission noted that article 11 of the Statute concerning casual vacancies contains no reference to article 3 requiring nominations by Governments for regular elections and therefore decided that it could consider candidatures submitted by a member of the Commission. The election to fill the casual vacancy was held at a private meeting. At the thirty-seventh session, in 1985, one candidate was proposed by a Commission member. Another individual whose name was put forward by a Commission member sent a letter to the Legal Counsel requesting that his name be withdrawn. The individual's name did not appear in the list of candidates. The election to fill casual vacancies was again held at a private meeting.

[49] The practice of issuing a Secretariat list of candidates began in 1960. Prior to then, information on candidatures received was circulated to members of the Commission and an informal list of candidates was prepared by the Secretariat for consideration by Commission members. (At times, the members of the Commission were also informed of candidatures by oral statements made by the Commission's Secretary.) In accordance with the decision of the Legal Counsel of the United Nations, Constantin A. Stavropoulos, in 1973, the Secretariat list of candidates contains the following information: names, nationalities and curricula vitae of candidates. The source of submission of the candidates is not indicated in the list. In accordance with the same decision, the Secretariat issues another document setting out the texts of communications received submitting or supporting candidatures in the form of a conference room document of the Commission restricted to Commission members. These communications are usually from Governments. In 1985, the Secretariat also published the text of a communication received from a member of the Commission submitting the name of a candidate. In some instances, information concerning the source of submission of candidates has been provided orally to Governments upon request prior to the election. In 1985, the Legal Counsel, Carl-August Fleischhauer, decided that the Secretariat could not follow this practice in a particular case because it was under a constraint of confidentiality due to the request of the member who had submitted the candidature not to disclose its source other than to Commission members prior to the election.

[50] The list of candidates prepared by the Secretariat is for information purposes only and is not necessarily determinative of which names will appear on the ballot. For example, in advance of the 2002 election to fill a casual vacancy for a single seat the Secretariat issued an addendum to its previous note (announcing the vacancy, document A/CN.4/522) containing the name of a single candidate (document A/CN.4/522/Add.1). Subsequently, a further nomination was received shortly prior to the election. As there

ity) submitted by a Government of a Member State or by a member of the Commission.

The date of election is fixed by the Commission following consultations conducted by its Chairman.[51] The Commission elects the new member to fill the vacancy by secret ballot[52] in a private meeting.[53] Since 1981, the Commission has elected members to fill vacancies following the geographical distribution provided for in resolution 36/39 of 18 November 1981.[54] The Commission holds separate elections to

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was no time to issue a further addendum, the second nomination was announced orally by the Chairman, and a copy of the communication was circulated to the members of the Commission. At the election, both names appeared on the ballot and the second candidate was subsequently elected.

[51] The Commission may hold an election to fill a casual vacancy arising during the session at a later time or at its next session.

[52] This practice is similar to that of the General Assembly which holds elections by secret ballot. See rule 92 of the Rules of Procedure of the General Assembly. In 1979, the General Assembly decided that "The practice of dispensing with the secret ballot for elections to subsidiary organs when the number of candidates corresponds to the number of seats to be filled should become standard and the same practice should apply to the election of the President and Vice-Presidents of the General Assembly, unless a delegation specifically requests a vote on a given election." See rules of procedure of the General Assembly, annex V, para. 16. The Commission considered the question of following this practice in filling casual vacancies in 1985 (in the context of the vacancy arising out of the election of Ni Jhengyu to the International Court of Justice), 1995, 2003 (for the casual vacancy arising out of the resignation of Robert Rosenstock) and in 2006. In the first instance, in 1985, the Commission nonetheless decided to proceed by secret ballot partly out of the concern that a distinction could be drawn between a member elected by acclamation and those elected by secret ballot (through which procedure three other members were elected at the same meeting to fill casual vacancies in another regional group). A similar approach was taken at the elections held at the 1999 and 2000 sessions, also involving several seats spanning more than one regional group, some of which only had one candidate, while others were contested by multiple candidates: a secret ballot was held (the possibility of an accalamation procedure was not considered). At the elections in 1995, 2003 and 2006, the Commission decided to follow the acclamation procedure where only one nomination had been received for one open seat and on the basis of a request (even if implicit, as was the case of the election in 1995), made from the floor, that resort to a secret ballot be dispensed with in favour of election by acclamation.

[53] Before 1954, the Commission filled casual vacancies by election in public meetings after consideration of candidates in private meetings. Since 1954, it has been the Commission's consistent practice to fill the vacancies by election (or in a few instances by acclamation) in private meetings (except in 1995 where a member was elected in a public meeting, See *Yearbook of the International Law Commission, 1995,* vol. I, 2378th meeting, paras. 7–9). There are no summary records of private meetings.

[54] Although there is no requirement in the Statute that a candidate for a casual vacancy should be from the same regional group of its previous occupant, since the establishment of the regional group distribution in 1956, nominations to fill a casual vacancy have always been for individuals from the same regional group. Accordingly, article 11 has been applied as also being subject to article 9, paragraph 1, in that it has consistently been understood that the casual vacancy election procedure cannot be used

fill vacancies in different regional groups.[55] Votes for candidates not belonging to the regional group for which an election is held or for more candidates than there are vacancies in the regional group are considered invalid. The candidate who receives a majority of the votes of the members who are present and voting is elected.[56] Members who abstain from voting[57] are considered as not voting.[58] When no candidate obtains the majority required as a result of the first ballot, subsequent ballots are held.[59]

The Chairman announces the result of the election in a public meeting, which is duly recorded in the summary records.[60] The Chairman notifies the newly-elected members of the election results and invites them to participate in the Commission's proceedings. Members elected to fill a casual vacancy serve for the remainder of their term and are eligible for re-election at the following election of the Commission.

In 1955, the General Assembly invited the Commission to give its opinion concerning a proposal to provide that a vacancy should be filled by the Assembly rather than the Commission in the light of the extension of the term of office of members from three to five years.[61] The Commission decided not to recommend such a proposal since the Gen-

to circumvent the regional group distribution most recently established by General Assembly resolution 36/39. The Secretariat notes announcing the casual vacancies at the 1985 and 1990 elections (documents A/CN.4/386 and A/CN.4/433, respectively) made this explicit by including a reference to the regional group distribution. This practice has been discontinued as compliance with the regional group distribution is now well established as a matter of practice.

[55] In the early years, the Commission normally held a separate election for each vacancy in the alphabetical order of the name of the vacating member. In 1973, the Commission decided to vote together on two vacancies in the same regional group. The same practice was followed in 1985 with respect to three vacancies in the same regional group; a separate election was held to fill a single vacancy in a different regional group. The procedure was followed again in 2003 in relation to two vacancies in the Eastern European Group, which had arisen simultaneously. In contrast, two vacancies in another regional group arose at different times that year (one before and one during the second part of the session). Two separate elections were held to fill those vacancies.

[56] See rule 125 of the Rules of Procedure of the General Assembly.

[57] A blank ballot paper constitutes an abstention.

[58] See rule 126 of the Rules of Procedure of the General Assembly.

[59] See rule 132 of the Rules of Procedure of the General Assembly.

[60] The Chairman's announcement does not mention the results of the ballot or ballots taken at the private meeting nor make reference to the persons considered. No announcement is made until all vacancies have been filled.

[61] General Assembly resolution 986 (X) of 3 December 1955. See also *Official Records of the General Assembly, Tenth Session, Annexes,* agenda item 50, document A/3028, paras. 21–26.

eral Assembly meets after the Commission's session and the vacancy would therefore remain unfilled for at least one session.[62]

The names (and nationalities) of the present and former members of the Commission are listed in annex II.

(c) Size of the Commission

The size of the membership of the Commission has been enlarged three times: from fifteen to twenty-one in 1956, under General Assembly resolution 1103 (XI) of 18 December 1956; to twenty-five in 1961, under Assembly resolution 1647 (XVI) of 6 November 1961; and to the present thirty-four in 1981, under Assembly resolution 36/39 of 18 November 1981.[63] Proposals for the enlargement were prompted by the progressive increase in the membership of the United Nations from the original fifty-one to eighty Member States in 1956, 104 Member States in 1961 and 157 Member States in 1981. A large majority of the General Assembly believed that the provision in article 8 of the Statute, requiring "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems," could be better assured by increasing the size of the Commission.[64]

(d) Terms of office and service on a part-time basis

Article 10 of the Statute originally provided that the term of office of the members of the Commission should be three years, with the possibility of re-election. However, in practice a longer term has proved beneficial to the progress of the Commission's work, and the term of office was extended to five years, first on an *ad hoc* and then on a permanent basis.[65]

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[62] See *Yearbook of the International Law Commission, 1956,* vol. II, document A/3159, para. 38. See also *Official Records of the General Assembly, Eleventh Session, Annexes,* agenda item 53, document A/3520, paras. 94–100.

[63] See article 2, paragraph 1, of the Statute.

[64] See *Official Records of the General Assembly, Eleventh Session, Annexes,* agenda item 59, document A/3427; *ibid.*, *Sixteenth Session, Annexes,* agenda item 77, document A/4939; *ibid.*, *Thirty-sixth Session, Plenary Meetings,* 63rd meeting, paras. 145–172; and *ibid.*, *Annexes,* agenda item 137, document A/36/244 and Add.1.

[65] By resolution 486 (V) of 12 December 1950, the General Assembly extended the term of the Commission's members elected in 1948 to five years. In 1955, the Commission recommended a formal amendment to article 10 of its Statute, to take effect from 1 January 1957, which was accepted by the General Assembly in resolution 985 (X) of 3 December 1955. Accordingly, elections have taken place in 1948, 1953, 1956, 1961, 1966, 1971, 1976, 1981, 1986, 1991, 1996, 2001, 2006 and 2011.

At its twentieth session, in 1968, the Commission proposed to the General Assembly the extension of the term of office of the Commission's members from five to six or seven years. In the view of the Commission, the experience had shown that, given the time-consuming nature of the codification process, a period of six or seven years was the minimum required for the completion of a programme of work.[66] The Sixth Committee of the General Assembly has taken note of the proposal and deferred taking a decision on it to a later session.[67]

By decision of the General Assembly, the Commission meets only in annual sessions, and its members, unlike judges of the International Court of Justice, do not serve on a full-time, year-round basis, although the Committee of Seventeen recommended that service be full-time.[68] Thus, the Commission is a permanent and part-time subsidiary organ of the General Assembly.[69] Members of the Commission are paid travel expenses and receive a special allowance in accordance with article 13[70] of the Commission's Statute. [71]

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[66] See *Yearbook of the International Law Commission, 1968,* vol. II, document A/7209/Rev.1, para. 98 (*a*).

[67] See *Official Records of the General Assembly, Twenty-fourth Session, Annexes,* agenda items 86 and 94 *(b),* document A/7746, para. 117.

[68] See the report of the Committee on the Progressive Development of International Law and its Codification, *ibid., Second Session, Sixth Committee, Annex 1,* para. 5 (*d*).

[69] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 4.

[70] As amended by General Assembly resolution 485 (V) of 12 December 1950. The members of the Commission were paid travel expenses and received a per diem allowance under article 13 of the Statute as originally adopted. In 1950, the General Assembly noted the inadequacy of the emoluments paid to Commission members and decided to amend this provision of the Statute to provide for the payment of travel expenses and a special allowance to Commission members bearing in mind the importance of the Commission's work, the eminence of its members and the method of their election as well as considering the nature and scope of the Commission's work which requires its members to devote considerable time in attendance at its necessarily long sessions.

[71] The Chairman, the Special Rapporteurs and the other members of the Commission have historically also been paid honorariums. The basic principle governing the payment of honorariums enunciated by the General Assembly in resolution 2489 (XXIII) of 21 December 1968 and reaffirmed in resolutions 3536 (XXX) of 17 December 1975 and 35/218 of 17 December 1980 was that neither a fee nor any other remuneration in addition to subsistence allowances at the standard rate would normally be paid to members of organs or subsidiary organs of the United Nations unless expressly decided upon by the General Assembly. Payment of honorariums to the members of the Commission was authorized by the General Assembly on an exceptional basis, with the rates being kept under review by the Secretary-General and occasionally revised. In 1981, the revised rates of honorariums payable to members of the Commission were as follows: Chairman—5,000; other members—3,000; and Special Rapporteurs who prepared reports between sessions—an additional 2,500 United States dollars. In 1998, the Secretary-General submitted a report indicating that the General Assembly might wish

In compliance with a request by the General Assembly to review the Statute and make recommendations for its revision, the International Law Commission, in 1951, recommended that the Commission should be placed on a full-time basis with a view to expediting its work.[72] When the matter was discussed in the Sixth Committee, however, most delegations believed that it was premature to make so fundamental a change in the structure of the Commission. They felt, *inter alia*, that a large increase in the Commission's output would impose an excessive burden on the General Assembly and Governments asked to comment on draft texts; that it would be difficult to find suitable candidates who would accept full-time appointment;

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to consider increasing the rates of honorariums by 25 per cent, effective 1 January 1999 (document A/53/643). The General Assembly, in resolution 56/272 of 27 March 2002, decided to set at a level of one United States dollar per year the honorariums payable to the Commission, with a view to utilizing the savings to restore Internet services to permanent missions in New York, which were provided by the United Nations Secretariat but which were to be halted owing to budgetary constraints (see General Assembly resolution 56/254D of 27 March 2002). At its fifty-fourth session, in 2002, the Commission noted that resolution 56/272 was adopted after the election of its members by the General Assembly and that the decision was taken without consulting the Commission; considered that the decision was not consistent in procedure or substance with either the principles of fairness on which the United Nations conducts its affairs or with the spirit of service with which members of the Commission contribute their time and approach their work; stressed that the resolution especially affected Special Rapporteurs, particularly those from developing countries, by compromising support for their research work; and decided not to collect the honorariums due to concerns about the administrative costs involved in the payment of the symbolic honorariums (see *Yearbook of the International Law Commission, 2002,* vol. II (Part Two), paras. 525–531). The Commission continued this practice of not collecting the symbolic honorariums at its fifty-fifth to sixty-third sessions, from 2003 to 2011, respectively. The Chairman of the Commission sent a letter to the Chairman of the Sixth Committee bringing this matter to his attention (document A/C.6/57/INF/2). The Commission reiterated its concerns in the reports on its fifty-fifth to sixty-third sessions. See, *Yearbook of the International Law Commission, 2003,* vol. II (Part Two), para. 447; *Official Records of the General Assembly, Fifty-ninth Session*, *Supplement No. 10* (A/59/10), para. 369; *ibid*., *Sixtieth Session*, *Supplement No. 10* (A/60/10), para. 501; *ibid*., *Sixty-first Session*, *Supplement No. 10* (A/61/10), para. 269; *ibid*., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 379; *ibid*., *Sixty-third Session, Supplement No. 10* (A/63/10), para. 358; *ibid*., *Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 240; *ibid*., *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396; and *ibid*., *Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 399. In 2006, the Commission urged the General Assembly to reconsider the matter, with a view to restoring the honorariums for Special Rapporteurs. See *ibid*., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 269. It reiterated this appeal at its 2007 and 2008 sessions, *ibid*., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 379, and *ibid*., *Sixty-third Session, Supplement No. 10* (A/63/10), para. 358. For further information see documents A/64/283 and A/65/186.

[72] See *Yearbook of the International Law Commission, 1951,* vol. II, document A/1858, paras. 60–71.

and that expense was a serious consideration.[73] Accordingly, the Assembly, in resolution 600 (VI) of 31 January 1952, decided not to take any action on the matter for the time being. Suggestions for placing the Commission on a full-time basis have also been made in the debates of the Sixth Committee at various later dates, but have never been acted on by the Assembly.

(e) Privileges and immunities

At its thirtieth session, in 1978, the Commission considered it necessary to define better the juridical status of the Commission at the place of its permanent seat in Switzerland, including the immunities, privileges and facilities to which it and its members were entitled.[74] The Commission requested the Secretary-General to study this matter and to take appropriate measures in consultation with the Swiss authorities.[75] In 1979, the Government of Switzerland decided to accord to members of the Commission for the duration of its session the same privileges and immunities to which judges of the International Court of Justice are entitled while present in Switzerland, namely, the privileges and immunities enjoyed by the heads of mission accredited to the international organizations at Geneva. (*See annex III.*) The Commission as well as the General Assembly expressed appreciation for this decision which would facilitate the performance by Commission members of their functions during its sessions in Geneva.[76]

(f) Basic duties of Commission members

Members of the International Law Commission enjoy the status of experts on mission. As such, their status, conduct and questions of accountability are regulated by a Secretary-General's Bulletin,[77] which requires,[78] *inter alia*, that "[o]fficials and experts on mission shall not use

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[73] See *Official Records of the General Assembly, Sixth Session, Annexes,* agenda item 49, document A/2088.

[74] The members of the Commission would be entitled to the privileges and immunities of experts on mission when the Commission meets at the United Nations Headquarters in New York or in a Member State which is a party to the Convention on the Privileges and Immunities of the United Nations (article VI). United Nations, *Treaty Series,* vol. 1, pp. 15, 26.

[75] See *Yearbook of the International Law Commission, 1978,* vol. II (Part Two), para. 199.

[76] See *ibid., 1979,* vol. II (Part Two), paras. 11–13, and General Assembly resolution 34/141 of 17 December 1979.

[77] Document ST/SGB/2002/9, of 18 June 2002.

[78] *Ibid.*, regulation 1 (*b*). Since 2007, all newly-elected members of the Commission have been asked to sign the declaration.

their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the gain of any third party . . .".[79]

3. Structure of the Commission

(a) Officers

At the beginning of each session, the Commission elects from among its members the Chairman, the First and Second Vice-Chairmen, the Chairman of the Drafting Committee[80] and the General Rapporteur for that session.[81] The Chairman presides over the meetings of the plenary, the Bureau and the Enlarged Bureau.[82] A vice-chairman has

[79] Regulation 2(*e*). In 2007, the Commission had occasion to consider the implications of such duty in the context of the external publication of International Law Commission documents. Upon the recommendation of a special Working Group of the Planning Group established to consider the matter, the Commission endorsed the following guidelines:

"*Guidelines on the publication of Commission documents*:

In order to ensure the proper attribution of the work of the International Law Commission, the following policy guidelines apply when present or former members of the Commission seek to publish documents relating to the work of the Commission:

1. Documents of the Commission should be appropriately attributed, with a clear indication whether the author is the Commission as a whole, a body established by the Commission, a Special Rapporteur or any other member of the Commission;

2. When the publication reproduces in whole or in part a document of the Commission this should be appropriately acknowledged;

3. If the document to be published relates to a subject on which the Commission has come to some collective conclusion, even if provisional, reference should be made in the publication to that conclusion;

4. Documents of the Commission which are intended for publication by the United Nations should not be published, on the initiative of individual members, before the documents have been officially released, including through the website on the work of the Commission;

5. A copy of the publication should be provided to the Commission."

See *Official Records of the General Assembly, Sixty-second session, Supplement No. 10* (A/62/10), para. 381.

[80] Since 1974, the Commission has elected the Chairman of the Drafting Committee. Previously, the First Vice-Chairman of the Commission also served as Chairman of the Drafting Committee. See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 45.

[81] In accordance with the practice of the Commission, the posts of Chairman and the other four officers have been rotated among nationals of the various regional groups.

[82] The functions of the Chairman are described in greater detail in rule 106 of the Rules of Procedure of the General Assembly.

the same powers and duties as the Chairman when designated to take the place of the Chairman.[83] The Chairman of the Drafting Committee presides over the meetings of the Drafting Committee; recommends the membership of the Drafting Committee for each topic; and introduces the report of the Drafting Committee when it is considered in plenary. The Rapporteur is responsible for the drafting of the Commission's annual report to the Assembly. The Commission has emphasized that the Rapporteur should play an active part in the preparation of the report (which is undertaken by the Secretariat)[84] (*see page 56*).

(b) Bureau, Enlarged Bureau and Planning Group

At each session, the Bureau, consisting of the five officers elected at that session, considers the schedule of work and other organizational matters with respect to the current session. The Enlarged Bureau, consisting of the officers elected at the current session, the former Chairmen of the Commission who are still members and the Special Rapporteurs, may also be called upon to consider issues relating to the organization, programme and methods of the Commission's work.

Since the 1970s, the Commission has established a Planning Group[85] for each session and entrusted it with the task of considering the programme and methods of work of the Commission. Since 1992, the Planning Group has established a Working Group on the Long-Term Programme which is entrusted with the task of recommending topics for inclusion in the Commission's programme of work. The Working Group has been reconstituted with the same Chairman and membership during the remaining sessions of the quinquennium (*see pages 44 to 46*). The Planning Group may also establish a Working Group to review and consider ways of improving the methods of work of the Commission on the basis of a request by the General Assembly or on the Commission's own initiative (*see pages 55 and 58*).

(c) Plenary

The Commission meets in plenary primarily to consider the reports of Special Rapporteurs, working groups, the Drafting Committee, the

[83] See rule 105 of the Rules of Procedure of the General Assembly.

[84] See *Yearbook of the International Law Commission, 1992,* vol. II (Part Two), para. 373 *(a)*.

[85] In the early years, the Planning Group was not always established and, when established, it met infrequently in the Enlarged Bureau, which reviewed its report. More recently, the Commission has adopted the practice of establishing the Planning Group more frequently, under the chairmanship of the First Vice-Chairman, and as a subsidiary body of the Commission to which it reports directly.

Planning Group as well as any other matters that may require consideration by the Commission as a whole. The Commission also decides in plenary to refer proposed draft articles to the Drafting Committee and to adopt provisional or final draft articles and commentaries.[86] At the end of each session, the Commission considers and adopts in plenary its annual report to the General Assembly.

The primary role of the general debate in plenary is to establish the broad approach of the Commission to a topic for the primary purpose of providing guidance to the Commission, its subsidiary organs and Special Rapporteurs on the directions to be taken.[87] This is essential to ensure that subsidiary organs, such as the Drafting Committee or a working group, are working along lines broadly acceptable to the Commission as a whole. The Commission has indicated that the Chairman of the Commission should, whenever possible, indicate the main trends of opinion revealed by the debate in plenary to facilitate the task of the Drafting Committee.[88] The Commission has also recommended that the plenary debates should be reformed to provide more structure and to allow the Chairman to make an indicative summary of conclusions at the end of the debate,[89] based if necessary on an indicative vote.[90] (*See page 57.*)

At its forty-ninth session, in 1997, the Commission introduced the practice of short, thematic debates or exchanges of views in plenary on particular issues or questions raised during the consideration of a topic, the so-called "mini-debates," in order to facilitate a more focused debate on particular issues.[91] At its fifty-fourth session, in 2002, the Commission expressed the view that the "mini-debates" were useful and constituted an important innovation in its working methods. The Commis-

[86] The Commission has decided that the commentaries to draft articles should be considered in plenary as soon as possible during each session and separately from the Commission's annual report. See *Yearbook of the International Law Commission*, *1994*, vol. II (Part Two), para. 399. Notwithstanding this, since the 1990's, the practice of the Commission, largely for practical reasons, has been to consider and adopt commentaries as part of the process of the adoption of its annual report.

[87] See *ibid., 1996,* vol. II (Part Two), paras. 202 and 204.

[88] See *ibid., 1987,* vol. II (Part Two), para. 239.

[89] See also the discussion below of the possible role of the Special Rapporteur in this respect.

[90] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 148 (i) and 202–211.

[91] Under the "mini-debate" arrangement, the Chairman is authorized to deviate from the established list of speakers on a topic in order to allow members to respond to or comment on a statement made by a speaker in the "general debate." The speaker whose statement gave rise to the "mini-debate" is usually afforded the opportunity to participate during, and to respond at the end of, the mini-debate.

sion emphasized, however, that a mini-debate should be brief, focused and not include long statements falling outside its scope.[92]

The Commission holds its plenary meetings in public[93] unless it decides otherwise, in particular when dealing with certain organizational or administrative matters.[94] The Commission's decisions on substantive and procedural matters are taken in plenary or, if such decisions are reached in a private meeting or informal consultations, announced by the Chairman in plenary.[95]

(d) Special Rapporteurs

The role of the Special Rapporteur is central to the work of the Commission.[96] Although the Statute only envisages the appointment of a Special Rapporteur in the case of progressive development (article 16 (*a*)), the practice of the Commission has been to appoint a Special Rapporteur at the early stage of the consideration of a topic, where appropriate, without regard to whether it might be classified as one of codification or progressive development.[97] The functions of the Special Rapporteur continue

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[92] See *Yearbook of the International Law Commission*, *2002*, vol. II (Part Two), para. 523.

[93] See rule 60 of the Rules of Procedure of the General Assembly.

[94] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 8.

[95] This is similar to the practice followed by the General Assembly. See rule 61 of the Rules of Procedure of the General Assembly. The summary records of the plenary meetings of the Commission are published in the Commission's *Yearbook* (in volume I). In addition, the major decisions taken in plenary are summarized in the relevant chapters of the Commission's annual report to the General Assembly. See *ibid*. The annual report also contains a summary of the debate on each topic held in plenary, except when the Commission adopts draft articles and commentaries (which reflect the position of the entire Commission, and take precedence over the individual views of its members as reflected in the debate).

[96] See *ibid., 1996,* vol. II (Part Two), paras. 185–201.

[97] In practice special rapporteurships tend to be distributed among members from different regions. See *ibid.,* paras. 185 and 186. The Commission has appointed one of its members to serve as Special Rapporteur for most of the topics on its agenda, with the exception of the appointment of two Special Rapporteurs for the topic "Question of international criminal jurisdiction," one Special Rapporteur for the topics "Formulation of the Nürnberg principles" and "Draft Code of Offences," and one Special Rapporteur for the topics "Regime of the high seas" and "Regime of territorial waters." No Special Rapporteurs were appointed for the following topics: fundamental rights and duties of States; extended participation in general multilateral treaties concluded under the auspices of the League of Nations; question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law; review of the multilateral treaty-making process; fragmentation of international law; the most-favoured-nation clause (second part of the topic); and treaties over time. In some instances, the Chairman of a Working Group has undertaken some of the functions typi-

until the Commission has completed its work on the topic, provided that he or she remains a member of the Commission.[98] In the event that it becomes necessary to appoint a new Special Rapporteur, the Commission usually suspends its work on the topic for an appropriate period of time to enable the newly appointed Special Rapporteur to perform the tasks required depending on the stage of work on the topic.

Special Rapporteurs are one of the institutional features of the Commission which contribute to the efficient performance of its functions and which have served it well.[99] The Special Rapporteur performs a number of key tasks, including preparing reports on the topic, participating in the consideration of the topic in plenary, contributing to

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cally performed by a Special Rapporteur. For example, the Chairman of the Study Group on the fragmentation of international law finalized a detailed study on the topic to serve as a companion document to a set of conclusions adopted by the Study Group. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 237.

[98] The Special Rapporteur for State responsibility, Roberto Ago, resigned from the Commission upon his election to the International Court of Justice in 1978. The Chairman of the Commission sent a letter to the President of the Court requesting that Judge Ago continue to be available to the Commission in his private capacity in order to assist it in finalizing the first part of its draft on State responsibility. The Court acceded to the request in order to facilitate the Commission's work on State responsibility on the understanding that Judge Ago would be available in an individual and personal capacity to assist the Commission in its consideration of the few remaining articles of a draft of which he himself had been the prime author; there was no question of his being appointed, designated or given any official title such as "expert consultant"; and priority would have to be given to his judicial duties. Mr. Ago attended the thirty-first and thirty-second sessions of the Commission, in 1979 and 1980, respectively. In 1979, he introduced to the Commission and commented on his eighth report. In 1980, he presented to the Commission the addendum to his eighth report. See *Yearbook of the International Law Commission, 1979,* vol. II (Part Two), para. 69, and *ibid*., *1980,* vol. II (Part Two), para. 28. The Special Rapporteur for the law of the non-navigational uses of international watercourses, Stephen M. Schwebel, after his resignation from the Commission in 1981, continued and completed his research for the third report on the topic which he had begun to prepare prior to his resignation from the Commission. See *ibid., 1982,* vol. II (Part Two), para. 251. Upon being appointed Director of the Codification Division (and Secretary of the Commission), Vaclav Mikulka, the Special Rapporteur for the topic of Nationality in relation to the succession of States, resigned from the Commission prior to its fifty-first session, in 1999. His analysis of the comments and observations of Governments on the draft articles on Nationality of natural persons in relation to the succession of States adopted on first reading, in 1997, was subsequently issued as a Secretariat memorandum (see document A/CN.4/497) which was submitted to the Commission at its 1999 session. See *ibid., 1999,* vol. II (Part Two), para. 40. The Commission considered a working paper on oil and gas (see document A/CN.4/608) prepared by Chusei Yamada, the Special Rapporteur on Shared Natural Resources, at its sixty-first session, in 2009, even though he had resigned from the Commission prior to the opening of that session. See *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 10* (A/64/10), paras. 187-193.

[99] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 104.

the work of the Drafting Committee on the topic, and elaborating commentaries to draft articles.

The Special Rapporteur marks out and develops the topic, explains the state of the law and makes proposals for draft articles in the reports on the topic.[100] The reports of Special Rapporteurs form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission established in its Statute.[101] The Commission has recommended that Special Rapporteurs specify the nature and scope of work planned for the next session to ensure that future reports meet the needs of the Commission as a whole and that reports be available to members sufficiently in advance of the session to enable study and reflection.[102] The Commission has also recommended that a consultative group be appointed by the Commission to provide input on the general direction of the report and on any particular issues the Special Rapporteur wishes to raise.[103]

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[100] See *ibid., 1996,* vol. II (Part Two), para. 188. The reports of the Special Rapporteurs are reproduced in the *Yearbook* of the Commission.

[101] See *ibid., 1982,* vol. II (Part Two), para. 271.

[102] See *ibid., 1996,* vol. II (Part Two), paras. 148 *(f),* 189 and 190. The Commission has emphasized on several occasions the importance it attaches to the timely submission of reports by the Special Rapporteur in view of their processing and distribution and to allow members to study the reports in advance. See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 498 and *ibid*., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 262. On occasion, Special Rapporteur reports, or addenda thereto, are submitted during a session in response to a development in the debate. For example, in 2004, in response to a question that arose during the plenary debate, the Special Rapporteur on the topic "diplomatic protection" submitted a memorandum, which was subsequently issued as his sixth report, on the relevance of the "clean hands" doctrine to diplomatic protection. See *ibid*., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 54.

[103] The Commission further recommended that the principle of a consultative group should be recognized, without any distinction being drawn between codification and progressive development, in any revision of the Statute. See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 148 *(g)* and 191–195. The extent to which such mechanism is resorted to in practice depends on the Special Rapporteur, and, to some degree, on the complexity of the topic. Some Special Rapporteurs prefer to work on their own with minimal guidance. Other Special Rapporteurs do on occasion seek the input, even if informally, of some of their colleagues. In some instances such guidance is sought within the framework of "informal consultations." For example, an informal consultation was held at the 2002 session to provide the Special Rapporteur for the topic "Diplomatic protection" with guidance on the question of the diplomatic protection of crews as well as that of corporations and shareholders. See *ibid., 2002,* vol. II (Part Two), para. 113. In other instances such a consultative group is constituted in the more formal setting of a Working Group (as discussed in the next section). For example, in 2001, the Commission established a Working Group to provide the Special Rapporteur on State responsibility with guidance as to the approach to be taken in the commentaries to the draft articles on responsibility of States for internationally wrongful acts. See *ibid*., 2001, vol. II (Part Two), para. 43.

The Special Rapporteur usually introduces the report at the beginning of the Commission's consideration of the topic in plenary, responds to questions raised during the debate, makes concluding remarks summarizing the main issues and trends at the end of the debate, and, where appropriate, gives a recommendation as to the referral of any draft articles to the Drafting Committee or a Working Group.[104]

The role of the Special Rapporteur with respect to the Drafting Committee comprises the following elements: (*a*) to produce clear and complete draft articles; (*b*) to explain the rationale behind the draft articles currently before the Drafting Committee; and (*c*) to reflect the view of the Drafting Committee in revised draft articles and/or commentary.[105] The Special Rapporteurs should prepare commentaries to draft articles on their respective topics which are as uniform as possible in presentation and length.[106] The Special Rapporteurs should also, as far as possible, produce draft commentaries or notes to accompany their draft articles and revise them in the light of changes made by the Drafting Committee to ensure their availability at the time of the debate of the draft articles in plenary.[107] (*See also page 57.*) The Special Rapporteur may also draft other working documents of the Commission and the Drafting Committee, as required by the Commission's progress of work on the topic.

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[104] In 2011, the Commission adopted some additional guidelines for Special Rapporteurs. See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 372.

[105] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 200. In 2011, the Commission recommended that the practice of leaving the formulation of commentaries to the Special Rapporteurs alone, and discussing them only at the time of the adoption of the Commission's annual report, should be reconsidered. It proposed that Special Rapporteurs prepare draft commentaries as soon as possible after the adoption of the draft articles, with a view to having them, or elements thereof, considered and provisionally approved by the Drafting Committee. See *Official Records of the General Assembly*, *Sixty-sixth Session*, *Supplement No. 10* (A/66/10 and Add.1), paras. 379-381.

[106] See *Yearbook of the International Law Commission, 1995,* vol. II (Part Two), para. 508 and *Official Records of the General Assembly*, *Sixty-sixth Session*, *Supplement No. 10* (A/66/10 and Add.1), para. 382. The main function of a commentary is to explain the text itself, with appropriate references to key decisions, doctrine and State practice to indicate the extent to which the text reflects, develops or extends the law. Generally speaking it is not the function of such commentary to reflect disagreements on the text as adopted on second reading which can be done in the Commission in plenary at the time of final adoption of the text and reflected in the Commission's report. See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 198.

[107] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 148 *(h).*

(e) Working groups

The Commission has made use of working groups, sometimes called subcommittees, study groups or consultative groups, on particular topics.[108] These *ad hoc* subsidiary bodies have been established by the Commission or by the Planning Group for different purposes and with different mandates.[109] They may be of limited membership or open-ended.[110]

The Commission has established working groups on new topics before appointing a Special Rapporteur to undertake preliminary work or to help define the scope and direction of work, including: formulation of the Nürnberg principles (1949); succession of States and Governments (1962–1963); question of treaties concluded between States and international organizations or between two or more international organizations (1970–1971); the law of the non-navigational uses of international watercourses (1974); status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (1977–1979); international liability for injurious consequences arising out of acts not prohibited by international law (1978 and 2002 (second part of the topic)); jurisdictional immunities of States and their property (1978); diplomatic protection (1997); unilateral acts of States (1997) and the most-favoured-nation clause (2007).[111]

The Commission has also established working groups after appointing a Special Rapporteur[112] to consider specific issues or to determine the direction of the future work on a particular topic or sub-topic, including: arbitral procedure (1957); State responsibility (1962–1963, 1997, 1998 and 2001[113]); relations between States and international organizations (1971 (first part of the topic) and 1992 (second part of the topic)[114]); draft code of crimes against the peace and security of mankind (1982 and 1995–1996); international liability for injurious consequences aris-

[108] In practice, "working groups," "subcommittees" and "study groups" enjoy a more formal status, in terms of procedure, issuance of documentation, structure of the entity's report to the Commission, than consultative groups which have included "informal consultations" for which, for example, linguistic interpretation services are not typically provided.

[109] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 217.

[110] The names of members of groups of limited membership are listed in the report of the Commission on the session at which a group is established.

[111] In most cases, the chairman of such a working group has been appointed subsequently by the Commission as the Special Rapporteur for the topic.

[112] This type of group is envisaged with respect to progressive development in article 16 (*d*) and (*i*) of the Statute.

[113] The Commission established two working groups on this topic in 2001.

[114] This working group was established by the Planning Group of the Enlarged Bureau.

ing out of acts not prohibited by international law (1992, 1995, 1996 and 1997 (the topic as a whole), 1998 and 2000 (prevention aspect of the topic) and 2003 and 2004 (liability aspect of the topic)); unilateral acts of States (1998–2001 and 2003–2006); nationality in relation to the succession of States (1995–1996 and 1999 (first part of the topic) and 1998 (second part of the topic)); diplomatic protection (1998 and 2003); responsibility of international organizations (2002, 2003,[115] 2005 and 2008); shared natural resources (2002, 2004–2007, 2009-2010) effects of armed conflicts on treaties (2007-2008), explusion of aliens (2008) and the obligation to extradite or prosecute (*aut dedere aut judicare*) (2008-2010).[116]

The Commission has further established working groups to handle a topic as a whole, *inter alia*, in case of urgency, including: question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (1972); review of the multilateral treaty-making process (1978–1979); draft code of crimes against the peace and security of mankind (draft Statute for an International Criminal Court) (1990 and 1992–1994); and jurisdictional immunities of States and their property (1999).[117]

The Commission established a "study group" for the first time, at its fifty-fourth session, in 2002, for the topic "Fragmentation of international law" (2002–2006) in recognition of the uniqueness of the topic which lent itself more to the undertaking of a research study, as opposed to the formulation of draft articles.[118] Study groups have since also been established for the topics "The most-favoured-nation clause" (2009–2011) and "Treaties over time" (2009–2011), for the same reasons.[119] Study groups

[115] The Commission established two working groups on this topic in 2003.

[116] These working groups have usually been chaired by the Special Rapporteur assigned to the topic, with some exceptions. For example, the Working Group established for the topic "Unilateral acts of States" was chaired by the Special Rapporteur in only three (1999–2001) of its eight years of existence. Indeed, for the last four years of its existence (2003–2006), the working group was, exceptionally, chaired by the Special Rapporteur for another topic, albeit not in that capacity. Likewise, the working groups on a draft statute for an international criminal court (in 1993 and 1994), shared natural resources (2005-2007 and 2009-2010), effects of armed conflicts on treaties (2007-2008), expulsion of aliens (2008), and the obligation to extradite or prosecute (*aut dedere aut judicare*) (2008-2010) were also chaired by Commission members other than the relevant Special Rapporteur. The Chairman of the Working Group on the Effects of Armed Conflicts on Treaties was subsequently appointed Special Rapporteur for the topic, following the resignation of the initial Special Rapporteur.

[117] These working groups are usually of substantial size and no Special Rapporteur is appointed.

[118] See *Yearbook of the International Law Commission, 2002*, vol. II (Part Two), paras. 493 and 510.

[119] See *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 10* (A/64/10), paras. 209 and 218, respectively.

should aim to achieve concrete outcomes in accordance with the mandate of the Commission and within a reasonable time.[120] While study groups have thusfar undertaken their work under the guidance of their respective Chairpersons,[121] without Special Rapporteurs, the Commission is free to consider the possibility of replacing a study group through the appointment of a Special Rapporteur as the topic progresses, as appropriate.[122]

Whereas the Drafting Committee works on texts of articles prepared by a Special Rapporteur, a working group begins its work at an earlier stage when ideas are still developing and thus is more closely involved in the formulation of an approach and drafts.[123] Such a working group may continue its work over several sessions, with substantial continuity of membership, while the composition of the Drafting Committee changes from year to year.[124] In some cases, a working group may be entrusted with the task of undertaking a thorough substantive consideration of a topic.[125] If the working group has undertaken careful drafting, the final product may be submitted directly to the Commission in plenary, not to the Drafting Committee, to avoid duplication or even mistakes which may be made if members of the Drafting Committee have not been party to the detailed discussion which underlies a particular text. In some cases, however, the Drafting Committee may have a role in engaging in a final review of a text from the perspective of adequacy and consistency of language.[126] Alternatively, working groups

[120] *Ibid*., *Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), para. 373.

[121] Two co-chairmen were appointed in 2009 to chair the Study Group on The Most-favoured-nation Clause. See *ibid., Sixty-fourth session, Supplement No. 10* (A/64/10), para. 209.

[122] *Ibid., Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), para. 373.

[123] For instance, the working group that elaborated the statute for an international criminal court began by focusing on some basic propositions on which agreement could be reached, before even attempting to draft any articles.

[124] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 217. A distinction between the Drafting Committee and a Working Group also exists at the level of mandate and procedure. While the Drafting Committee focuses primarily on questions of drafting, working groups tend to enjoy broader mandates involving the consideration of matters of substance. At the level of procedure, the Drafting Committee follows a more formal procedure, involving the submission of a written report and a detailed oral statement by its Chairman. Working groups tend to adopt more flexible working methods, depending on the nature of the task at hand. Likewise, the reporting procedure for working groups is more flexible, with no requirement that they be in writing, nor that there be a detailed exposition of the decisions taken by the group.

[125] For example, the first reading of the draft articles on the law of transboundary aquifers, adopted at the fifty-eighth session, in 2006, in the context of the topic "Shared natural resources," was (owing to the technical nature of the topic) undertaken largely with the assistance of an open-ended working group *(see Part III.A, section 30).*

[126] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 218.

have also been established, as an interim step, to prepare a revised version of a draft article (or guidance regarding the formulation of a draft article), which is subsequently referred to the Drafting Committee. In those instances,[127] it is the text of the Working Group and not the proposal of the Special Rapporteur which is referred to the Drafting Committee. Working groups have also been established to consider the feasability of work on a certain topic.[128]

Such flexibility in the mandates of the working groups (ranging from focusing on specific, sometimes procedural, issues to a more thoroughly substantive consideration of a topic) allows the Commission to tailor its working methods to the needs of the topic at hand, thereby enhancing its overall efficiency.

Whatever its mandate, a working group is always subordinate to the Commission, the Planning Group or other Commission organ which established it. It is for the relevant organ to issue the necessary mandate, to lay down the parameters of any study, to review and, if neces-

[127] For example, at its fifty-fifth session, in 2003, the Commission established an open-ended Working Group for the topic "Responsibility of international organizations," in order to consider draft article 2, as proposed by the Special Rapporteur. A revised draft of the provision, prepared by the Working Group, was subsequently referred to the Drafting Committee. See *ibid., 2003,* vol. II (Part Two), paras. 47–48. Likewise, the Drafting Committee on international liability for injurious consequences arising out of acts not prohibited by international law, established at the fifty-sixth session, in 2004, had before it a draft prepared by a Working Group established that session to consider the proposals of the Special Rapporteur. See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 170–171. A similar function was performed by an open-ended informal consultation established at the fifty-second and fifty-third sessions, in 2000 and 2001, for the topic "Diplomatic protection," in order to consider the Special Rapporteur's proposals for specific draft articles. In both instances, it was the text formulated, or guidance developed, in the "informal consultation" which was referred to the Drafting Committee. See *Yearbook of the International Law Commission, 2000*, vol. II (Part Two), para. 412 and 495; and *ibid., 2001,* vol. II (Part Two), para. 166. Likewise, the working group on the effects of armed conflicts on treaties was established, at the fifty-ninth and sixtieth sessions, to consider, *inter alia*, the Special Rapporteur's proposals for specific draft articles prior to those articles being referred to the Drafting Committee. See *Official Records of the General Assembly, Fifty-ninth Session*, *Supplement No. 10* (A/59/10), paras. 323-324 and *ibid*., *Sixtieth Session, Supplement No. 10* (A/60/10), paras. 58-61.

[128] The Working Group on Shared Natural Resources was established at the sixty-first and sixty-second sessions, in 2009 and 2010, in order to consider the feasibility of any future work by the Commission on tranboundary oil and gas. See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 187-192, and *ibid*., *Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 376-384, respectively. At the latter session, the Working Group recommended that the Commission not take up the consideration of such aspects of the topic "Shared natural resources", *ibid*., para. 384.

sary, modify proposals, and to make a decision on the product of the work.[129]

In 1996, the Commission recommended that working groups be more extensively used to resolve particular disagreements and, in appropriate cases, to expeditiously deal with whole topics; in the latter case normally acting in place of the Drafting Committee[130] (*see page 57*).

(f) Drafting Committee

Since its first session, the Commission has made use of a Drafting Committee,[131] the composition of which has been progressively enlarged to take account of the increase in the size of the Commission. The membership of the Drafting Committee varies from session to session and, since 1992, from topic to topic at any given session, although it continues to be a single body exercising its functions under one Chairman.[132] The Special Rapporteur serves as a member of the Drafting Committee on his or her topic. As a member of the Commission, a Special Rapporteur is not precluded from serving as a member of the Drafting Committee on another topic. The General Rapporteur participates *ex officio* in the work of the Drafting Committee on all topics. The Drafting Committee is also constituted so as to provide equitable representation of the principal legal systems and the various languages[133] of the Commission within limits compatible with its drafting responsibilities.[134]

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[129] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 219. The final outcome of work by a working group is typically a report either presented orally by the Chairman of the working group to the Commission in plenary, which is reflected in the summary records or in written form issued as a document, which may be included in the Commission's report.

[130] See *ibid., 1996,* vol. II (Part Two), para. 148 (*k*).

[131] Committees in the nature of drafting committees were set up by the Commission to deal with specific topics or questions at its first three sessions. However, a standing Drafting Committee has been used at each session of the Commission since its fourth session, in 1952. See *ibid., 1979,* vol. II (Part One), document A/CN.4/325, para. 45.

[132] See *ibid., 1992,* vol. II (Part Two), para. 371; and *ibid., 1996,* vol. II (Part Two), paras. 148 (*j*) and 214.

[133] The practice of multilingual drafting, now customary in the Commission, as opposed to mere translation from the working language of the Special Rapporteur into the other working languages, frequently brings to light unsuspected questions of substance. This has added additional responsibilities to the work of the Drafting Committee. Upon completion of its work on a set of draft articles, members of the Drafting Committee from the various linguistic groups typically meet separately to align their respective linguistic texts with that of the authoritative version adopted by the Committee.

[134] See *Yearbook of the International Law Commission, 1987,* vol. II (Part Two), para. 238.

The Drafting Committee plays an important role in harmonizing the various viewpoints and working out generally acceptable solutions.[135] The Drafting Committee may be entrusted not only with purely drafting points but also with points of substance which the full Commission has been unable to resolve or which seemed likely to give rise to unduly protracted discussion.[136] However, issues which proved difficult to overcome in the Drafting Committee may be transferred to a more informal setting such as a working group.[137] In practice, the Commission usually does not take a vote at the end of its first discussion of a particular article, and leaves it to the Drafting Committee to try to draft a generally satisfactory text on the question. The Drafting Committee's proposals have very often been adopted unanimously by the Commission, sometimes without discussion. However, the Drafting Committee's texts are subject to amendments or alternative formulations submitted by members of the Commission in plenary and may be referred back to the Committee for further consideration.[138] The Commission has noted that premature referral of draft articles to the Drafting Committee, and excessive time-lags between such referral and actual consideration of draft articles in the Committee, have counter-productive effects.[139]

The report of the Chairman of the Drafting Committee to the Commission in plenary provides a detailed summary of its work on each topic, including an explanation of the draft articles that have been adopted by the Drafting Committee and are submitted for consideration and adoption by the Commission in plenary.[140] (*See also pages 55 to 58.*)

4. Programme of work

(a) Selection of topics

Under the Statute, the Commission shall consider proposals for the progressive development of international law referred by the General

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[135] See *ibid.*, para. 237; and *ibid.*, *1996,* vol. II (Part Two), para. 212.

[136] See *ibid., 1958,* vol. II, document A/3859, para. 65.

[137] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para 375.

[138] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 47. In practice, members who joined the consensus in the Drafting Committee abstain from objecting to the draft articles during the plenary discussion.

[139] See *ibid., 1987,* vol. II (Part Two), paras. 235–239.

[140] There are no summary records of the meetings of the Drafting Committee which are not public meetings. However, the statement of the Chairman of the Drafting Committee is reflected in the summary records of the Commission which are published in the Commission's *Yearbook*, and is included on the Commission's website.

Assembly (article 16) or submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies or official bodies established by intergovernmental agreements to encourage the progressive development and codification of international law (article 17). With respect to codification, the Commission is required to survey the whole field of international law with a view to selecting appropriate topics (article 18). In addition, the Commission may recommend to the General Assembly the codification of a particular topic which is considered necessary and desirable (article 18). At its first session, in 1949, the Commission decided that it had competence to proceed with its work of codification of a topic that it had recommended to the General Assembly without awaiting action by the General Assembly on such recommendation.[141] However, in practice, the Commission has generally sought endorsement by the General Assembly before engaging in the substantive consideration of a topic. The General Assembly may also request the Commission to deal with any question of codification which receives priority (article 18).

In the early years, the Commission received a number of proposals and special assignments from the General Assembly as well as proposals from the Economic and Social Council. In 1996, the Commission expressed concern that the relevant provisions of the Statute have been used infrequently in recent years and recommended that the General Assembly—and through it other bodies within the United Nations system—should be encouraged to submit to the Commission possible topics involving codification and progressive development of international law.[142]

The Commission has conducted two surveys of international law as provided for in its Statute, the first, at its first session, in 1949, on the basis of a Secretariat memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission,"[143] and the second, on the occasion of the Commission's twentieth session on the basis of a series of documents prepared by the Secretariat,[144] in particular a working paper entitled "Survey of International Law," prepared by the Secretary-General in response to the Commission's request.[145]

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[141] See *Yearbook of the International Law Commission, 1949,* Report to the General Assembly, para. 12.

[142] See *ibid., 1996,* vol. II (Part Two), paras. 148 (*b*) and 177.

[143] Document A/CN.4/1 (United Nations publication, Sales No. 48.V.1) reissued under the symbol A/CN.4/1/Rev.1 (United Nations publication, Sales No. 48.V.1(1)).

[144] See *Yearbook of the International Law Commission, 1968,* vol. II, document A/7209/Rev.1, annex; and *ibid., 1970,* vol. II, document A/CN.4/230.

[145] See *ibid., 1971,* vol. II (Part Two), document A/CN.4/245.

At its forty-eighth session, in 1996, the Commission analysed the scope for progressive development and codification after nearly fifty years of work by the Commission and, in order to provide a global review of the main fields of general public international law, established a general scheme of topics of international law classified under thirteen main fields of public international law, not meant to be exhaustive, that included topics already taken up by the Commission, topics under consideration by the Commission and possible future topics.[146]

Apart from the surveys, the Commission has held a periodic review of its programme of work with a view to bringing it up to date, taking into account General Assembly recommendations and the international community's current needs and discarding those topics which are no longer suitable for treatment.[147] Such a review has sometimes taken place at the request of the General Assembly. [148]

(b) Topics on the Commission's programme of work

At its first session, in 1949, the Commission reviewed, on the basis of the survey of international law prepared by the Secretariat,[149] twenty-five topics for possible inclusion in a list of topics for study. Following its consideration of the matter, the Commission drew up a provisional list of fourteen topics selected for codification, as follows:

(1) Recognition of States and Governments;

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[146] See *ibid., 1996,* vol. II (Part Two), paras. 246–248 and annex II.

[147] See *ibid., 1962,* vol. II, document A/5209, paras. 24–62; *ibid*., *1967,* vol. II, document A/6709/Rev.1, para. 49; *ibid*., *1968,* vol. II, document A/7209/Rev.1, paras. 95–101; *ibid*., *1969,* vol. II, document A/7610/Rev.1, para. 91; *ibid*., *1970,* vol. II, document A/8010/Rev.1, para. 87; *ibid*., *1971,* vol. II (Part One), document A/8410/Rev.1, paras. 119–128; *ibid*., *1972,* vol. II, document A/CN.4/254; *ibid*., *1973,* vol. II, document A/9010/Rev.1, paras. 134–176; *ibid*., *1977,* vol. II (Part Two), paras. 96–111; *ibid*., *1992,* vol. II (Part Two), paras. 368–370; *ibid*., *1995,* vol. II (Part Two), paras. 498–503; *ibid*., *1996,* vol. II (Part Two), paras. 244–248 and annex II; *ibid*., *1997,* vol. II (Part Two), para. 238; *ibid*., *1998,* vol. II (Part Two), paras. 551–554; *ibid*., *1999,* vol. II (Part Two), paras. 640–644; *ibid*., *2000,* vol. II (Part Two), paras. 726–733; *ibid., 2002*, vol. II (Part Two), paras. 517–521; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362–364; *ibid*., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 500; *ibid*., *Sixty-first Session, Supplement No. 10* (A/61/10), paras. 256–260; *ibid*., *Sixty-second Session, Supplement No. 10* (A/62/10), paras. 374-378; *ibid*., *Sixty-third Session, Supplement No. 10* (A/63/10), paras. 351-354; and *ibid*., *Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), paras. 365-369.

[148] For example, in resolution 54/111 of 9 December 1999, the General Assembly encouraged the Commission to proceed with the selection of new topics for its next quinquennium corresponding to the wishes and preoccupations of States and to present possible outlines and related information for new topics to facilitate decision thereon by the Assembly.

[149] See footnote 143, above.

(2) Succession of States and Governments;

(3) Jurisdictional immunities of States and their property;

(4) Jurisdiction with regard to crimes committed outside national territory;

(5) Regime of the high seas;

(6) Regime of territorial waters;[150]

(7) Nationality, including statelessness;

(8) Treatment of aliens;

(9) Right of asylum;

(10) Law of treaties;

(11) Diplomatic intercourse and immunities;

(12) Consular intercourse and immunities;

(13) State responsibility;[151] and

(14) Arbitral procedure.

The Commission agreed to the 1949 list of fourteen topics on the understanding that it was provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly. Amendments were made in the course of the Commission's consideration of certain topics. The topic of "Succession of States and Governments" was subsequently divided into three, namely succession in respect of treaties, succession in matters other than treaties,[152] and succession in respect of membership of international organizations.[153] The topics "Regime of the high seas" and "Regime of territorial waters," for the most part, were considered separately, but, at its eighth session, in 1956, the Commission grouped together systematically all the rules it had adopted under these topics in the final report on the subject "Law of the Sea."

The Commission has submitted a final report on all of the topics included in the 1949 list, except for the following:

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[150] At its fourth session, in 1952, the Commission decided, in accordance with a suggestion of the Special Rapporteur, to use the term "territorial sea" in lieu of "territorial waters."

[151] At its fifty-third session, in 2001, the Commission decided to amend the title of the topic to "Responsibility of States for internationally wrongful acts." See *Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 68. In practice, the topic is still referred to by its previous title "State responsibility."

[152] The sub-topic was originally entitled "Succession of States in respect of rights and duties resulting from sources other than treaties." The Commission adopted the new title to read as above at its twentieth session, in 1968.

[153] The third sub-topic has never been the subject of substantive consideration by the Commission.

- Recognition of States and Governments;
- Jurisdiction with regard to crimes committed outside national territory;
- Treatment of aliens; and
- Right of asylum.

The first two topics have never been the subject of substantive consideration by the Commission, *per se*. However, the second topic may be viewed as being encompassed within the scope of the topics of "The obligation to extradite or prosecute (*aut dedere aut judicare*)" and "Extraterritorial jurisdiction"[154].

The remaining two topics were the subject of partial consideration by the Commission. The topic "Treatment of aliens" was considered by the Commission in the course of its work on the topic "State responsibility," but this work was discontinued. It was also considered, to some extent, by the Commission in connection with its work on the topic "Diplomatic protection," and is being considered as an aspect of the topic "Expulsion of aliens." With respect to the topic "Right of asylum," at the Commission's first session, in 1949, during the discussion of the draft Declaration on Rights and Duties of States, a proposal was submitted to include in the draft Declaration an article relating to the right of asylum. It was finally decided not to include such an article.[155] At a later stage, the topic was specifically referred to the Commission by the General Assembly.[156] At its twelfth session, in 1960, the Commission took note of the General Assembly resolution and decided to defer further consideration of the question to a future session.[157] At its twenty-ninth session, in 1977, the Commission concluded that the topic did not appear at that time to require active consideration by the Commission in the near future.[158]

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[154] Included in the Commission's long-term programme of work in 2006.

[155] See *Yearbook of the International Law Commission, 1949,* Report to the General Assembly, para. 23.

[156] In resolution 1400 (XIV) of 21 November 1959, the General Assembly requested the Commission, as soon as it considered it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum.

[157] See *Yearbook of the International Law Commission, 1960,* vol. II, document A/4425, para. 39. In 1967, the General Assembly adopted the Declaration on Territorial Asylum, General Assembly resolution 2312 (XXII) of 14 December 1967, taking into consideration the work of codification to be undertaken by the International Law Commission in accordance with General Assembly resolution 1400 (XIV).

[158] See *ibid., 1977,* vol. II (Part Two), para. 109. Earlier that year, the United Nations Conference on Territorial Asylum, which had been convened by the Secretary-General, in consultation with the United Nations High Commissioner for Refugees, was held in Geneva, from 10 January to 4 February 1977, in accordance with General Assembly resolution 3456 (XXX) of 9 December 1975. The conference ended inconclusively. See *Yearbook*

The 1949 list of topics constituted the Commission's basic long-term programme of work for more than fifty years. The list was supplemented by the following topics:

(15) Draft declaration on rights and duties of States;

(16) Formulation of the Nürnberg principles;

(17) Question of international criminal jurisdiction;

(18) Ways and means for making the evidence of customary international law more readily available;[159]

(19) Draft code of crimes against the peace and security of mankind;[160]

(20) Reservations to multilateral conventions;

(21) Question of defining aggression;

(22) Relations between States and international organizations[161] (first and second parts of the topic, the first dealing with the status, privileges and immunities of representatives of States to international organizations, and the second dealing with the status, privileges and immunities of international organizations and their personnel);

(23) Juridical regime of historic waters, including historic bays;

(24) Special missions;[162]

(25) Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations;

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of the United Nations, vol. 31, 1977, pp.625–626. A recommendation by the Conference that the General Assembly, at its thirty-second session, consider the question of convening at an appropriate time a further session of the Conference (see document A/CONF.78/12, para. 25) was not acted upon. As regards the question of diplomatic asylum, the General Assembly, in resolution 3497 (XXX) of 15 December 1975, decided to give further consideration to the matter at a future session.

[159] This topic was considered by the Commission in accordance with article 24 of its Statute.

[160] This topic was originally entitled "Draft code of offences against the peace and security of mankind." The Commission, at its thirty-ninth session, in 1987, recommended to the General Assembly that the title of the topic in English be amended to read as above in order to achieve greater uniformity and equivalence between different language versions. The General Assembly agreed with this recommendation in resolution 42/151 of 7 December 1987.

[161] At its twentieth session, in 1968, the Commission decided to amend the title of the topic, without altering its meaning, by changing the word "intergovernmental" to "international."

[162] The Commission initially considered this subject under the topic of *ad hoc* diplomacy, following the submission of the Commission's final draft on diplomatic intercourse and immunities in 1958.

(26) The Most-favoured-nation clause;[163]

(27) Question of treaties concluded between States and international organizations or between two or more international organizations;

(28) Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law;

(29) The law of the non-navigational uses of international watercourses;

(30) Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier;[164]

(31) Review of the multilateral treaty-making process;[165]

(32) International liability for injurious consequences arising out of acts not prohibited by international law (first and second parts of the topic, the first dealing with prevention of transboundary damage from hazardous activities, and the second dealing with international liability in case of loss from transboundary harm arising out of such activities);

(33) Reservations to treaties;[166]

(34) Nationality in relation to the succession of States;[167]

(35) Diplomatic protection;

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[163] The topic was first considered from 1967 to 1978. The Commisssion included the topic in its work programme once again at its sixtieth session, in 2008.

[164] This topic was preliminarily considered by the Commission under an agenda item entitled "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

[165] In resolution 32/48 of 8 December 1977, the Assembly requested the Secretary-General to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties. Also in that resolution, the General Assembly, bearing in mind the important contribution of the Commission to the preparation of multilateral treaties, provided for the participation of the Commission in the review in question. The Commission was invited, as were Governments, to submit its observations on the subject for inclusion in the Secretary-General's report. Pursuant to that invitation, the Commission considered the subject at its thirtieth and thirty-first sessions, in 1978 and 1979, respectively. See *Yearbook of the International Law Commission, 1979*, vol. II (Part Two), paras. 184–195. Its observations were transmitted to the Secretary-General in 1979 in the Commission's document entitled "Report of the Working Group on review of the multilateral treaty-making process." See *ibid., 1979,* vol. II (Part One), document A/CN.4/325.

[166] This topic was originally entitled "The law and practice relating to reservations to treaties." At its forty-seventh session, in 1995, the Commission concluded that the title of the topic should be amended to read as above.

[167] The Commission's study on the topic proceeded under this title following the completion by the Commission of the preliminary study of the topic "State succession and its impact on the nationality of natural and legal persons" at its forty-eighth session, in 1996.

(36) Unilateral acts of States;

(37) Responsibility of international organizations;

(38) Shared natural resources;[168]

(39) Fragmentation of international law: difficulties arising from the diversification and expansion of international law;[169]

(40) Effects of armed conflicts on treaties;

(41) Expulsion of aliens;

(42) The obligation to extradite or prosecute (*aut dedere aut judicare*);

(43) Protection of persons in the event of disasters;

(44) Immunity of State officials from foreign criminal jurisdiction; and

(45) Treaties over time.

The topics listed above that were placed on the Commission's programme of work in addition to those included in the 1949 list may be divided into four categories: (i) topics that were a specific follow-up to the Commission's previous work on one of the topics included in the 1949 list; (ii) topics that were not a specific follow-up to the Commission's previous work, but nonetheless relate to some extent to one of the 1949 topics; (iii) topics that do not relate to any of the topics in the 1949 list; and (iv) special assignments referred to the Commission by the General Assembly.

The first category comprising the topics that were referred to the Commission by the General Assembly as a specific follow-up to the consideration by the Commission of a topic included in the 1949 list includes: (22) relations between States and international organizations (General Assembly resolution 1289 (XIII) of 5 December 1958);[170] (23) juridical regime of historic waters, including historic bays (General Assembly resolution 1453 (XIV) of 7 December 1959);[171] (24) special missions (General Assembly resolution 1687 (XVI) of 18 December

[168] The Commission initially conceived the topic as including several sub-topics to be identified later commencing with the "law of transboundary aquifers", which it concluded at its sixtieth session, in 2008. The Commission subsequently decided, at its sixty-second session, in 2010, not to pursue the sub-topic "oil and gas".

[169] The topic was originally entitled "Risks ensuing from fragmentation of international law." At its fifty-fourth session, in 2002, the Commission decided to change the title of the topic to read as above.

[170] The topic was a follow-up to the topic of diplomatic intercourse and immunities.

[171] The topic was a follow-up to the topic of the law of the sea.

1961);[172] (26) the most-favoured-nation clause (General Assembly resolution 2272 (XXII) of 1 December 1967);[173] (27) question of treaties concluded between States and international organizations or between two or more international organizations (General Assembly resolution 2501 (XXIV) of 12 November 1969);[174] and (32) international liability for injurious consequences arising out of acts not prohibited by international law (General Assembly resolution 3071 (XXVIII) of 30 November 1973).[175] The topics listed in subparagraphs (23), (24) and (27) were referred to the Commission as a follow-up to the consideration by the General Assembly of a resolution previously adopted to that effect by a conference of plenipotentiaries.

The second category comprising the topics that were not a specific follow-up to the Commission's previous work, but nonetheless relate to one of the 1949 topics, includes: (30) the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,[176]and (44) immunity of State officials from foreign criminal jurisdiction, both of which relate, to some extent, to the topic of diplomatic intercourse and immunities; (33) reservations to treaties, (40) effects of armed conflicts on treaties and (45) treaties over time, which relate to the topic of the law of treaties;[177] (34) nationality in relation to the succession of States, which relates to both the topic of succession of States and Governments as well as the topic of nationality, including statelessness; (35) diplomatic protection and (37) responsibility of international organizations, both of

[172] The topic was also a follow-up to the topic of diplomatic intercourse and immunities.

[173] The topic was a follow-up to the topic of the law of treaties.

[174] The topic was also a follow-up to the topic of the law of treaties.

[175] The topic was a follow-up to the topic of State responsibility.

[176] This topic was referred to the Commission by the General Assembly for the further development and concretization of international diplomatic law (General Assembly resolutions 31/76 of 13 December 1976 and 33/139 and 33/140 of 19 December 1978).

[177] The Commission undertook work on the topic "Reservations to treaties" in order to address the ambiguities and gaps in the provisions concerning reservations to treaties contained, in particular, in the Vienna Convention on the Law of Treaties which was based on the Commission's earlier draft articles on the law of treaties. As regards the topic "Effects of armed conflicts on treaties", on adopting the draft articles on the law of treaties, in 1966, the Commission was of the view that the case of the outbreak of hostilities between parties to a treaty was "wholly outside the scope of the general law of treaties to be codified in the present articles." See *Yearbook of the International Law Commission, 1966,* vol. II, para. 38, commentary to article 69, para. (2). The same approach was later adopted in the Vienna Convention on the Law of Treaties, except that an express saving clause was included to the effect that "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from . . . the outbreak of hostilities between States" (article 73).

which relate to the topic of State responsibility;[178] and (41) expulsion of aliens which is related, in part, to the topic "Treatment of aliens."

The third category comprising new topics that do not relate to any of the topics in the 1949 list includes: (29) the law of the non-navigational uses of international watercourses; (36) unilateral acts of States; (38) shared natural resources;[179] (39) fragmentation of international law; (42) the obligation to extradite or prosecute (*aut dedere aut judicare*);[180] and (43) protection of persons in the event of disasters.

The fourth category comprising special assignments in terms of requests by the General Assembly to the Commission to report on particular legal problems, to examine particular texts or to prepare a particular set of draft articles[181] includes: (15) draft declaration on rights and duties of States (General Assembly resolution 178 (II) of 21 November 1947); (16) formulation of the Nürnberg principles (General Assembly resolution 177 (II) of 21 November 1947); (17) question of international criminal jurisdiction (General Assembly resolution 260 B (III) of 9 December 1948); (19) draft code of offences against the peace and security of mankind (General Assembly resolution 177 (II) of 21 November 1947); (20) reservations to multilateral conventions (General Assembly resolution 478 (V) of 16 November 1950); (21) question of defining aggression (General Assembly resolution 378 (V) of 17 November 1950); (25) question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII) of 20 November 1962); (28) question of the protection and inviolability of diplomatic agents (General Assembly resolution 2780 (XXVI) of 3 December 1971); and (31) review of the

[178] These topics were partially considered by the Commission in the course of its work on State responsibility. In addition, some aspects of the subject of responsibility of international organizations were examined in the course of the Commission's work on the second part of the topic "Relations between States and international organizations," dealing with the status, privileges and immunities of international organizations and their personnel.

[179] This topic relates to some extent to the Commission's previous work on the law of the non-navigational uses of international watercourses.

[180] This issue had previously been considered by the Commission in the context of: the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, of 1972, draft article 6, see *Yearbook of the International Law Commission, 1972,* vol. II, chapter III.B); crimes against the peace and security of mankind (Draft code of crimes against the peace and security of mankind, draft article 9; see *ibid., 1996,* vol. II (Part Two), para. 50) and the crimes within the jurisdiction of an international criminal court (Draft statute for an international criminal court, draft article 54; see *ibid., 1994,* vol. II (Part Two), para. 91).

[181] See *ibid., 1979,* vol. II (Part One), document A/CN.4/325, para. 57.

multilateral treaty-making process (General Assembly resolution 32/48 of 8 December 1977).

Most of the topics were referred to the Commission by the General Assembly, often as a result of an earlier initiative of the Commission itself. The topics listed above in subparagraphs (33)-(45) were selected by the Commission in accordance with the new procedure for the selection of topics, involving initial inclusion in the Commission's long-term programme of work. With respect to these topics, the General Assembly endorsed the Commission's decisions to undertake studies on the topics of (33) reservations to treaties, (34) nationality in relation to the succession of States, (35) diplomatic protection, (36) unilateral acts of States, (40) effects of armed conflicts on treaties, (41) expulsion of aliens, (42) the obligation to extradite or prosecute (*aut dedere aut judicare*); took note of the Commission's decision to include in its programme of work the topics of (38) shared natural resources; (39) fragmentation of international law; (43) protection of persons in the event of disasters; (44) immunity of State officials from foreign criminal jurisdiction; (45) treaties over time; (26) most-favoured-nation clause; and requested the Commission to begin its work on the topic of (37) responsibility of international organizations.

The Commission has submitted a final report on all of the topics and sub-topics added to the 1949 list which are not under current consideration, except for the following: (22) the second part of the topic of relations between States and international organizations (status, privileges and immunities of international organizations and their personnel), (23) juridical regime of historic waters, including historic bays; and (34) the second part of the topic of nationality in relation to the succession of States (question of nationality of legal persons).[182]

At the beginning of the Commission's sixty-fourth session, in 2012, the following six topics were on the Commission's programme of work:[183] (*41*) expulsion of aliens; (42) the obligation to extradite or prosecute (*aut dedere aut judicare*); (43) protection of persons in the event of disasters; (44) immunity of State officials from foreign criminal jurisdiction; (45) treaties over time; and (26) the most-favoured-nation clause.

[182] The topic (23) has never been the subject of substantive consideration by the Commission. *See footnote 523.* The work on the other two topics (22) and (34) was discontinued by the Commission before any final report was produced.

[183] In 2010 the Commission held a discussion on "settlement of disputes clauses", under the agenda item "other matters". See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 388. This was followed by a discussion on "peaceful settlement of disputes", held at the next session in 2011, also under the same agenda item. See *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), paras. 416 and 417.

(c) Procedure and criteria for the selection of topics

Since 1992, the selection of topics by the Commission for its future work has been carried out in accordance with the procedure under which designated members of the Commission, or its Secretariat,[184] write a short outline or explanatory summary on one of the topics included in a pre-selected list,[185] indicating: (i) the major issues raised by the topic; (ii) any applicable treaties, general principles or relevant national legislation or judicial decisions; (iii) existing doctrine; and (iv) the advantages and disadvantages of preparing a report, a study or a draft convention, if a decision is taken to proceed with the topic.[186] A bibliography of relevant and authoritative writings on each topic is usually also included.

The Working Group on the Long-term Programme of Work considers the outlines or summaries on the various topics with a view to identifying topics for possible future consideration by the Commission. The Chairman of the Working Group provides an annual oral progress report to the Planning Group at each session and submits a final written report, in the last year of the quinquennium, containing a list of recommended topics for inclusion in the Commission's long-term programme of work, accompanied by syllabuses annexed to the Commission's annual report to the General Assembly.[187] The Planning Group

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[184] The Secretariat has, on occasion, submitted papers, both formal and informal, related to possible new topics for inclusion in the long-term programme of work, in accordance with article 17 of the Statute of the International Law Commission, following a request to do so. See, for example, *ibid., Sixty-First Session, Supplement No. 10* (A/61/10), para. 261.

[185] The topics may be drawn from the list of possible future topics identified by the Commission in 1996 or suggested by members of the Commission.

[186] See *Yearbook of the International Law Commission, 1992,* vol. II (Part Two), para. 369.

[187] Since 1992, the following topics have been included in the Commission's long-term programme of work: Law and practice relating to reservations to treaties (in 1993, see *ibid., 1993,* vol. II (Part Two), para. 427); State succession and its impact on the nationality of natural and legal persons (in 1993, *ibid*., para. 427); Diplomatic protection (in 1995, *ibid*., *1995,* vol. II (Part Two), para. 501; Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (in 1996, *ibid*., *1996,* vol. II (Part Two), para. 248); Unilateral acts of States (in 1996, *ibid*., para. 248); Responsibility of international organizations (in 2000, *ibid*., vol. II (Part Two), para. 729); Shared natural resources of States (in 2000, *ibid*., para. 729); Risks ensuing from fragmentation of international law (in 2000, *ibid*., para. 729); Effects of armed conflict on treaties (in 2000, *ibid*., para. 729); Expulsion of aliens (in 2000, *ibid*., para. 729); The obligation to extradite or prosecute (*aut dedere aut judicare*) (in 2004, see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362–363); Immunity of State officials from foreign criminal jurisdiction (in 2006, *ibid*., *Sixty-first session, Supplement No. 10* (A/61/10), para. 257); Jurisdictional immunity of international organizations (in 2006, *ibid*., para. 257); Protection of persons in the event of disasters (in 2006, *ibid*., para. 257); Protection of personal data in transborder flow of information (in 2006, *ibid*., para. 257);

considers and adopts the report which is then submitted to the Commission. The Commission considers and adopts this report in plenary and includes it in its annual report to the General Assembly. The list of topics is intended to facilitate the selection of topics for inclusion in the Commission's programme of work, taking into account views expressed by Governments in the Sixth Committee. The list of topics performs a function similar to the 1949 list which guided the Commission in the selection of topics for more than fifty years.

The Commission has recommended that the work on the identification of possible future topics continue to follow this procedure which it considers to be an improvement.[188]

In the selection of topics, the Commission has been guided by the following criteria: (i) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (ii) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (iii) the topic should be concrete and feasible for progressive development and codification; and (iv) the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[189]

Extraterritorial jurisdiction (in 2006, *ibid*., para. 257); Treaties over time (in 2008, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 351); The Most-Favoured-Nation Clause (in 2008, *ibid*., para. 351); Formation and evidence of customary international law (in 2011, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 365); Protection of the atmosphere (in 2011, *ibid*., para. 365); Provisional application of treaties (in 2011, *ibid*., para. 365); The fair and equitable treatment standard in international investment law (in 2011, *ibid*., para. 365); and Protection of the environment in relation to armed conflicts (in 2011, *ibid*., para. 365).

[188] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 148 *(a)* and 165. For the consideration of the long-term programme of work in accordance with this procedure in subsequent years, see *ibid., 1997,* vol. II (Part Two), para. 238; *ibid*., *1998,* vol. II (Part Two), paras. 551–554; *ibid*., 1999, vol. II (Part Two), para. 642; *ibid*., 2000, vol. II (Part Two), paras. 726–733; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362–363; *ibid*., *Sixty-first Session, Supplement No. 10* (A/61/10), paras. 256–261; *ibid*., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 374; *ibid*., *Sixty-third Session, Supplement No. 10* (A/63/10), paras. 351-352; and *ibid*., *Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 365-369.

[189] See *Yearbook of the International Law Commission, 1997,* vol. II (Part Two), para. 238; *ibid*., *1998,* vol. II (Part Two), para. 553 and *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 256; *ibid*., *Sixty-third Session, Supplement No. 10* (A/63/10), para. 351; and *ibid*., *Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 366.

As of the beginning of the sixty-fourth session of the Commission, in 2012, the following topics were on the long-term programme of work of the Commission:

- Ownership and protection of wrecks beyond the limits of national maritime jurisdiction;
- Jurisdictional immunity of international organizations;
- Protection of personal data in transborder flow of information;
- Extraterritorial jurisdiction;
- Formation and evidence of customary international law;
- Protection of the atmosphere;
- Provisional application of treaties;
- The fair and equitable treatment standard in international investment law; and
- Protection of the environment in relation to armed conflicts.

5. Methods of work

(a) Progressive development and codification

The drafters of article 13(1)(*a*) of the Charter of the United Nations, at the San Francisco Conference, in 1945, considered a proposal to make an explicit reference to "revision" of existing international rules, but opted for the words "progressive development" since "juxtaposed as they were with codification, they implied modifications of as well as additions to existing rules" so as to "establish a nice balance between stability and change, whereas 'revision' would lay too much emphasis on change."[190]

During the process of drafting the Statute, the Committee of Seventeen recognized that the tasks that were to be entrusted to the Commission would vary in nature: some might involve the drafting of a convention on a subject which had not yet been regulated by international law or in regard to which the law had not yet been highly developed or formulated in the practice of States; while other tasks might involve the more precise formulation and systematization of the law in areas where there had been extensive State practice, precedent and doctrine. The former type of task was labeled, "for convenience of reference," as "progressive development" and the latter "codification."[191]

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[190] Document 848; II/2/46, *The United Nations Conference on International Organization,* [1945], vol. 9, pp. 177–178.

[191] See the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1,* para. 7. See also article 15 of the Statute of the Commission.

The Statute contemplates the progressive development of international law through the preparation of draft conventions (article 15), but envisages two further possible conclusions to its work when the Commission's task is one of codification: (*a*) simple publication of its report; and (*b*) a resolution of the General Assembly, taking note of or adopting the report (article 23, paragraph 1).[192] The Statute also lays down the specific steps to be taken by the Commission in the course of its work on progressive development (articles 16 and 17) and on codification (articles 18 to 23).

Notwithstanding the distinction drawn between the two concepts, the Committee of Seventeen recognized that they were not mutually exclusive, as, for example, in cases where the formulation and systematization of the existing law may lead to the conclusion that some new rule should be suggested for adoption by States.[193] This insight has been borne out by practice. The Commission has indicated that the distinctions drawn in its Statute between the two processes have proved unworkable and could be eliminated in any review of the Statute.[194] Instead the Commission has proceeded on the basis of a composite idea of codification and progressive development.[195] It has developed a consolidated procedure to its methods of work and applied that method in a flexible manner making adjustments that the specific features of the topic concerned or other circumstances demand.[196]

(b) Process of consideration

The Commission does not necessarily begin consideration of a topic immediately after it has been included in the programme of work (since 1992, from the list of topics in the long-term programme of work). The Commission's actual consideration of a topic on its programme results, rather, from a further decision of the Commission to place it on the agenda of its next session. The Commission's decision to commence its

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[192] Such distinction between possible outcomes in the context of progressive development of international law, as opposed to its codification, has not always met with agreement in the Commission. See, for example, the debate, at the fifty-third session, in 2001, on the recommendation of the Commission to the General Assembly on the occasion of the adoption of the draft articles on responsibility of States for internationally wrongful acts. See *Yearbook of the International Law Commission, 2001, vol. II (Part Two),* paras. 61–67.

[193] See the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1,* para. 7.

[194] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 147 (*a*) and 156–159.

[195] See *ibid., 1979,* vol. II (Part One), document A/CN.4/325, para. 13.

[196] See *ibid.*, para. 16.

work on a topic is mainly influenced by the status of the consideration of other topics and requests by the General Assembly (e.g., special assignments or requests to give priority to certain topics or to begin work on a certain topic).[197] In some instances, the placing of a topic on the agenda has also been preceded by preliminary work undertaken by a subcommittee or working group established for this purpose (*see page 28*).

The Commission has identified three different stages generally present in the consideration of a topic on its agenda: a first preliminary stage, devoted mainly to the organization of work and the gathering of relevant materials and precedents; a second stage, during which the Commission proceeds to a first reading of the draft articles submitted by the Special Rapporteur; and a third and final stage, devoted to a second reading of the draft articles provisionally adopted.[198]

The first stage usually comprises the following: appointment of a Special Rapporteur; formulation of a plan of work; and, where necessary or desirable, requests for data and information from Governments[199] as well as international organizations and for research projects, studies, surveys and compilations from the Secretariat.[200]

The second stage usually comprises the following: the consideration of the reports of the Special Rapporteur[201] by the Commission in plenary, and of the proposed draft articles in the plenary and in the Drafting Committee; the elaboration of draft articles with commentaries setting forth precedents, any divergences of views expressed in the Commission, and alternative solutions considered;[202] the approval of the provisional draft articles in the Drafting Committee and the draft articles with commentaries afterwards in the plenary; and the issuance of the provisional draft with commentary as a Commission document and its submission to the General Assembly, and also to Governments

[197] See *ibid.*, para. 22.

[198] See *ibid.*, para. 35.

[199] For example, Governments may be requested to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other relevant documents under article 19 of the Statute.

[200] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, paras. 36–43.

[201] At the Commission's request or on his initiative, the Special Rapporteur's initial presentation may be of a general and exploratory character, in the form of a working paper or preliminary report. See *ibid.*, para. 39.

[202] The content of the commentary to draft articles is addressed in article 20 of the Statute. A distinction can be drawn between commentaries written on first reading, which may include minority views within the Commission, as well as a description of alternative solutions sought; and commentaries to draft articles adopted on second reading, which reflect only the decisions and positions taken by the Commission as a whole.

for their written observations.[203] As experience has shown that a shorter period failed to elicit a sufficient number of replies, Governments are normally given one year or more in which to study these provisional drafts and present their written observations before the Commission begins the second reading of the draft articles.[204]

The third stage usually involves the study by the Special Rapporteur of the replies received from Governments, together with any comments made in the debates of the Sixth Committee; submission of a further report to the Commission, recommending the changes in the provisional draft that seem appropriate; the consideration and approval of the revised draft in the Drafting Committee in the light of the written and oral observations from Governments; and adoption by the Commission in plenary of the final draft with commentaries[205] and a recommendation regarding further action.[206]

The task of the Commission in relation to a given topic is completed when it presents to the General Assembly a final product on that topic, which is usually accompanied by the Commission's recommendation on further action with respect to it.[207] In some instances, the General Assembly has requested the Commission to undertake further work on a topic on which it has already submitted a final report.[208]

The Commission has generally considered that its drafts constitute both codification and progressive development of international law in the sense in which those concepts are defined in the Statute, and has found it impracticable to determine into which category each provision

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[203] See *Yearbook of the International Law Commission, 1979*, vol. II (Part One), document A/CN.4/325, paras. 44–49.

[204] See *ibid., 1958,* vol. II, document A/3859, paras. 60 and 61.

[205] The commentaries are amended to explain the final version of the draft articles, including the solutions adopted with respect to any controversial issues, and updated to include the most recent precedents.

[206] See *Yearbook of the International Law Commission*, *1979*, vol. II (Part One), document A/CN.4/325, paras. 50–56.

[207] In 2011, the Commission recommended that a "preliminary indication as to the final form of the work undertaken on a specific topic (draft articles which might be embodied in a convention, declaration of principles, guidelines, expository study with conclusions and recommendations, etc.) should, as far as possible, be made at an early stage by Special Rapporteurs or Study Groups, subject to review and later adjustment as the work develops". See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 383.

[208] The General Assembly may refer drafts back to the Commission for reconsideration or redrafting under article 23, paragraph 2, of the Statute. The General Assembly took such action with respect to the draft articles on arbitral procedure submitted by the Commission to the General Assembly in 1953 (General Assembly resolution 989 (X) of 14 December 1955) as well as aspects of the draft articles on the jurisdictional immunities of States and their property (General Assembly, resolution 53/98 of 8 December 1998).

falls.[209] The Commission has usually recommended that the General Assembly take action envisaged with respect to the codification of international law under its Statute, namely: (*a*) to take no action, the report having already been published; (*b*) to take note of or adopt the report by resolution; (*c*) to recommend the draft to Members with a view to the conclusion of a convention; or (*d*) to convoke a conference to conclude a convention (article 23, paragraph 1).

As noted in Part III, the Commission recommended that the General Assembly take the following action with respect to the various draft articles in the years indicated in parentheses: *(a) take no action* with respect to the draft article on the contiguous zone since the report covering it had already been published (1953); *(b) adopt the reports* containing drafts relating to the continental shelf and fisheries (1953),[210] and the Model Rules on Arbitral Procedure (1958); *(c) adopt the draft articles* on nationality of natural persons in relation to the succession of States *in the form of a declaration* (1999); *(d) recommend the conclusion of a convention* on arbitral procedure (1953), elimination and reduction of future statelessness (1954),[211] diplomatic intercourse and immunities (1958), special missions (1967),[212] most-favoured-nation clauses (1978), law of the non-navigational uses of international watercourses (1994),[213] prevention of transboundary harm from hazardous activities (2001), and diplomatic protection (2006); (*e*) *take note* of the draft articles on the law of transboundary aquifers (2008),[214] the responsibility of international

[209] See, for instance, *Yearbook of the International Law Commission*, *1951,* vol. I. pp. 123 and 132–135; *ibid*., *1953,* vol. II, document A/2456, para. 54; *ibid*., *1956,* vol. II, document A/3159, paras. 25 and 26; *ibid*., *1961,* vol. II, document A/4843, para. 32; *ibid*., *1966,* vol. II, document A/6309/Rev.1, para. 35; *ibid*., *1967,* vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, para. 23; *ibid*., *1971,* vol. II (Part One), document A/8410/Rev.1, para. 50; *ibid*., *1974,* vol. II (Part One), document A/9610/Rev.1, para. 83; *ibid*., *1978,* vol. II (Part Two), para. 72; *ibid*., *1982,* vol. II (Part Two), para. 55 and *ibid*., *1996,* vol. II (Part Two), paras. 156 and 157.

[210] These drafts, later included in the all-embracing draft on the law of the sea, became the basis for two conventions adopted by the first United Nations Conference on the Law of the Sea (1958).

[211] The recommendation of the Commission was implicit in the identical provision of article 12 of the two draft conventions on the subject submitted to the General Assembly, which read: "The present Convention, having been approved by the General Assembly, shall . . . be open for signature . . . and shall be ratified."

[212] The Commission recommended to the General Assembly that appropriate measures be taken for the conclusion of a convention on special missions.

[213] The Commission recommended that a convention be elaborated by the Assembly or an international conference of plenipotentiaries.

[214] The Commission further recommended to the General Assembly that it recommend that States concerned make appropriate bilateral and regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunci-

organizations (2011), and the effects of armed conflicts on treaties (2011), which were to be annexed to the Assembly's resolution, and *consider, at a later stage, the elaboration of a convention on the basis of the draft articles*; *(f) convoke a conference to conclude a convention* on the law of the sea (1956), consular intercourse and immunities (1961), law of treaties (1966), representation of States in their relations with international organizations (1971), succession of States in respect of treaties (1974), succession of States in respect of State property, archives and debts (1981), treaties concluded between States and international organizations or between two or more international organizations (1982), status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and two optional protocols thereto (1989), and jurisdictional immunities of States and their property (1991); (*g*) *take note of* the draft articles on responsibility of States for internationally wrongful acts, which were to be annexed to the Assembly's resolution, *and subsequently consider convening a conference to conclude a convention* (2001); and *(h) endorse* the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law) (2006) by a resolution.[215] The Commission has also *commended* the Guiding principles applicable to unilateral declarations of States capable of creating legal obligations (2006) and the conclusions of the Study Group on the fragmentation of international law (2006) *to the attention of the General Assembly,* and recommended that the Assembly *take note* of the Guide to Practice on Reservations to Treaties (2011) and *ensure its widest possible dissemination*.[216]

(c) Special assignments

In performing special assignments, the question has arisen whether the Commission should use the methods laid down in its Statute for carrying out its normal work of progressive development and codification, or whether it was free to decide on the methods to be used in such cases. The Commission has always decided that it was free to adopt special

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ated in the draft articles. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 49(*b*).

[215] The Commission further recommended that the General Assembly urge States to take national and international action to implement the draft principles. See *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 63.

[216] With respect to the topic "Ways and means for making the evidence of customary international law more readily available," no recommendation by the Commission in accordance with article 23, para. 1, of the Statute was required because of the nature of the work on the topic.

methods for special tasks.[217] The Commission often dispenses with the normal stages of its work and considers special assignments as a whole or in a working group without appointing a Special Rapporteur or holding first and second readings.[218] In such cases, the Commission reports its conclusions simply for the consideration of the General Assembly, without recommending any of the courses of action listed in article 23, paragraph 1, of the Statute. In other cases, the Commission has used virtually the same working methods for special assignments as for progressive development and codification with the result being the submission of draft articles accompanied by commentaries, and in some instances, a recommendation for action by the General Assembly.[219]

The Commission submitted its reports with respect to the following special assignments in the years indicated in parentheses: draft declaration on rights and duties of States (1949); formulation of the Nürnberg principles (1950); question of international criminal jurisdiction (1950); question of defining aggression (1951); reservations to multilateral conventions (1951); draft code of crimes against the peace and security of mankind (1951, 1954, 1994[220] and 1996); extended participation in general multilateral treaties concluded under the auspices of the League of Nations (1963); question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (1972); and review of the multilateral treaty-making process (1979).

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[217] See, for example, the discussion at the Commission's first session concerning the procedure to be followed in its work on the draft Declaration on Rights and Duties of States, in *Yearbook of the International Law Commission, 1949,* Report to the General Assembly, para. 53. The General Assembly, in taking note of the draft Declaration and in commending it to the continuing attention of Member States and jurists of all nations (resolution 375 (IV) of 6 December 1949), appeared to accept without question the thesis stated in the Commission's report that it was within the competence of the Commission to adopt such procedure as it might deem conducive to the effectiveness of its work in respect of a special assignment even though such procedure differed from the procedures set forth in the Statute for progressive development or codification. See also *ibid., 1977,* vol. II (Part Two), paras. 116 and 117.

[218] See *ibid., 1979*, vol. II (Part One), document A/CN.4/325, paras. 57–61.

[219] With respect to the draft Statute for an International Criminal Court submitted by the Commission to the General Assembly in 1994, the Commission recommended that the General Assembly convene an international conference of plenipotentiaries to study the draft Statute and to conclude a convention on the establishment of an international criminal court. With respect to the draft Code of Crimes against the Peace and Security of Mankind submitted by the Commission to the General Assembly in 1996, the Commission recommended that the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code.

[220] In this year, the Commission submitted its report containing the final text of the draft Statute for an International Criminal Court.

The Commission's reports on the following special assignments contained draft articles with commentaries: draft declaration on rights and duties of States; formulation of the Nürnberg principles; draft code of crimes against the peace and security of mankind; and question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. The conclusions reached by the Commission on the other special assignments did not lend themselves to the preparation of draft articles.

(d) Review of methods of work

The Commission has periodically reviewed its methods of work, at the request of the General Assembly or on its own initiative, in the light of comments and suggestions made in the Sixth Committee or in the Commission itself.[221] It has consequently introduced a number of changes aimed at expediting or streamlining its procedures to respond more readily to its tasks.[222]

At its tenth session, in 1958, the Commission considered various methods by which its work might be accelerated based on a working paper prepared by the Chairman of its previous session in response to observations in the Sixth Committee.[223] As a result of this review, the Commission made changes in its methods of work with respect to plenary meetings, the Drafting Committee and Government comments. The Commission concluded that it might be useful in the initial stages of preparing a draft on a difficult or complex subject to make greater use of committees or sub-committees so that less would be done in plenary. The Commission decided that in the future the Drafting Committee should be formally constituted as what it had long been in fact, namely, a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had been unable

[221] At its twenty-ninth session, in 1977, the Commission, stated its intention to keep constantly under review the possibility of improving its method of work and procedures in the light of the specific features presented by the individual topics under consideration. See *Yearbook of the International Law Commission, 1977,* vol. II (Part Two), para. 120. This was reiterated at the Commission's thirty-first session, in 1979, when the Commission conducted a comprehensive review of its methods of work, while preparing its observations on the item "Review of the multilateral treaty-making process," as well as at its next session, in 1980. See *ibid., 1979,* vol. II (Part One), document A/CN.4/325, para. 16, and *ibid., 1980,* vol. II (Part Two), para. 185, respectively.

[222] See *ibid.*, *1979*, vol. II (Part One), document A/CN.4/325, para. 16. However, in 1973, the Commission noted that "whatever improvements it may be possible to make in the methods of work of the Commission, it is clear that there is an inbuilt periodicity at work that places certain limits on the Commission's ability to respond promptly to urgent requests." See *ibid., 1973,* vol. II, document A/9010/Rev.1, para. 166.

[223] Document A/CN.4/L.76.

to resolve, or which seemed likely to give rise to unduly protracted discussion. The Commission also decided to prepare its final draft at the second session following that in which the first draft had been prepared which would give more time for Governments to comment on the first drafts produced by the Commission, also for the members to consider those comments and for the Special Rapporteur to make recommendations concerning them.[224]

At its twentieth session, in 1968, the Commission reviewed its methods of work based on working papers prepared by the Secretariat.[225] As a result of this review, the Commission recommended that: the term of office of its members be extended from five to six or seven years; an additional special allowance be made available to Special Rapporteurs to help defray expenses in connection with their work; and the staff of the Codification Division be increased so that it could provide additional assistance to the Commission and its Special Rapporteurs.[226]

At its twenty-seventh session, in 1975, the Commission established a Planning Group in the Enlarged Bureau to study the functioning of the Commission and formulate suggestions regarding its work. As an initial project, the Planning Group undertook a review of the existing workload of the Commission with a view to proposing general goals toward which the Commission might direct its efforts during its five-year term of office ending in 1981.[227] The adoption by the Commission of general goals for completion of work on the topics under consideration was received with approval in the General Assembly.[228] From 1977 on, the Commission has established a Planning Group[229] for each of its annual sessions and entrusted it with the task of considering the programme, organization and methods of work of the Commission.

At its thirtieth and thirty-first sessions, in 1978 and 1979, respectively, the Commission examined its methods of work in the context of its consideration of the topic "Review of the multilateral treaty-making process" pursuant to General Assembly resolution 32/48 of 8 December 1977.[230] The Commission established a working group to consider preliminary questions raised by the topic and to recommend to the Com-

[224] See *Yearbook of the International Law Commission, 1958,* vol. II, document A/3859, paras. 59–62 and 65.

[225] See *ibid., 1968,* vol. II, document A/7209/Rev.1, paras. 95–102 and annex.

[226] See *ibid.*, para. 98.

[227] See *ibid., 1975,* vol. II, document A/10010/ Rev.1, paras. 139–147.

[228] See General Assembly resolution 3495 (XXX) of 15 December 1975.

[229] As mentioned previously, the Commission's current practice is to establish the Planning Group as a subsidiary body of the Commission (*see footnote 85*).

[230] See *Yearbook of the International Law Commission, 1979*, vol. II (Part Two), paras. 184–195.

mission the action to be taken in response to the General Assembly's request. The Commission subsequently adopted the report of the working group[231] which contained detailed observations on the following: (1) the International Law Commission as a United Nations body; (2) the object and functions of the Commission; (3) the role of the Commission and its contribution to the treaty-making process through the preparation of draft articles; (4) the consolidated methods and techniques of work of the Commission as applied in general to the preparation of draft articles (without distinguishing between the progressive development of international law and its codification), including the functions performed by the Special Rapporteur, the Drafting Committee and the Commission during the three stages of consideration of a topic; (5) other methods and techniques employed by the Commission (for example, with respect to special assignments); (6) the relationship between the Commission and the General Assembly; and (7) the elaboration and conclusion of conventions based on draft articles prepared by the Commission following a General Assembly decision to that effect. The Commission concluded, *inter alia*, that the techniques and procedures provided in the Statute, as they had evolved over three decades, were well adapted for the object of the Commission set forth in article 1 of the Statute, namely, the progressive development of international law and its codification. The Commission noted that it might be necessary to provide more assistance and facilities to Special Rapporteurs to enable them to perform their duties in the future and to make more use of questionnaires addressed to Governments than in the past. The Commission did not, however, recommend any major changes in its methods of work.

At its thirty-ninth session, in 1987, the Commission considered thoroughly its methods of work in all their aspects in response to General Assembly resolution 41/81 of 3 December 1986. The Planning Group established a Working Group on Methods of Work for this purpose. As a result, the Commission, while maintaining the view that tested methods should not be radically or hastily altered, agreed that some specific aspects of its procedures could usefully be reviewed. The Commission believed that the Drafting Committee, which played a key role in harmonizing the various viewpoints and working out generally acceptable solutions, should work in optimum conditions. As regards the composition of the Drafting Committee, the Commission was aware that a proper balance must be kept, notwithstanding practical constraints, between two legitimate concerns, namely that the principal legal systems and the various languages should be equitably represented in the Committee and that the size of the Committee should be kept within

[231] See *ibid.*, vol. II (Part One), document A/CN.4/325.

limits compatible with its drafting responsibilities. To facilitate the work of the Drafting Committee, the Chairman of the Commission should, whenever possible, indicate the main trends of opinion revealed by the debate in plenary. The Commission was aware that premature referral of draft articles to the Drafting Committee, and excessive time-lags between such referral and actual consideration of draft articles in the Committee, have counter-productive effects.[232]

At its forty-fourth session, in 1992, the Commission considered thoroughly its methods of work in all their aspects as requested by the General Assembly in resolution 46/54 of 9 December 1991. On the recommendation of the Planning Group, the Commission adopted guidelines with respect to the Drafting Committee and the Commission's report. The guidelines concerning the composition and working methods of the Drafting Committee provide as follows: (*a*) the Drafting Committee shall continue to be a single body, under one Chairman, but may have a different membership for each topic; (*b*) the Drafting Committee should, as a general rule, concentrate its work on two to three topics at each session to attain greater efficiency; (*c*) the Chairman of the Drafting Committee, in consultation with the other officers of the Commission, shall recommend the membership for each topic; (*d*) membership for each topic shall be limited to no more than fourteen members and shall ensure as far as possible representation of the different working languages; (*e*) members who are not serving on the Drafting Committee for a given topic may attend the meetings and occasionally be authorized to speak, but should exercise restraint; (*f*) the Drafting Committee shall be given the necessary time for the timely completion of the tasks entrusted to it; (*g*) when necessary, the Drafting Committee may be given additional time for concentrated work, preferably at the beginning of a session; and (*h*) the Drafting Committee shall present a report to the Commission as early as possible after the conclusion of its consideration of each topic. The guidelines concerning the preparation and content of the Commission's annual report provide, *inter alia*, as follows: (*a*) the General Rapporteur should play an active part in the preparation of the report to provide the necessary coordination and consistency, bearing in mind continuing efforts to avoid an excessively long report; and (*b*) the report should include a summary of the work of the session as well as a list of questions on which the views of the Sixth Committee would be particularly helpful.[233]

At its forty-sixth and forty-seventh sessions, in 1994 and 1995, respectively, the Commission considered its working methods with

[232] See *ibid., 1987*, vol. II (Part Two), paras. 235–239.

[233] See *ibid., 1992*, vol. II (Part Two), paras. 371 and 373.

respect to the commentaries to draft articles. The Commission reviewed the conditions under which the commentaries to draft articles are discussed and adopted. The Commission agreed that the commentaries should be taken up as soon as possible at each session in order to receive the requisite degree of attention and should be discussed separately rather than in the framework of the adoption of the annual report. The Commission noted that the content and length of the commentaries accompanying draft articles depend partly on the nature of the topic and the extent of the precedents and other relevant data. Nonetheless, the Commission encouraged its Special Rapporteurs to draft the briefest possible commentaries and pay due attention to the desirability of having the commentaries to the draft articles on the various topics as uniform as possible in presentation and length.[234]

At its forty-eighth session, in 1996, the Commission examined the procedures of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law in response to General Assembly resolution 50/45 of 11 December 1995. The Commission adopted the report of the Planning Group[235] which contained the following recommendations with respect to plenary meetings, the Drafting Committee, working groups, Special Rapporteurs and the Commission's annual report: (*a*) the plenary debates should be reformed to provide more structure and to allow for an indicative summary of conclusions by the Chairman at the end of the debate, based if necessary on an indicative vote; (*b*) the Drafting Committee should continue to have a different membership for different topics; (*c*) working groups should be used more extensively to resolve particular disagreements and, in appropriate cases, as an expeditious way of dealing with whole topics, in the latter case normally acting in place of the Drafting Committee; (*d*) Special Rapporteurs should specify the nature and scope of work planned for the next session, work with a consultative group of members, produce draft commentaries or notes to accompany their draft articles, which should be revised in the light of changes made in the Drafting Committee and made available at the time of the debate in plenary, and the Special Rapporteur's reports should be available sufficiently in advance of the session; (*e*) the Commission should identify specific issues for comment by the Sixth Committee before the adoption of draft articles, where possible, and the Commission's report should be shorter, more thematic and should highlight and explain key issues to assist in structuring the debate on the report

[234] See *ibid., 1995*, vol. II (Part Two), paras. 504–508.

[235] See *ibid., 1996,* vol. II (Part Two), paras. 142–243.

in the Sixth Committee.[236] The Commission also recommended that goals should be set at the beginning and reviewed at the end of each quinquennium, together with any preparations that should be made to facilitate adopting the plan for the next quinquennium at the beginning of its first year.[237] The General Assembly welcomed with appreciation the steps taken by the Commission in relation to its internal matters to enhance its efficiency and productivity and invited the Commission to continue taking such measures.[238]

At its sixty-third session, in 2011, the Commission reviewed its working methods and, on the basis of the report of the Planning Group, adopted several recommendations (supplementing the recommendations adopted during previous reviews of its methods of work) pertaining to: the role of the Special Rapporteurs, the convening of study groups, the work of the Drafting Committee as well as the role of the Planning Group, the preparation of commentaries, the final form of texts being elaborated by the Commission, the Commission's report and the relationship with the Sixth Committee.[239] The General Assembly welcomed the work of the Commission to improve its methods of work.[240]

6. Meetings of the Commission

(a) Rules of procedure

As a subsidiary organ of the General Assembly, the procedure of the Commission is governed by the Rules of Procedure of the General Assembly relating to the procedure of committees (rules 96 to 133) as well as rule 45 (duties of the Secretary-General) and rule 60 (public and private meetings) unless the Assembly or the Commission decides otherwise.[241] The Commission, at its first session, in 1949, decided that these Rules of Procedure should apply to the procedure of the Commission, and that the Commission should, when the need arose, adopt its own rules of procedure.[242]

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[236] For the complete list of specific recommendations, see *ibid.*, para. 148.

[237] See *ibid.*, paras. 148 *(1)* and 221.

[238] See General Assembly resolution 52/156 of 15 December 1997.

[239] See *Official Records of the General Assembly, Sixty-sixth Session*, Supplement No. 10 (A/66/10 and Add.1), paras 370-388.

[240] See General Assembly resolution 66/98 of 9 December 2011.

[241] See Rule 161 of the Rules of Procedure of the General Assembly.

[242] See *Yearbook of the International Law Commission, 1949*, Report of the General Assembly, para. 5.

(b) Agenda

At the beginning of each session, the Commission adopts the agenda for the session. The provisional agenda is prepared by the Secretariat on the basis of the decisions of the Commission and the pertinent provisions of the Statute. The order in which items are listed in the agenda adopted does not necessarily determine their actual order of consideration by the Commission. The agenda of a given session is to be distinguished from the Commission's programme of work. Not every topic on the programme of work is necessarily included in the agenda of a particular session.[243] The Commission gives serious consideration to recommendations by the General Assembly to include a topic in the agenda of its next session. However, the Commission decides whether it is appropriate to follow such a recommendation, which is not reflected in the provisional agenda prepared by the Secretariat, in the light of its previous decisions concerning the plan of work for the session.[244]

(c) Languages

The official languages of the Commission are those of the United Nations, namely Arabic, Chinese, English, French, Russian and Spanish.[245] In the subsidiary bodies, discussion is predominantly in English and French, coinciding with the working language of the text under discussion, if applicable, but members are free to use other official languages.[246]

(d) Decision making

The Chairman of the Commission may declare a meeting open and permit the debate to proceed when at least one quarter of the members are present. The presence, however, of a majority of the Commission's members is required for a decision to be taken by the Commission. In addition, the Chairman of the Commission (or of a subsidiary body, as the case may be) may, from time to time, be called upon to make a ruling (usually on procedural matters).[247] Decisions are taken by a majority of

[243] See *ibid., 1979*, vol. II (Part One), document A/CN.4/325, para. 7.

[244] Similarly, while a topic may be on the programme of work of the Commission, it might not be on its agenda for the session in the hiatus following the adoption of draft articles on first reading when the draft articles are before Governments for their comments and observations.

[245] See rule 51 of the Rules of Procedure of the General Assembly.

[246] See *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), para. 216.

[247] See rule 106 of the Rules of Procedure of the General Assembly.

the members present and voting. Members who abstain from voting are considered as not voting.[248]

In the early years of the Commission, decisions were often taken by vote. At a later stage, it became more common for the Commission to take decisions on procedural and substantive matters without a vote, by common understanding or consensus.[249] In 1996, the Commission discussed the method of voting in the plenary and subsidiary bodies and made some suggestions.[250] It was noted, that although the Commission and its subsidiary bodies[251] attempted to reach consensus, it would be less burdensome and time-consuming to call for an indicative vote in certain cases, for instance, on provisional and tentative points or points of detail, with the reflection of minority views in the summary records and in the report of the Commission. "When decisions ultimately come to be taken, again every effort should be made to reach a consensus, but if this is not possible in the time available, a vote may have to be taken."[252]

(e) Report of the Commission

At the end of each session, the Commission adopts a report to the General Assembly, covering the work of the session, on the basis of a draft prepared by the General Rapporteur with the assistance of the Special Rapporteurs concerned and the Secretariat.[253]

The report includes information concerning the organization of the session, the progress of work[254] and the future work of the Commission on the topics given substantive consideration during the session, the texts of draft articles and commentaries adopted by the Commission during the session, any procedural recommendations of the Commis-

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[248] See *Yearbook of the International Law Commission*, *1979*, vol. II (Part One), document A/CN.4/325, para. 8. See also rules 108 (Quorum), 125 (Majority required) and 126 (Meaning of the phrase "members present and voting") of the Rules of Procedure of the General Assembly.

[249] See *ibid.*, *1979*, vol. II (Part One), document A/CN.4/325, para. 8.

[250] See *ibid.*, *1996,* vol. II (Part Two), paras. 207–210.

[251] The right to participate in a decision taken by a subsidiary body is limited to the members of that body.

[252] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 210.

[253] See *ibid.*, *1979*, vol. II (Part One), document A/CN.4/325, para. 65.

[254] The recent practice of the Commission has been to provide a more concise description of the history of the consideration of each topic, in the introductory parts of the relevant chapters of its report.

sion calling for a decision on the part of the General Assembly as well as other decisions and conclusions of the Commission. [255]

The structure of the report has changed from time to time.[256] At present, it is divided into the following main chapters: the first chapter deals with organizational issues; the second chapter summarizes the work of the session; the third chapter identifies specific issues on which comments of Governments would be of particular interest to the Commission; subsequent chapters are devoted to each of the different topics considered at the session; and the last chapter contains other decisions and conclusions of the Commission. The Commission has, on occasion, also decided to include other relevant documents, such as reports of working groups or syllabuses prepared for individual topics to be included on its long-term programme of work, in an annex to its report.[257]

The Commission's annual report is the means by which it keeps the General Assembly informed on a regular basis of the progress of its work on the various topics on its current programme as well as of its achievements in the preparation of draft articles on these topics. The report is also the means by which the Commission's drafts are given the necessary publicity provided for in articles 16 and 21 of its Statute.[258]

(f) Summary records

Since its establishment, the Commission has been provided with summary records of its meetings in both provisional and final form,[259] in accordance with the consistent policy of the General Assembly.[260] At its thirty-second session, in 1980, the Commission concluded that the

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[255] See *Yearbook of the International Law Commission*, *1979*, vol. II (Part One), document A/CN.4/325, para. 66.

[256] See pages 74-75.

[257] The Commission's report on its first session and as of its twenty-first session is published as *Supplement No. 10* of the *Official Records of the General Assembly*. The Commission's report on its second session was published as *Supplement No. 12* and on its third to twentieth sessions as *Supplement No. 9* of the *Official Records of the General Assembly*. The report is subsequently published in the *Yearbook of the International Law Commission* (in volume II, except for the *1949 Yearbook* which consists of only one volume) together with a check-list of the documents issued during the session.

[258] See *Yearbook of the International Law Commission*, *1979*, vol. II (Part One), document A/CN.4/325, para. 64.

[259] The summary records of Commission meetings are provided in provisional form to its members and are published in final form in the *Yearbook of the International Law Commission* (in volume I).

[260] See General Assembly resolutions 32/151 of 19 December 1977, 34/141 of 17 December 1979, 35/163 of 15 December 1980, 36/114 of 10 December 1981, 37/111 of 16 December 1982 and all subsequent resolutions on the annual reports of the Commission

provision of summary records of its meetings constitutes an inescapable requirement for the procedures and methods of work of the Commission and for the process of codification of international law in general. The Commission has observed that the need for summary records in the context of its procedures and methods of work was determined by, *inter alia*, its functions and composition. As its task is mainly to draw up drafts providing a basis for the elaboration by States of legal codification instruments, the debates and discussions held in the Commission on proposed formulations are of paramount importance, in terms of both substance and wording, for the understanding of the rules proposed to States by the Commission. Pursuant to the Commission's Statute, members of the Commission serve in a personal capacity and do not represent Governments. Therefore, States have a legitimate interest in knowing not only the conclusions of the Commission as a whole as recorded in its reports but also those of its individual members contained in the summary records of the Commission, particularly if it is borne in mind that members of the Commission are elected by the General Assembly so as to ensure representation in the Commission of the main forms of civilization and the principal legal systems of the world. The summary records of the Commission are also a means of making its deliberations accessible to international institutions, learned societies, universities and the public in general. They play an important role, in that respect, in promoting knowledge of and interest in the process of promoting the progressive development of international law and its codification. The Commission has emphasized the importance of providing summary records of its meetings in both provisional and final form and expressed its appreciation to the General Assembly for doing so.[261]

(g) Yearbook of the Commission

Following a request by the Commission, the General Assembly, in resolution 987 (X) of 3 December 1955,[262] requested the Secretary-General to arrange for the printing of: (*a*) the principal documents (namely,

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to the General Assembly. See also *Yearbook of the International Law Commission, 1980*, vol. II (Part Two), para. 190.

[261] See *ibid.*, paras. 188–190. In 2004, the Commission recalled that on several occasions it had considered the summary records to be an inescapable requirement for the procedures and methods of its work. In its view, "[t]hey constitute the equivalent of *travaux préparatoires* and are an indispensable part of the process of progressive development of international law and its codification. They are vital for the Commission's work." See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 367, and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 403.

[262] The General Assembly recalled its resolution 176 (II) of 21 November 1947, in which it stated, *inter alia*, that "one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the

studies, reports, principal draft resolutions and amendments presented to the Commission) relating to the first seven sessions, in their original languages, and the summary records of these sessions, initially in English; and (*b*) the principal documents and summary records relating to the subsequent sessions, in English, French and Spanish. As a result, an annual publication entitled *Yearbook of the International Law Commission* has been printed in two volumes in respect of each session (except the first session for which there was only one volume). The *Yearbook* has also been published in Russian since 1969, in Arabic since 1982 and in Chinese since 1989. Volume I of the *Yearbook* contains the summary records of the meetings of the Commission and volume II reproduces the principal documents, including the Commission's report to the General Assembly. Volume II is published in two parts, part two reproducing, since 1976, the annual report of the Commission to the General Assembly.[263]

In 2011, the Commission noted that, "since its inception, the *Yearbook of the International Law Commission* has become an authoritative international legal publication critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The *Yearbook* has been extensively cited in legal proceedings before international courts and tribunals, and by Governments in their official communications. It has further proved an invaluable resource for practitioners and academics alike seeking evidence of customary international law. The *Yearbook* constitutes an indispensable tool for the preservation of the legislative history of the documents emanating from the Commission, as well as for the teaching, study, dissemination and wider appreciation of the efforts undertaken by the Commission in the progressive development of international law and its codification."[264]

(h) Documentation

By its very nature, the documentation of the Commission is comprehensive and, therefore, often lengthy. From time to time, the Commission has addressed the question of the applicability of United Nations regulations for the control and limitation of documentation to its own documentation.[265] The Commission noted that the length of its documentation

media of education and publicity to familiarize the peoples with the principles and rules that govern international relations".

[263] The Commission's documents, reports and publications are also available on its website.

[264] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 407.

[265] For the Commission's discussions, see *Yearbook of the International Law Commission, 1977*, vol. II (Part Two), paras. 124–126; *ibid.*, *1980*, vol. II (Part Two), paras. 191

depended upon a series of variable factors, for example: (i) as regards its annual report, the duration of the session, the topics considered, the draft articles and commentaries included and the Commission's perception of the need for explaining the work accomplished at that session and justifying the draft articles contained therein to the General Assembly and Member States;[266] (ii) as regards information provided by Governments and international organizations, the volume of relevant information submitted by them since it is an absolute need for the Commission to have at its disposal, *in extenso* and in its working languages, the replies of Governments and international organizations to its requests for information;[267] (iii) as regards the reports and working papers of the Special Rapporteurs, the scope and complexity of the topic in question, the stage of the Commission's work on the topic, the nature and number of proposals made by the Special Rapporteur, in particular draft articles with supporting data derived from, *inter alia*, State practice and doctrine, including analysis of relevant debates held in the General Assembly as well as comments and observations submitted by Governments;[268] and (iv) as regards research studies by the Secretariat, the nature of studies which usually reflect "treaties, judicial decisions and doctrine" as well as "the practice of States," indispensable for the Commission's study of the various topics on its programme and formulation of commentaries on the drafts it proposes to the General Assembly, according to article 20 of its Statute.[269] The Commission has repeatedly concluded that the application of regulations for the control and limitation of documentation to its own documentation would render the documents in question unfit for the purpose for which they are intended. "In the matter of legal research—and codification of international law demands legal research—limitations on the length of documents cannot be imposed."[270] This conclusion has been endorsed by the General Assembly on a number of occasions.[271]

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and 192; *ibid.*, *1982*, vol. II (Part Two), para. 271; and *ibid., 2003, vol. II (Part Two)*, paras. 440–443.

[266] See *ibid.*, *1977*, vol. II (Part Two), paras. 125 and 126.

[267] The Commission indicated its understanding that regulations on the preparation of documents on the basis of Governments' replies to a questionnaire or of submissions of the agencies and programmes of the United Nations do not affect the obligation of the Secretary-General under the Statute to publish *in extenso*, and in the languages of the Commission, all such replies whenever the work of the Commission and its procedures and methods so require. See *ibid.*, *1980*, vol. II (Part Two), para. 191.

[268] See *ibid., 1982*, vol. II (Part Two), para. 271.

[269] See *ibid., 1980*, vol. II (Part Two), para. 192.

[270] See *ibid., 1977*, vol. II (Part Two), para. 123; and *ibid.*, *1980*, vol. II (Part Two), para. 192.

[271] See General Assembly resolutions 32/151 of 19 December 1977, 34/141 of 17 December 1979, 35/163 of 15 December 1980, 36/114 of 10 December 1981, 37/111 of

At its fifty-fifth session, in 2003, the Commission recalled the particular characteristics of its work that make it inappropriate for page limits to be applied to its documentation.[272] In particular, the Commission noted that it was established to assist the General Assembly in the discharge of its obligation under Article 13, paragraph 1 (*a*), of the Charter of the United Nations. That obligation stemmed from the recognition by those involved in drafting the Charter that, if international legal rules were to be arrived at by agreement, then in many areas of international law a necessary part of the process of arriving at agreement would involve an analysis and precise statement of State practice. Accordingly, the Commission is required by its Statute to justify its proposals to the General Assembly, and ultimately to States, on the basis of evidence of existing law and the requirements of progressive development in the light of the current needs of the international community. Thus, the draft articles or other recommendations contained in the reports of the Special Rapporteurs or the Commission's report must be supported by extensive references to State practice, doctrine and precedents and be accompanied by extensive commentaries in accordance with article 20 of the Statute. The Commission noted that its documentation is also indispensable for the following reasons: (1) it constitutes a critical component in the process of consulting States and obtaining their views; (2) it assists individual States in understanding and interpreting the rules embodied in codification conventions; (3) it is part of the *travaux préparatoires* of such conventions and is frequently referred to or quoted in the diplomatic correspondence of States, in argument before the International Court of Justice and by the Court itself in its judgments; (4) it contributes to the dissemination of information about international law in accordance with the relevant United Nations programme; and (5) it forms as important a product of the Commission's work as the draft articles themselves and enables the Commission to fulfil, in accordance with its Statute, the tasks entrusted to the Commission by the General Assembly.[273]

The Commission therefore confirmed its previous conclusion that it would be entirely inappropriate to attempt in advance and *in abstracto* to fix the maximum length of its documentation.[274] At the same time,

16 December 1982, 38/138 of 19 December 1983 and all subsequent resolutions on the annual report of the Commission to the General Assembly.

[272] The Commission referred to the following documentation: its annual reports, the reports of Special Rapporteurs as well as various related research projects, studies and other working documents.

[273] See *Yearbook of the International Law Commission, 2003, vol. II (Part Two),* paras. 440–442.

[274] See *ibid.,* para. 443; *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 263 (reiterating "the importance of providing and

the Commission again stressed that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of United Nations documentation and will continue to bear such considerations in mind.[275]

(i) Duration of the session

The Statute of the Commission does not specify the duration of its sessions. Until 1973, the Commission's sessions normally lasted ten weeks. In 1973, the General Assembly approved a twelve-week period for the Commission's twenty-sixth session, in 1974.[276] The General Assembly subsequently approved, "in the light of the importance of its existing work programme, a twelve-week period for the annual sessions of the International Law Commission, subject to review by the General Assembly whenever necessary."[277]

Since 1974, the Commission's sessions have normally lasted twelve weeks.[278] By subsequent resolutions, most recently resolution 50/45 of 11 December 1995, the Assembly expressed the view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on the agenda of the Commission made it desirable that the usual duration of its sessions be maintained.

At its forty-eighth session, in 1996, the Commission considered the duration of its sessions in connection with the examination of its work procedures requested by the General Assembly in resolution 50/45. The

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making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function of progressive development and codification of international law. While [the Commission was] aware of the advantages of being as concise as possible, it strongly believe[d] that an *a priori* limitation [could not] be placed on the length of its documentation and research projects, in particular reports of Special Rapporteurs"); *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 359; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 232; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 399; and *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 402.

[275] See *Yearbook of the International Law Commission, 1982*, vol. II (Part Two), para. 271, subsequently confirmed in *ibid., 2003,* vol. II (Part Two), para. 443.

[276] General Assembly resolution 3071 (XXVIII) of 30 November 1973.

[277] General Assembly resolution 3315 (XXIX) of 14 December 1974.

[278] The thirty-eighth session, in 1986, was reduced to ten weeks for budgetary reasons. In response to the view expressed by the Commission, the twelve-week session was restored the following year. See *Yearbook of the International Law Commission, 1986*, vol. II (Part Two), para. 252 and General Assembly resolution 41/81 of 3 December 1986. The fifty-seventh session, in 2005, was reduced to eleven weeks as a cost-saving measure. See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 497.

Commission expressed the view that, in principle, it should be able to determine on a year-to-year basis the necessary length of the following session (i.e., twelve weeks or less), having regard to the state of work and any priorities laid down by the General Assembly for the completion of particular topics. The Commission favoured reverting to the previous practice of holding ten-week sessions, with the possibility of extending this to twelve weeks in particular years, as required, and especially in the last year in a quinquennium.[279] Since 1996, the Commission's forty-ninth, fifty-fourth to fifty-seventh, fifty-ninth to sixty-second[280] sessions, held in 1997, 2002 to 2005 and 2007 to 2010, respectively, consisted of ten weeks; its fiftieth session, held in 1998, consisted of eleven weeks, and its fifty-first to fifty-third, fifty-eighth and sixty-third sessions, held in 1999 to 2001, 2006 and 2011, respectively, consisted of twelve weeks.

(j) Split sessions

There is no statutory provision concerning dividing the Commission's annual session into two parts. The Commission has traditionally held a single annual session, with the exception of the seventeenth session which was held in Geneva and Monaco in 1965 and 1966.

At its forty-fourth session, in 1992, the Commission considered the possibility of dividing its annual session into two parts in the context of the review of its programme, procedures and methods of work. The Commission considered the advantages in terms of the effectiveness of its work as well as the disadvantages in terms of administrative and financial problems. The Commission concluded that the suggestion to divide its annual session into two parts had not received enough support at that time and therefore improvements in the effectiveness of its work should continue to be sought under the current arrangements, for the time being.[281]

At its forty-eighth session, in 1996, the Commission returned to the question of holding a split session in connection with the organization and length of its sessions. Those in favour of a single session argued that a continuous session was necessary to assure the best results on priority topics, including careful consideration of proposed draft articles, while

[279] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 148 *(m)* and 224–226; and *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 389.

[280] In 2005, the Commission decided to reduce the length of its fifty-seventh session by one week as a cost-saving measure. See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 497.

[281] See *Yearbook of the International Law Commission, 1992*, vol. II (Part Two), para. 376.

maintaining progress and direction on other topics. Those in favour of a split session argued that it would facilitate reflection and study by members, improve productivity as a result of inter-sessional preparation for the second part, encourage informal inter-sessional work, give Special Rapporteurs time to reconsider proposals, allow concentrated work by the Drafting Committee or a working group at the end of the first part or the beginning of the second part of the session, and facilitate better and more continuous attendance of members. Noting that a split session might not be significantly more expensive than a continuous session, the Commission decided to recommend that a split session be held as an experiment in 1998 in order to assess the advantages and disadvantages in practice.[282]

The fiftieth session of the Commission, in 1998, was divided into two parts, with the first part of the session being held in Geneva and the second in New York. The Commission agreed to continue the practice of split sessions as of 2000, scheduling the sessions to take place in two evenly split parts, with a reasonable period in between.[283]

At its fifty-first session, in 1999, the Commission examined the advantages and disadvantages of holding split sessions in response to General Assembly resolution 53/102 of 8 December 1998. The Commission concluded that a split session was more efficient and effective and facilitated the uninterrupted attendance of its members based on its experience in 1998. The Commission further concluded that there were no disadvantages to a split session and that any resulting cost increase should be more than offset by increased productivity and cost-saving measures. In particular, the Commission suggested adjusting the organization of work during sessions so that one or two weeks at the end of the first part of the session and/or the beginning of the second part of the session could be devoted exclusively to the meetings which require the attendance of a limited number of the Commission's members.[284] This measure was put into effect at the fifty-third session of the Commission, in 2001, pursuant to General Assembly resolutions 54/111 of 9 December 1999 and 55/152 of 12 December 2000.[285]

At its sixty-third session, in 2011, the Commission stressed the importance of retaining split sessions for the efficiency and effectiveness of its work and recalled its decision of 1999 on the matter. It further emphasized its view that only a split session allowed sufficient time for the preparation of the commentaries on the texts adopted during the

[282] See *ibid., 1996*, vol. II (Part Two), paras. 148 (n) and 227–232.

[283] See *ibid., 1998*, vol. II (Part Two), para. 562.

[284] See *ibid., 1999,* vol. II (Part Two), paras. 633–639.

[285] See *ibid., 2001,* vol. II (Part Two), para. 260.

first part of the session, which was necessary for the Commission to fulfil its mandate effectively. In addition, given that several members of the Commission might not be able to attend the entire ten- or twelve-week duration of an undivided session, the efficacy of the Commission would be hampered if the undivided session were to be reintroduced.[286]

The Commission reached these conclusions on the understanding that it would maintain a flexible need-based approach to the nature and duration of its sessions.[287] The Commission's fifty-second to sixty-third sessions, from 2000 to 2011, were each held in two parts.

(k) Location

The Commission has held all of its sessions in Geneva, except for its first session, which was held in New York (at Lake Success) in 1949; its sixth session, which was held at the headquarters of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris in 1954; the second part of its seventeenth session, which was held in Monaco in January 1966; and the second part of its fiftieth session, which was held at United Nations Headquarters, in New York, in 1998.

Article 12 of the Statute initially provided that the Commission would meet at the Headquarters of the United Nations, in New York, while recognizing the right of the Commission to hold meetings at other places after consultation with the Secretary-General. However, the Commission decided, after consulting with the Secretary-General, to hold its second to seventh sessions, from 1950 to 1955, in Geneva.[288] The Commission preferred Geneva to New York because its atmosphere and law library were more favourable for the studies of a body of legal experts and because its location simplified arrangements for its sessions by the Secretariat.[289] In 1955, the General Assembly, acting on the recommendation of the Commission,[290] amended article 12 of the Statute

[286] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), paras. 389-391.

[287] See *Yearbook of the International Law Commission, 1999,* vol. II (Part Two), paras. 635 and 638.

[288] See *ibid., 1949,* Report to the General Assembly, para. 40; *ibid.*, *1950,* vol. II, document A/1316, para. 22; *ibid.*, *1951,* vol. II, document A/1858, para. 91; *ibid.*, *1952,* vol. II, document A/2163, para. 55; *ibid.*, *1953,* vol. II, document A/2456, para. 173; *ibid.*, *1954,* vol. II, document A/2693, para. 79; and *ibid.*, *1955,* vol. II, document A/2934, para. 29. The Commission initially decided to hold its sixth session in Geneva. However, this session was held in Paris. See *ibid., 1954,* vol. II, document A/2693, para. 1.

[289] See *ibid., 1953,* vol. II, document A/2456, para. 173; and *ibid.*, *1955,* vol. II, document A/2934, para. 26.

[290] See *ibid., 1955,* vol. II, document A/2934, para. 25.

to provide for the Commission to meet at the European Office of the United Nations at Geneva.[291]

In introducing the practice of split sessions, the Commission has considered holding the second part of its split sessions in New York, towards the middle of a quinquennium, in order to enhance the relationship between the Commission and the General Assembly and its Sixth Committee.[292]

(1) The International Law Seminar

Since 1965, the International Law Seminar has been held in conjunction with the Commission's sessions, and many hundreds of young professionals have been introduced to the United Nations and to the work of the Commission through the seminar. During the seminar, the participants observe plenary meetings of the Commission, attend specially arranged lectures, and participate in small-group discussions on specific topics.

7. Relationship with Governments

Governments play an important role in every stage of the Commission's work on the progressive development of international law and its codification. Individually, they may refer a proposal or draft convention to the Commission for consideration, furnish information at the outset of the Commission's work and comment upon its drafts as the work proceeds. Collectively, they decide sometimes upon the initiation or priority of the work and always upon its outcome.

(a) Direct relationship with Governments

The Statute provides for the consideration by the Commission of proposals and draft multilateral conventions submitted directly by Members of the United Nations (article 17, paragraph 1).[293] In practice, the Commission has never received such a proposal or draft directly from a Member State but rather indirectly from the General Assembly, usually following its consideration in the Sixth Committee.

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[291] General Assembly resolution 984 (X) of 3 December 1955.

[292] See *Yearbook of the International Law Commission, 2000,* vol. II (Part Two), para. 734; and *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 388.

[293] The procedure to be followed in such cases is set forth in article 17, paragraph 2, of the Statute.

The Statute of the Commission also contains provisions designed to give Governments an opportunity to make their views known at every stage of the Commission's work. At the outset of its work, the Commission is required: (*a*) to circulate a questionnaire to Governments, inviting them to supply data and information relevant to items included in its plan of work for progressive development (article 16 (*c*)); or (*b*) to address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied for codification (article 19, paragraph 2). The Commission is also required to invite or request Governments to submit comments on the Commission's document containing the initial draft as well as appropriate explanations, supporting material and information supplied by Governments (article 16 (*g*) to (*h*) and article 21). Finally, the Commission is required to take into consideration such comments in preparing the final draft and explanatory report (articles 16 (*i*) and 22).

The Commission has noted the fundamental and basic role that materials, comments and observations submitted by Governments play in the codification methods of the Commission. The interaction between the Commission, a permanent body of legal experts serving in their personal capacity, and Governments, through a variety of means including the submission of materials and written comments and observations, is at the core of the system created by the General Assembly for the promotion, with the assistance of the Commission, of the progressive development of international law and its codification.[294]

The Commission has indicated its concern that, in practice, the data and comments submitted by Governments in relation to particular topics have in some cases tended to be limited in quantity.[295] The Commission has attempted to make the questionnaires sent to Governments more "user-friendly" by indicating clearly what is requested and why.[296] In 1958, the Commission stated in its report that it "felt little doubt that its work tended to suffer because of defects in the process of obtaining and dealing with the comments of Governments," and accordingly it decided to give Governments more time to prepare their

[294] See *Yearbook of the International Law Commission, 1980,* vol. II (Part Two), para. 191. The Commission has emphasized the importance of the written comments submitted by Governments in response to the Commission's requests on particular topics as an indispensable part of the dialogue between the Commission and Governments. See *ibid., 1999,* vol. II (Part Two), para. 616.

[295] See *ibid., 1996,* vol. II (Part Two), para. 180; and *ibid., 1999,* vol. II (Part Two), para. 617.

[296] See *ibid., 1996,* vol. II (Part Two), para. 148 *(d).*

comments.[297] The General Assembly has repeatedly noted that consulting with national organizations and individual experts concerned with international law may assist Governments in considering whether to make comments and observations on drafts submitted by the Commission and formulating their comments and observations.[298] The written comments have been supplemented by the comments made during the annual debates in the Sixth Committee on the Commission's reports to the General Assembly.[299]

After the Commission has submitted its final draft to the General Assembly on a topic, the Assembly normally requests comments of Governments on that draft. Such comments are considered by the General Assembly's Sixth Committee in connection with further consideration of the topic before the convening of the diplomatic conference or in connection with the elaboration of the convention by the General Assembly itself (e.g., special missions, prevention and punishment of crimes against diplomatic agents and other internationally protected persons, and the law of the non-navigational uses of international watercourses), or by the diplomatic conference called upon to draw up the convention on the topic concerned. Occasionally, Governments have also been invited to submit amendments to the Commission's draft articles before the opening of the diplomatic conference (e.g., consular intercourse and immunities, and law of treaties). Those amendments are subsequently referred to the conference.

(b) Relationship with the General Assembly

The General Assembly, usually on the recommendation of its Sixth Committee, has requested the Commission to study or to continue to study a number of topics, or to give priority to certain topics from among those already selected by the Commission itself; has rejected, or deferred action in respect of, certain drafts and recommendations of the Commission; has referred a draft back to the Commission for reconsideration and redrafting; has invited the Commission to present comments regarding outstanding substantive issues related to the draft articles; has decided to convoke diplomatic conferences to study and adopt draft conventions prepared by the Commission; and has decided

[297] See *ibid., 1958,* vol. II, document A/3859, paras. 60 and 61.

[298] See, for instance, General Assembly resolution 52/156 of 15 December 1997 and subsequent resolutions on the report of the International Law Commission.

[299] Until 1979, the relevant reports of the Sixth Committee to the General Assembly contained a summary of the main trends of the discussion in that Committee of the reports of the International Law Commission. For practical reasons, the summary has, since 1980, been issued as part of the Commission's documentation and entitled "topical summaries."

to consider and adopt draft conventions prepared by the Commission (*see pages 50-51*).[300] These collective decisions have sometimes been preceded by, or have given rise to, discussions on the appropriate role of the Assembly and its Sixth Committee in relation to the work of the Commission. These debates and a number of resolutions resulting from them have gradually formed a general pattern of working relationships between the two bodies.

Although the Statute of the Commission is silent on the matter, the Commission from its first session has submitted to the General Assembly a report on the work done at each of its sessions. The well-established practice of annually considering the Commission's reports in the Sixth Committee has facilitated the development of the existing relationship between the General Assembly and the Commission. The Chairman of the Commission introduces its report in the Sixth Committee and attends the meetings during which the report is considered. The Com-

[300] The General Assembly has usually taken the action recommended by the Commission with respect to its final products on the various topics and special assignments with the exception of the draft articles on arbitral procedure (submitted by the Commission in 1953), most-favoured-nation clauses and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In some cases, the General Assembly undertook further work on the text adopted by the Commission before taking the recommended action. For example, while the Commission, on transmitting the draft articles on jurisdictional immunities of States to the General Assembly, recommended the convening of a diplomatic conference to adopt the treaty, the Assembly established a Working Group of the Sixth Committee to consider several issues arising out of the draft articles. It was only following the resolution of those matters that a convention was adopted—by the Assembly itself (*see Part III.A, section 22*). The same recommendation was made by the Commission on transmitting the draft statute for an international criminal court. However, the General Assembly first established an Ad Hoc Committee, followed by a Preparatory Committee whose revised version of the draft statute was the text considered by the Rome Conference, in 1998 (*see Part III.A, section 7(c)*). The Commission has recognized that whether a particular set of draft articles is acceptable or appropriate for adoption at a given time is essentially a matter of policy for States. See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 182. At the time of writing, a final decision by the General Assembly on the outcome of the following draft articles was still pending: the draft articles on responsibility of States for internationally wrongful acts (adopted by the Commission at its fifty-third session, in 2001), the draft articles on prevention of transboundary harm from hazardous activities (adopted by the Commission at its fifty-third session, in 2001), the draft articles on diplomatic protection (adopted by the Commission at its fifty-eighth session, in 2006); the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (adopted by the Commission at its fifty-eighth session, in 2006); the draft articles on the law of transboundary aquifers (adopted by the Commission at its sixtieth session, in 2008); the draft articles on the responsibility of international organizations (adopted by the Commission at its sixty-third session, in 2011); the draft articles on the effects of armed conflicts on treaties (adopted by the Commission at its sixty-third session, in 2011); and the Guide to Practice on Reservations to Treaties (adopted by the Commission at its sixty-third session, in 2011).

mission also designates a Special Rapporteur to attend the Sixth Committee under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989. The Chairman and the Special Rapporteur may make observations during the meetings in response to the comments of delegations and may also meet informally with delegations. Every year several members of the Commission are also designated by their States to serve on the Sixth Committee as representatives. A number of individuals who have been elected to membership in the Commission have at some time represented their States in the Sixth Committee.[301]

The Commission has made changes with respect to the preparation and content of its report to facilitate a more structured and focused debate in the Sixth Committee. In 1992, the Commission adopted guidelines on the preparation and content of its report which provide, *inter alia*, as follows: (*a*) efforts should continue to avoid excessively long reports; (*b*) the report should include a chapter providing, in a summary form, a general view of the work of the session to which the report refers, including a list of questions on which the Commission would find the views of the Sixth Committee particularly helpful; (*c*) parts of the report indicating previous work on each topic should continue to be as brief as possible; (*d*) the summary of debates should be more compact, giving emphasis to trends of opinions rather than to individual views unless such an individual view was a reservation to a decision taken by the Commission; and (*e*) the presentation of fragmentary results that cannot be properly assessed by the Sixth Committee without additional elements should be a summary, with the indication that the matter will be more fully presented in a future report.[302] The Commission has requested the Secretariat to circulate the

[301] This practice has not met with approval by all. See, for example, the criticism expressed by the representative of the United Kingdom during the debate on the Commission's report in the Sixth Committee, at the fifty-fourth session of the General Assembly, in 1999. Document A/C.6/54/SR.24, para.35 ("Confusing the roles of Commission member and [G]overnment representative had not ensured independence or objectivity . . .").

[302] See *Yearbook of the International Law Commission, 1992,* vol. II (Part Two), para. 373. The Commission has extended its practice of highlighting the issues on which comment is specifically sought in a special chapter of its annual report to the General Assembly devoted to specific issues on which comments would be of particular interest to the Commission. See *ibid., 1999,* vol. II (Part Two), para. 614. This practice has been endorsed by the General Assembly which has requested the Commission to continue to pay special attention to indicating in its annual report for each topic, those specific issues, if any, on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its future work. See, for instance, General Assembly resolution 44/35 of 4 December 1989 and subsequent resolutions on the report of the International Law Commission.

chapters of the report containing a summary of the Commission's work and the specific issues on which views from Governments would be particularly useful (Chapters II and III, respectively) as well as the text of draft articles adopted at each session shortly after the end of the session before the report is issued.[303]

The Sixth Committee has also attempted to improve its own method of consideration of the Commission's report in order to provide effective guidance for the Commission regarding its work, for example, by: (*a*) indicating the dates when the Commission's annual report will be considered in the Sixth Committee at the next session of the General Assembly;[304] (*b*) providing for the consideration of the report in late October to give delegates time to examine carefully and prepare statements on the report which is issued in September;[305] (*c*) inviting the Commission, when circumstances so warrant, to request a Special Rapporteur to attend the session of the General Assembly during the discussion of the respective topic;[306] (*d*) encouraging the holding of informal discussions between the members of the Sixth Committee and those members of the Commission attending the session of the General Assembly;[307] and (*e*) structuring the debates on the report in such a manner that conditions are provided

[303] See *ibid*., *1977,* vol. II (Part Two), para. 130 and *ibid*., *2003*, vol. II (Part Two), para. 445. The relevant chapters are also posted on the Commission's website shortly after the end of the session. In 1996, the Commission recommended that the issues on which comment is specifically sought from the Sixth Committee should be identified, if possible, before the adoption of draft articles on the point and these issues should be of a more general, "strategic" character rather than issues of drafting technique. See *ibid., 1996,* vol. II (Part Two), paras. 148 *(c)* and 181. In 2003, the Commission further noted that Special Rapporteurs may wish to provide sufficient background and substantive elaboration to better assist Governments in developing their responses. See *ibid*., *2003*, vol. II (Part Two), para. 446.

[304] This information is included in the resolution adopted by the General Assembly on the agenda item relating to the Commission's annual report.

[305] In 2003, following an initiative by Sweden and Austria, the General Assembly designated the first week in which the report of the Commission is discussed in the Sixth Committee to be known as "International Law Week," and encouraged Member States to consider being represented at the level of legal adviser during that week. See General Assembly resolution 58/77 of 9 December 2003 and subsequent resolutions.

[306] General Assembly resolution 44/35 of 4 December 1989.

[307] General Assembly resolution 55/152 of 12 December 2000 and subsequent resolutions. Each year since 2004, informal consultations have been held, at the annual meeting of the Sixth Committee, between the members of the Committee and those Special Rapporteurs of the Commission in attendance, to discuss issues arising out of the work of the Commission. The General Assembly has welcomed this so-called "enhanced dialogue" between the two bodies and called for its continuation. See General Assembly resolution 59/41 of 2 December 2004, and subsequent resolutions. A special event, held in Geneva in May 2008 to commemorate the sixtieth anniversary of the Commission, included several meetings, involving legal advisers of member States and other international law experts, focusing on the Commission's cooperation with member States. See

for concentrated attention to each of the main topics dealt with in the report.[308] The Sixth Committee has also made suggestions regarding the length and content of the Commission's reports to the General Assembly, including shortening the report and focusing on points requiring comments by Governments.[309] The General Assembly recommended the continuation of efforts to improve the ways in which the report of the Commission is considered in the Sixth Committee, with a view to providing effective guidance for the Commission in its work.[310]

The Sixth Committee, following its consideration of the Commission's report,[311] submits a report to the General Assembly which contains a summary of its consideration of the agenda item, including the relevant documentation, as well as one or more draft resolutions recommended for adoption by the General Assembly. The General Assembly considers and adopts a resolution on the report of the Commission, usually as recommended by the Sixth Committee without change, indicating any recommendations or instructions that it may have with respect to the Commission's work, both substantive and procedural. The General Assembly may also adopt a separate resolution or decision, again based on the recommendation of the Sixth Committee, with respect to a particular topic relating to the Commission's work when appropriate.[312]

Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10), paras. 336-340.

[308] Some of the changes have been instituted by the Sixth Committee based on the suggestions made by the Commission. See, for instance, *Yearbook of the International Law Commission, 1977,* vol. II (Part Two), paras. 127–129; *ibid.*, *1988,* vol. II (Part Two), paras. 581 and 582; and *ibid.*, *1989,* vol. II (Part Two), para. 742.

[309] This was one of the recommendations made by the Ad Hoc Working Group of the Sixth Committee established at the forty-third session of the General Assembly, in 1988, to deal with the question of improving the ways in which the report of the Commission was considered in the Committee, with a view to providing effective guidance for the Commission in its work. The Working Group's conclusions were summarized in the oral report of its Chairman to the Sixth Committee (see document A/C.6/43/SR.40, paras. 10–18). The relevant paragraphs of the summary record of the 40th meeting of the Sixth Committee are reproduced in the topical summary of the forty-third session of the General Assembly (see document A/CN.4/L.431, annex 2).

[310] Resolutions 43/169, 44/35, 45/41, 46/54, 47/33, 48/31 and 49/51.

[311] The report of the Sixth Committee on the agenda item relating to the report of the International Law Commission, which indicates the relevant documentation, is published in the *Official Records of the General Assembly* for each session. Relevant information may also be found on the website of the Sixth Committee. See www.un.org/en/ga/sixth/.

[312] In some situations, a topic relating to the work of the Commission may be considered by the General Assembly as a separate agenda item and be the subject of a separate resolution or decision. For example, a topic on which the Commission has already submitted a final report to the General Assembly would not be covered in its subsequent annual reports to the General Assembly. Therefore, the consideration of this topic by the General Assembly would be provided for under a separate agenda item until the

The Sixth Committee has indicated broad policy guidelines when assigning topics to the Commission or when giving priority to some topics, and has exercised its judgement as to action in regard to the Commission's final drafts and recommendations. This policy supervision by the Sixth Committee, however, has tended to be exercised with great restraint. The fact that the Commission is a subsidiary organ of the General Assembly has not prevented wide acceptance in the Sixth Committee of the view that the Commission should have a substantial degree of autonomy and that it should not be subject to detailed directives from the Assembly.[313] At the same time, the Commission, at each of its sessions, takes fully into consideration the recommendations addressed to it by the General Assembly and the observations made in the Sixth Committee in connection with the Commission's work in general or its specific drafts.

The Sixth Committee, while carefully examining the Commission's reports, has never given precise instructions regarding changes in the form or contents of the Commission's provisional drafts and has usually refrained from modifying the final drafts submitted by the Commission before reaching the final stage of the codification process, normally the adoption of the corresponding codification convention. The eventual modification of a Commission's final draft has been left to the body entrusted with the elaboration of the convention. On four occasions, with regard to the topics "Special missions," "Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law", "The law of the non-navigational uses of international watercourses" and "Jurisdictional immunities of States and their property", the Sixth Committee itself undertook the task of elaborating the conventions with a view to their adoption by the General Assembly. In the process of elaborating the conventions, the Sixth Committee acted *mutatis mutandis* as a codification conference, studying in detail each of the provisions of the draft articles prepared by the International Law Commission and amending some of them.[314]

Assembly has concluded its consideration of the topic. In 2006, the General Assembly decided to include in the provisional agenda of its sixty-second session (2007) a single agenda item entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm," to consider two separate sets of draft articles developed by the Commission (the first on "prevention," adopted in 2001, and the second on "liability" adopted in 2006). See General Assembly resolution 61/36 of 4 December 2006.

[313] See *Yearbook of the International Law Commission, 1979,* vol. II (Part One), document A/CN.4/325, para. 18.

[314] In a further instance, concerning the topic "Jurisdictional immunities of States and their property," the Sixth Committee was involved in the task of elaborating a draft convention, initially through two Working Groups which were established to resolve several outstanding matters arising out of the Commission's draft articles

The General Assembly subsequently adopted the Convention on Special Missions and the Optional Protocol concerning the Compulsory Settlement of Disputes relating thereto, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the Convention on the Law of Non-navigational Uses of International Watercourses, as well as the United Nations Convention on Jurisdictional Immunities of States and Their Property, as elaborated by the Sixth Committee (*see volume II, annex V, sections 5, 7, 12, and 13, respectively*).

The General Assembly frequently invites the Commission's Special Rapporteur on a topic to attend as an expert consultant the proceedings of the body entrusted with the task of elaborating the corresponding codification convention.[315] The international conferences which have finalized the Commission's draft articles and adopted them as conventions have always paid tribute to the Commission for its efforts in the codification and progressive development of international law.

Through its resolutions, the General Assembly has also contributed to establishing and improving the dialogue between the Commission and Governments. The Secretary-General forwards to the Commission and makes available to its members, as appropriate, the relevant resolutions of the General Assembly, as well as the reports and the summary records of the meetings of the Sixth Committee relating to the Commission's work. In addition, the Secretariat produces the topical summary of the Sixth Committee's consideration of the report of the Commission as part of the Commission's documentation for each session.

8. Relationship with other bodies

Several articles of the Statute envisage the relationship which may be established between the Commission and various other bodies, both

(*see Part III.A., section 22*). Subsequently, an Ad Hoc Committee was established by the General Assembly to finalize the text of the draft convention, the text of which was considered and submitted by the Sixth Committee to the General Assembly for adoption as the United Nations Convention on Jurisdictional Immunities of States and their property.

[315] See *Yearbook of the International Law Commission, 1979*, vol. II (Part One), document A/CN.4/325, para. 93 and 98 (*d*). Commission members have, on occasion, also been active in the Sixth Committee's consideration of the Commission's work, albeit in their capacity as Government representatives. For example, the informal consultations on the draft articles on jurisdictional immunities of States and their property, held in the context of the Sixth Committee, as well as the first working group established by the Committee, were chaired by a sitting member of the Commission. The second working group, established by the Committee in 1999, and the Ad Hoc Committee established by the General Assembly in 2000 to finalize the draft convention, were also chaired by a member of the Commission.

official and unofficial. The Commission may consider proposals or draft conventions submitted by principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification (article 17, paragraph 1).[316] In addition, the Commission may consult with: (*a*) any organ of the United Nations on any subject which is within the competence of that organ (article 25, paragraph 1); (*b*) any international or national organizations, official or non-official (article 26, paragraph 1);[317] as well as (*c*) scientific institutions and individual experts (article 16 *(e)*).[318] Furthermore, Commission documents on subjects within the competence of organs of the United Nations are circulated to those organs which may furnish information or make suggestions (article 25, paragraph 2). The Statute also provides for the distribution of the Commission's documents to national and international organizations concerned with international law (article 26, paragraph 2).

The Commission has received proposals from official bodies other than the General Assembly on only two occasions during the early years of its work. At its second and third sessions, in 1950 and 1951, the Commission was notified of resolutions adopted by the Economic and Social Council of the United Nations (resolutions 304 D (XI) of 17 July 1950 and 319 B III (XI) of 11 August 1950), in which the Council requested the Commission to deal with two subjects: the nationality of married women and the elimination of statelessness. The Commission dealt with these subjects in connection with the comprehensive topic of "Nationality, including statelessness," which had already been selected for codification by the Commission in 1949.

The Commission has recommended that the General Assembly—and through it other bodies within the United Nations system—be encouraged to submit to the Commission possible topics involving codification and progressive development of international law. The Commission has further recommended that it should seek to develop links with other United Nations specialized bodies with law-making responsibili-

[316] The article further provides for the procedure that the Commission should follow if it deems it appropriate to proceed with the study of such proposals or drafts, including circulating a questionnaire to the bodies concerned and, if desirable, making an interim report to the organ which has submitted the proposal or draft.

[317] The advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law is specifically recognized in article 26, paragraph 4, of the Statute of the Commission.

[318] See *Yearbook of the International Law Commission, 1999,* vol. II (Part Two), paras. 620–627.

ties in their field and, in particular, explore the possibility of exchange of information or even joint work on selected topics.[319]

On occasion, the Commission, or its Special Rapporteur, has had informal contacts with or received information from various entities, in relation to particular topics, including: the Food and Agriculture Organization on the law of the sea[320] and shared natural resources;[321] the United Nations High Commissioner for Refugees on nationality including statelessness[322] and nationality in relation to the succession of States;[323] the International Committee of the Red Cross, in particular, on the draft code of crimes against the peace and security of mankind;[324] the International Association of Hydrogeologists, the Economic Commission for Europe, the United Nations Educational, Scientific and Cultural Organization and the Food and Agriculture Organization on shared natural resources;[325] a group of experts on the law of the sea;[326] the members of various United Nations Human Rights bodies on reservations to treaties;[327] and the International Law Association on diplomatic protection, responsibility of international organizations and water resources.[328]

In some instances, the Commission has invited organizations concerned to submit relevant data and materials that could assist the Commission in determining its future work on a topic as well as comments and observations on the work in progress,[329] including: relations between States and international organizations, the question of treaties

[319] See *ibid., 1996,* vol. II (Part Two), paras. 148 *(b)* and *(r)*, 165, 177–178 and 240.

[320] See *ibid., 1996,* vol. II (Part Two), para. 238 *(d)*.

[321] See *ibid., 2003,* vol. II (Part Two), paras. 373 and 453.

[322] See *ibid., 1952,* vol. I, Summary Record of the 155th meeting, para. 16.

[323] See *ibid., 1999,* vol. II (Part Two), para. 621.

[324] See *ibid., 1999,* vol. II (Part Two), para. 622.

[325] See *ibid., 2003,* vol. II (Part Two), paras. 373 and 453; and *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 80.

[326] See *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, para. 63.

[327] See *ibid.*, *2003,* vol. II (Part Two), para. 453; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 375; and *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 509; and *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 268.

[328] *Yearbook of the International Law Commission, 2003*, vol. II (Part Two), para. 454; and *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 376.

[329] The Commission has noted the fundamental and basic role that materials, comments and observations submitted by international organizations play in the codification methods of the Commission. See *Yearbook of the International Law Commission, 1980*, vol. II (Part Two), para. 191.

concluded between two or more international organizations, reservations to treaties[330] and responsibility of international organizations.[331]

The Commission is also involved in an ongoing process of consultations, exchange of views and mutual information with scientific institutions and professors of international law, which keeps the Commission abreast of new developments and trends in scholarly research on international law. For example, members of the Commission participated in the United Nations Colloquium on the Progressive Development and Codification of International Law[332] as well as the seminar on the work of the International Law Commission during its first fifty years, both of which were held to commemorate the fiftieth anniversary of the establishment of the Commission.[333]

Throughout the years, the Commission has maintained a close relationship with the International Court of Justice.[334] The Commission usually invites the President of the Court to give a presentation on the recent activities of and cases currently before the Court. The members of the Commission are given the opportunity to have an exchange views with the President.

The Commission has also established and maintained cooperative relationships with the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law, the Inter-American Juridical Committee, and other regional and inter-regional organizations. The Commission is informed by representatives of these Committees and Organizations of their recent activities and the members of the Commission have the opportunity to exchange views with them. For its part, the Commission is often represented by one of its members at the ses-

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[330] See *ibid., 1971*, vol. II (Part One), document A/8410/Rev.1, para. 15; *ibid.*, *1978*, vol. II (Part Two), paras. 148 and 150–153; and *ibid.*, *1995*, vol. II (Part Two), para. 489.

[331] See *ibid.*, *2003*, vol. II (Part Two), para. 52; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 66 (calling for further contributions from international organizations); *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 196; *ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), footnote 440; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), footnote 559; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), footnote 9; and *ibid.*, *Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), footnote 34 and para. 80.

[332] The proceedings of the Colloquium were published in "Making Better International Law: the International Law Commission at 50", 1998, United Nations Sales Publication, No. 98.V.5.

[333] The proceedings of the seminar were published in "The International Law Commission Fifty Years After: An Evaluation." See *Selected bibliography.* See also *Yearbook of the International Law Commission, 1999,* vol. II (Part Two), paras. 623–625.

[334] This close relationship is, in part, due to the fact that a significant number of Judges of the International Court of Justice were former members of the Commission.

sions and meetings of those bodies. The Commission has recommended that relations with other bodies, such as the regional legal bodies, should be further encouraged and developed.[335]

For a number of years, the Commission has also held consultations with the International Committee of the Red Cross on topics under consideration by the Commission as well as issues of international humanitarian law.[336]

The General Assembly has requested the Commission to continue the implementation of the relevant provisions of its Statute to further strengthen cooperation between the Commission and other bodies concerned with international law. [337]

9. The Secretariat

In accordance with article 14 of the Statute of the Commission, the Secretary-General of the United Nations provides the staff and facilities required by the Commission to fulfil its task. The Codification Division of the Office of Legal Affairs of the United Nations serves as the Secretariat for the Commission. The Commission has recognized the essential contribution of the Codification Division.[338] Members of the Codification Division assist the officers of the Commission by, *inter alia*, providing the agenda, keeping records and preparing drafts of reports to the Commission. They assist in the preparation of the commentary to draft articles, although the Commission remains of the view that this is the primary responsibility of the Special Rapporteur. In working groups,

[335] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 148 *(q)* and 239. In 2010, the Commission noted with interest the establishment of the African Union Commission on International Law (AUCIL) and welcomed the willingness of AUCIL to establish cooperation with the Commission. See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 404.

[336] See *Yearbook of the International Law Commission, 1999,* vol. II (Part Two), para. 622, and subsequent reports of the Commission to the General Assembly.

[337] See resolution 53/102 of 8 December 1998 and subsequent resolutions.

[338] See, for example, the view expressed by the Chairman of the Commission in introducing the annual report in the Sixth Committee, in 2003, that "[t]he importance of the role of the Codification Division in the work of the Commission rested not only on the high quality of the members of the Division, their hard work and commitment to the Commission, but also on the fact that the members of the Division were involved in dealing both with the content and substance of work as well as with the procedural and technical aspects of servicing. That provided continuous and useful interaction and feedback between the Commission and its Secretariat. The fact that the Codification Division served also as the Secretariat of the Sixth Committee provided an invaluable and irreplaceable link between the two bodies. The Codification Division was thus in a position to be a source of information and unique expertise mutually beneficial for both bodies. That quality of servicing must be preserved." See Document A/C.6/58/SR.14, para. 6.

where there may be no Special Rapporteur, this assistance is invaluable. The Commission has recommended that members of the Codification Division should be encouraged to make an even greater contribution to the Commission's work.[339]

In addition to providing this substantive servicing to the Commission and its subsidiary bodies, the Codification Division undertakes considerable research to facilitate the work of the Commission.[340] At the preliminary stage of the consideration of a topic, the Codification Division may, at the Commission's request or on its own initiative, prepare substantive studies and carry out research projects to facilitate the commencement of work on the topic by the Commission and the Special Rapporteur concerned. Secretariat studies and research projects may also be requested by the Commission or the Special Rapporteur concerned at other stages in the consideration of a topic. At its thirty-second session, in 1980, the Commission noted that the studies and research projects prepared by the Codification Division are part and parcel of the consolidated method and techniques of work of the Commission and, as such, constitute an indispensable contribution to its work.[341]

The Codification Division has prepared a number of studies and surveys on general questions relating to progressive development and codification[342] as well as on particular topics on the programme of the Commission or aspect thereof.[343] Except for those prepared in 1948 and 1949, these studies and surveys are usually published in the *Yearbook of the International Law Commission,* or are issued as sales publications.

The Codification Division has also published, primarily for the assistance of the Commission, in the *United Nations Legislative Series,* collections of laws, decrees and treaty provisions on such subjects as: the regime of the high seas; the nationality of ships; the regime of the territorial sea; diplomatic and consular privileges and immunities; the legal status, privileges and immunities of international organizations; nationality; the conclusion of treaties; the utilization of international rivers for purposes other than navigation; succession of States; the law of the sea; jurisdictional immunities of States and their property;

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[339] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), para. 234.

[340] *Ibid.*

[341] See *ibid.*, *1980*, vol. II (Part Two), para. 192. See *Selected bibliography* for a list of substantive studies undertaken by the Secretariat.

[342] For example, the Codification Division assisted the Commission in the review of its long-term programme of work by preparing surveys on international law in 1949 and 1971, as discussed above.

[343] See *Yearbook of the International Law Commission*, *1979*, vol. II (Part One), document A/CN.4/325, para. 9.

and review of the multilateral treaty-making process. Texts of arbitral awards are also published by the Codification Division in the *Reports of International Arbitral Awards*.[344] The Codification Division also established, and maintains, a comprehensive website for the International Law Commission.[345]

The Commission has recognized the increased role of the Codification Division in providing assistance to the Commission and its Special Rapporteurs, especially in the area of research and studies. The Commission has recommended that the contribution of the Codification Division to the Commission's work be maintained and reinforced.[346] The General Assembly has endorsed the Commission's recommendation for the strengthening and increased role of the Codification Division since 1977 in resolutions concerning the report of the Commission.

[344] See *Selected bibliography*.

[345] See http://www.un.org/law/ilc.

[346] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 148 *(o)* and 233–234.

PART III

TOPICS AND SUB-TOPICS CONSIDERED BY THE INTERNATIONAL LAW COMMISSION

A. TOPICS AND SUB-TOPICS ON WHICH THE COMMISSION HAS SUBMITTED FINAL REPORTS

A brief account of the work on the topics and sub-topics on which the International Law Commission has submitted final reports to the General Assembly[347] is presented below.[348]

1. Draft Declaration on Rights and Duties of States

By resolution 178 (II) of 21 November 1947, the General Assembly instructed the International Law Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion the draft declaration on this subject presented by Panama[349] and certain other related documents.

At its first session, in 1949, the Commission examined article by article the Panamanian draft. It also had before it a memorandum by the Secretary-General, which reproduced *inter alia* comments and observations of Member States on the Panamanian draft and a detailed analysis of the United Nations discussions on the subject.[350]

At the same session, the Commission, after three readings, adopted a final draft Declaration on Rights and Duties of States in the form of

[347] In addition, at the request of the General Assembly, the Commission submitted its final report on the topic "Review of the Multilateral Treaty-Making Process" to the Secretary-General for inclusion in his report on the subject (*see footnote 165*).

[348] The Commission's work on a topic or sub-topic at its various sessions is reflected in the relevant chapter of its annual report on each session which is reproduced in the corresponding *Yearbook*. The relevant documentation that was before the Commission at a particular session is also indicated in the *Yearbook*.

[349] Document A/285.

[350] Document A/CN.4/2 and Add.1 (Preparatory Study concerning a draft Declaration on the Rights and Duties of States).

fourteen articles with commentaries,[351] the text of which is reproduced in volume II, annex VI, section 1. It decided to transmit the draft to the General Assembly with its conclusion that it was for the General Assembly to decide what further course of action should be taken in relation to the draft Declaration.[352] The Commission also observed that:

> "the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic rights and duties. The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming 'the supremacy of international law'".[353]

By resolution 375 (IV) of 6 December 1949, the General Assembly commended the draft Declaration to the continuing attention of Member States and of jurists of all nations and requested Member States to furnish their comments on the draft. It also invited the suggestions of Member States on: (1) "whether any further action should be taken by the General Assembly on the draft Declaration"; and (2) "if so, the exact nature of the document to be aimed at and the future procedure to be adopted in relation to it".

As the number of States which had given their comments and suggestions was considered too small to form the basis of any definite decision regarding the draft Declaration on Rights and Duties of States, the General Assembly, in resolution 596 (VI) of 7 December 1951, decided to postpone consideration of the matter "until a sufficient number of States have transmitted their comments and suggestions, and in any case to undertake consideration as soon as a majority of the Member States have transmitted such replies".

2. Ways and means for making the evidence of customary international law more readily available

In accordance with article 24 of its Statute, the Commission, at its first session, in 1949, began consideration of ways and means for making the evidence of customary international law more readily available. At

[351] See *Yearbook of the International Law Commission, 1949,* Report to the General Assembly, paras. 46–52.

[352] See *ibid*., para. 53.

[353] See *ibid*., para. 52.

its second session, in 1950, the Commission completed consideration of this topic and submitted a report to the General Assembly, containing specific ways and means suggested by the Commission.[354]

The Commission recommended that the widest possible distribution should be made of publications relating to international law issued by organs of the United Nations, particularly the *Reports* and other publications of the International Court of Justice, the United Nations *Treaty Series,* and the *Reports of International Arbitral Awards.* The Commission also recommended that the General Assembly authorize the Secretariat to prepare the following publications:

(*a*) a Juridical Yearbook, setting forth, *inter alia*, significant legislative developments in various countries, current arbitral awards by *ad hoc* international tribunals, and significant decisions of national courts relating to problems of international law;

(*b*) a Legislative Series containing the texts of current national legislation on matters of international interest, and particularly legislation implementing multilateral international agreements;

(*c*) a collection of the constitutions of all States, with supplementary volumes to be issued from time to time for keeping it up to date;

(*d*) a list of the publications issued by Governments of all States containing the texts of treaties concluded by them, supplemented by a list of the principal collections of treaty texts published under private auspices;

(*e*) a consolidated index of the League of Nations *Treaty Series*;

(*f*) occasional index volumes of the United Nations *Treaty Series*;

(*g*) a repertoire of the practice of the United Nations with regard to questions of international law;

(*h*) additional series of the *Reports of International Arbitral Awards*, of which a first series had already been published in three volumes.

In addition, the Commission recommended that the Registry of the International Court of Justice publish occasional digests of the Court *Reports;* that the General Assembly call to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law; and that the General Assembly give consideration to the desirability of an international convention concerning the general exchange of official publications relating to international law and relations.

[354] See *ibid., 1950*, vol. II, document A/1316, paras. 24–94.

Since these recommendations were made, the General Assembly has authorized the Secretary-General to issue most of the publications suggested by the Commission and certain other publications relevant to the Commission's recommendations.[355] The Governments of several Members are publishing or preparing digests of their materials relating to international law. Two conventions—the Convention concerning the Exchange of Official Publications and Government Documents between States and the Convention concerning the International Exchange of Publications—were adopted by the General Conference of UNESCO in 1958.[356]

3. Formulation of the Nürnberg principles

By General Assembly resolution 177 (II) of 21 November 1947, the Commission was directed to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

At its first session, in 1949, the Commission undertook a preliminary consideration of the subject. It had before it a memorandum submitted by the Secretary-General entitled "The Charter and the Judgement of the Nürnberg Tribunal: History and Analysis."[357] In the course of this consideration, the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and in the judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been unanimously affirmed by the General Assembly in resolution 95 (I) of 11 December 1946, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them.

At the same session, the Commission appointed a sub-committee, which submitted a working paper containing a formulation of the Nürnberg principles. The Commission considered the working paper and

[355] I.e., *United Nations Juridical Yearbook* (of which a provisional volume for 1962 and printed volumes for the following years have been issued); *United Nations Legislative Series* (25 volumes of which have been issued); *List of Treaty Collections* (published in 1955); *Cumulative Index* of the United Nations *Treaty Series* (of which No. 44, the latest one as of 31 December 2011, covers the *Treaty Series*, vols. 2351-2400); *Repertoire of the Practice of the Security Council* (originally published in 1954, with supplements issued subsequently); *Repertory of Practice of United Nations Organs* (originally published in 1955, with supplements issued later); and *Reports of International Arbitral Awards* (28 volumes of which have been issued). In addition, the Secretariat of the United Nations has issued *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice* (covering the periods 1948–1991, 1992–1996, 1997–2002 and 2003-2007).

[356] United Nations, *Treaty Series,* vol. 398, p. 9, and vol. 416, p. 51.

[357] Document A/CN.4/5.

retained tentatively a number of draft articles, which were referred to the sub-committee for redrafting. In considering what action should be taken with respect to the further draft submitted by the sub-committee, the Commission noted that the task of formulating the Nürnberg principles appeared to be closely connected with that of preparing a draft code of offences against the peace and security of mankind (*see section 7(a) below*). The Commission decided to defer a final formulation of the principles until the work of preparing the draft code was further advanced. It appointed Jean Spiropoulos as Special Rapporteur for both topics and referred to him the draft prepared by the sub-committee. The Special Rapporteur was requested to submit his report on the draft to the Commission at its second session.

At its second session, in 1950, on the basis of the report presented by the Special Rapporteur,[358] the Commission adopted a final formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and submitted it, with commentaries, to the General Assembly, without making any recommendation on further action thereon.[359] The text of the formulation, which consists of seven principles, is reproduced in volume II, annex VI, section 2.

By resolution 488 (V) of 12 December 1950, the General Assembly decided to send the formulation to the Governments of Member States for comments, and requested the Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which might later be received from Governments.[360]

4. Question of international criminal jurisdiction

The General Assembly, in resolution 260 B (III) of 9 December 1948, invited the Commission "to study the desirability and possibility of estab-

[358] See *Yearbook of the International Law Commission, 1950*, vol. II, document A/CN.4/22.

[359] See *ibid*., document A/1316, paras. 97–127.

[360] Observations of Member States on the Commission's formulation of the Nürnberg principles are contained in *ibid., 1951*, vol. II, document A/CN.4/45 and Add.1 and 2. In addition, the second report of the Special Rapporteur on a draft code of offences against the peace and security of mankind (*ibid*., document A/CN.4/44) contained a digest of the observations on the Commission's formulation of the Nürnberg principles made by delegations during the fifth session of the General Assembly. As requested by the General Assembly, the Commission took into account the comments and observations received from Governments on the formulation of the Nürnberg principles (*see footnote 390*).

lishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions," and requested the Commission, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".

The Commission considered the question of international criminal jurisdiction at its first and second sessions, in 1949 and 1950, respectively. At its first session, the Commission appointed as Special Rapporteurs to deal with this question Ricardo J. Alfaro and A. E. F. Sandström, who were requested to submit to the Commission one or more working papers on the subject. In connection with the consideration of the question, the Commission had before it the reports of the Special Rapporteurs[361] and documents prepared by the Secretariat.[362]

At its second session, in 1950, the Commission discussed the report presented by each of the Special Rapporteurs and concluded that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and possible. It recommended, however, against such an organ being set up as a chamber of the International Court of Justice, though it was possible to do so by amendment of the Court's Statute which, in Article 34, provides that only States may be parties in cases before the Court.[363]

After giving preliminary consideration to the Commission's report on the question of international criminal jurisdiction, the General Assembly adopted resolution 489 (V) of 12 December 1950, establishing a committee composed of the representatives of seventeen Member States for the purpose of preparing preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court. The committee met at Geneva in August 1951 and formulated proposals together with a draft statute for an international criminal court. Under the draft statute it was proposed that the court should have a permanent structure but should function only on the basis of cases submitted to it.

The report of the Committee,[364] containing the draft statute, was communicated to Governments for their observations. Only a few Gov-

[361] For the report of Ricardo J. Alfaro, see *ibid., 1950,* vol. II, document A/CN.4/15, and for the report of A. E. F. Sandström, see *ibid.*, document A/CN.4/20.

[362] Memorandum entitled "Historical survey of the question of international criminal jurisdiction" (document A/CN.4/7/Rev.1 published in United Nations publication, Sales No. 1949.V.8); and bibliography on International Criminal Law and International Criminal Court (document A/CN.4/28).

[363] See *Yearbook of the International Law Commission, 1950*, vol. II, document A/1316, paras. 128–145.

[364] See *Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136).

ernments commented on the draft, however, and in 1952 the Assembly, in resolution 687 (VII) of 5 December 1952, decided to set up a new committee, consisting again of representatives of seventeen Member States, which met at United Nations Headquarters in the summer of 1953. The terms of reference of the Committee were: (1) to explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done; (2) to study the relationship between such a court and the United Nations and its organs; and (3) to reexamine the draft statute. The Committee made a number of changes in the 1951 draft statute and, in respect of several articles, prepared alternative texts, one appropriate if the court were to operate separately from the United Nations and the other in case it were decided that the court should be closely linked with the United Nations. The report of the Committee[365] was placed before the Assembly at its 1954 session.

The Assembly, however, in resolution 898 (IX) of 14 December 1954, decided to postpone consideration of the question of an international criminal jurisdiction until it had taken up the report of the special committee on the question of defining aggression and had taken up again the draft code of offences against the peace and security of mankind (*see pages 95 and 96*). The report of the special committee was before the General Assembly at its twelfth session, in 1957. While taking note of the report, the Assembly postponed consideration of the question of defining aggression and the draft code of offences to a later stage (*see pages 95, 96 and 99*). A similar decision was taken by the General Assembly with respect to the question of an international criminal jurisdiction in resolution 1187 (XII) of 11 December 1957. It was felt that, since the subject was related both to the question of defining aggression and to the draft code of offences against the peace and security of mankind, consideration should be deferred until such time as the Assembly again took up the two related items.

The matter was subsequently brought to the attention of Member States in 1968 by the Secretary-General[366] in connection with placing the item on the report of the Special Committee on the Question of Defining Aggression on the agenda of the General Assembly. The Assembly's General Committee decided, however, that it would not be desirable at that stage, prior to the completion of the Assembly's consideration of the question of defining aggression, for the items "International criminal jurisdiction" and "Draft Code of Offences against the Peace and Security

[365] See *ibid., Ninth Session, Supplement No. 12* (A/2645).

[366] See *ibid., Twenty-third Session, Annexes*, vol. I, agenda item 8, document A/BUR/171/Rev.1, para. 4.

of Mankind" to be included in the agenda and that those items should be taken up only at a later session when further progress had been made in arriving at a generally agreed definition of aggression.[367] The General Assembly adopted its agenda as proposed by the General Committee.

The same question was again brought to the attention of Member States by the Secretary-General in a memorandum addressed to the General Committee in 1974,[368] when a draft definition of aggression was submitted to the General Assembly (*see page 96*). In allocating the item on the question of defining aggression to the Sixth Committee, the Assembly commented that it had decided to take note of the Secretary-General's observations and to consider whether it should take up again the question of a draft code of offences against the peace and security of mankind and the question of an international criminal jurisdiction.[369]

The question of international criminal jurisdiction was raised again in the context of the Commission's work on a draft code of crimes against the peace and security of mankind (*see section 7 below*).

5. Reservations to multilateral conventions

The question of reservations to multilateral conventions arose out of difficulties encountered by the Secretary-General in his capacity as depositary of the Convention on the Prevention and Punishment of the Crime of Genocide, which had been adopted by the General Assembly on 9 December 1948.[370] The Secretary-General, as depositary of multilateral conventions, had substantially followed the practice of the League of Nations. Under this practice, in the absence of stipulations in a convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General accepted in definitive deposit an instrument of ratification or accession offered with a reservation only after it had been ascertained that there was no objection on the part of any of the other States directly concerned. This practice, however, was contested by some Member States and, in 1950, the Secretary-General asked the General Assembly for directions on the procedure he should follow.[371] The General Assembly, by resolution 478 (V) of 16 November 1950, requested an advisory opinion from the International Court of

[367] See *ibid.*, document A/7250, para. 10.

[368] See *ibid., Twenty-ninth Session, Annexes*, agenda item 8, document A/BUR/182, para. 26.

[369] See *ibid.*, agenda item 86, document A/9890, para. 2.

[370] United Nations, *Treaty Series*, vol. 78, p. 277.

[371] See *Official Records of the General Assembly, Fifth Session, Annexes*, agenda item 56, document A/1372.

Justice on reservations to the Genocide Convention. The Assembly also invited the Commission, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions in general, both from the point of view of codification and from that of the progressive development of international law, and to report to the Assembly at its sixth session, in 1951.

In pursuance of this resolution, the Commission, in the course of its third session, in 1951, gave priority to a study of the question of reservations to multilateral conventions.[372] It had before it a "Report on Reservations to Multilateral Conventions,"[373] submitted by the Special Rapporteur on the topic of the law of treaties, as well as two memoranda, submitted by two other members of the Commission.[374] In its report to the Assembly, the Commission stated that the criterion of compatibility of a reservation with the object and purpose of a convention—applied by the International Court of Justice in its advisory opinion on reservations to the Genocide Convention[375]—would not be suitable for application to multilateral conventions in general; while no single rule uniformly applied could be wholly satisfactory, a rule suitable for application in the majority of cases could be found in the practice theretofore followed by the Secretary-General, with some modifications.[376]

The General Assembly, in resolution 598 (VI) of 12 January 1952, endorsed the Commission's recommendation that clauses on reservations be inserted in future conventions; stated that the Court's advisory opinion should be followed in regard to the Genocide Convention; and asked the Secretary-General, in respect of future United Nations conventions, to act as depositary for documents containing reservations or objections thereto without passing on the legal effect of such documents. The documents were to be communicated to all States concerned, to which it would be left to draw the legal consequences. In 1959, the General Assembly, in resolution 1452 (XIV) of 7 December 1959, asked the Secretary-General

[372] At this session, the Commission recalled its preliminary discussion of the question at its second session, in 1950, on the basis of the report of the Special Rapporteur on the topic of the law of treaties (*Yearbook of the International Law Commission, 1950,* vol. II, document A/CN.4/23).

[373] See *ibid., 1951,* vol. II, document A/CN.4/41.

[374] See *ibid.*, documents A/CN.4/L.9 and A/CN.4/L.14.

[375] The Court declared that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise that State cannot be regarded as a party. International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders, 1951*, p. 29.

[376] See *Yearbook of the International Law Commission, 1951*, vol. II, document A/1858, paras. 12–34.

to follow the same practice with respect to United Nations conventions concluded before, as well as after, the Assembly's resolution of 1952.

The Commission returned again to the subject in the course of its preparation of draft articles on the law of treaties (*see section 14 below*) and the question of treaties concluded between States and international organizations or between two or more international organizations (*see section 20 below*). Articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties[377] and of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[378] deal with reservations to treaties. The Commission also took up the subject in the context of its work on the topic of reservations to treaties (*see section 31 below*).

6. Question of defining aggression

The General Assembly, in resolution 378 (V) of 17 November 1950, decided to refer to the Commission a proposal made by the Union of Soviet Socialist Republics in connection with the agenda item "Duties of States in the event of the outbreak of hostilities" and all the records of the First (Political and Security) Committee of the Assembly dealing with the question, so that the Commission might take them into consideration and formulate its conclusions as soon as possible. The Soviet proposal provided that the General Assembly, "considering it necessary . . . to define the concept of aggression as accurately as possible," declares, *inter alia*, that "in an international conflict that State shall be declared the attacker which first commits" one of the acts enumerated in the proposal.[379]

At its third session, in 1951, the Commission considered the question whether it should enumerate aggressive acts or try to draft a definition of aggression in general terms.[380] The sense of the Commission was that it was undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive. It also considered it inadvisable unduly to limit the freedom of judgement of the competent

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[377] See volume II, annex V, section 6.

[378] See volume II, annex V, section 11.

[379] See *Official Records of the General Assembly, Fifth Session, Annexes*, agenda item 72, document A/C.1/608.

[380] The Commission considered the question on the basis of chapter II of the second report of the Special Rapporteur for the draft code of offences against the peace and security of mankind entitled "The Possibility and Desirability of a Definition of Aggression" (see *Yearbook of the International Law Commission, 1951*, vol. II, document A/CN.4/44) as well as memoranda and proposals presented by other members of the Commission (see *ibid.*, documents A/CN.4/L. 6–8, 10–12 and 19).

organs of the United Nations by a rigid and necessarily incomplete list of acts constituting aggression. It was therefore decided that the only practical course was to aim at a general and abstract definition. But the Commission's efforts to draw up a general definition were not successful.

During the same session, however, the matter was reconsidered in connection with the preparation of the draft Code of Offences against the Peace and Security of Mankind (*see section 7 (a) below*). The Commission then decided to include among the offences defined in the draft Code any act of aggression and any threat of aggression.[381]

At its sixth session, the General Assembly examined the question of defining aggression and concluded, in resolution 599 (VI) of 31 January 1952, that it was both "possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it". At the Assembly's request, the Secretary-General submitted a detailed report to the Assembly at its seventh session covering all aspects of the question.[382]

On 20 December 1952, the Assembly, in resolution 688 (VII), established a fifteen-member special committee which was requested to submit to the Assembly's ninth session, in 1954, "draft definitions of aggression or draft statements of the notion of aggression". The special committee met at United Nations Headquarters from 24 August to 21 September 1953. Several different texts aimed at defining aggression were presented. The committee, however, decided unanimously not to put the texts to a vote but to transmit them to the General Assembly and to Member States for comments.[383] Comments were received from eleven Member States.

By resolution 895 (IX) of 4 December 1954, the General Assembly established another special committee, consisting of nineteen members, and requested it to report to the eleventh session of the General Assembly, in 1956. The nineteen-member committee met at United Nations Headquarters from 8 October to 9 November 1956. It did not adopt a definition but decided to transmit its report to the Assembly, summarizing the views expressed on the various aspects of the matter, together with the draft definitions previously submitted to it.[384]

At its twelfth session, in 1957, the General Assembly, in resolution 1181 (XII) of 29 November 1957, took note of the special committee's

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[381] See *ibid*., document A/1858, para. 53.

[382] See *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54, document A/2211.

[383] See *ibid., Ninth Session, Supplement No. 11* (A/2638).

[384] See *ibid., Twelfth Session, Supplement No. 16* (A/3574).

report. By the same resolution, the Assembly decided to invite the views of twenty-two States admitted to the United Nations since 14 December 1955, and to renew the request for comments of other Member States. It also decided to refer the replies of Governments to a new committee, composed of the Member States which had served on the General Committee of the Assembly at its most recent regular session, and entrusted the committee with the procedural task of studying the replies "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression".

The committee, which met at the United Nations Headquarters from 14 to 24 April 1959, decided that the fourteen replies received did not indicate any change of attitude and agreed to postpone further consideration of the question until April 1962, unless an absolute majority of its members favoured an earlier meeting in the light of new developments. The committee met again at United Nations Headquarters in 1962, 1965 and 1967, but on each occasion found itself unable to determine any particular time as appropriate for the Assembly to resume consideration of the question of defining aggression. The activities of this committee came to an end in 1967, when the General Assembly decided to undertake again substantive consideration of the question of the definition of aggression.[385]

Recognizing "that there is a widespread conviction of the need to expedite the definition of aggression", the General Assembly, by resolution 2330 (XXII) of 18 December 1967, established a Special Committee on the Question of Defining Aggression, composed of thirty-five Member States, "to consider all aspects of the question so that an adequate definition of aggression may be prepared". The Special Committee held seven sessions, one every year from 1968 to 1974. At its 1974 session, the Special Committee adopted by consensus a draft definition of aggression and recommended it to the General Assembly for adoption.[386] On 14 December 1974, the Assembly adopted by consensus the Definition of Aggression as recommended by the Special Committee. The Assembly also called the attention of the Security Council to the Definition and recommended that the Security Council should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.[387]

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[385] For the reports of the committee, see documents A/AC.91/2, 3 and 5.

[386] See *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19* (A/9619).

[387] The text of the Definition of Aggression is contained in General Assembly resolution 3314 (XXIX), annex. See also *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 86, document A/9890.

(*For the Commission's consideration of the question of individual responsibility for the crime of aggression, see section 7(d) below*).

7. Draft Code of Crimes against the Peace and Security of Mankind[388]

(a) Draft Code of Offences (1954)

The task of preparing a draft code of offences against the peace and security of mankind was entrusted to the Commission in 1947, by General Assembly resolution 177 (II) of 21 November 1947, the same resolution that requested it to formulate the Nürnberg principles (*see section 3 above*).

The Commission began its consideration of the draft code of offences at its first session, in 1949, when the Commission appointed Jean Spiropoulos as Special Rapporteur for the subject. It proceeded with its work at its third, fifth and sixth sessions, in 1951, 1953 and 1954, respectively. In connection with its work on the draft code of offences, the Commission had before it the reports of the Special Rapporteur,[389] information received from Governments[390] as well as documents prepared by the Secretariat.[391]

At its third session, in 1951, the Commission completed a draft Code of Offences against the Peace and Security of Mankind and submitted it to the General Assembly, together with commentaries thereto.[392]

In the course of the preparation of the text, the Commission considered that it was not necessary to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft Code.

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[388] This topic was originally entitled "Draft code of offences against the peace and security of mankind". At its thirty-ninth session, in 1987, the Commission recommended to the General Assembly that it amend the title of the topic in English so that it would read as above. The General Assembly agreed with this recommendation in resolution 42/151 of 7 December 1987.

[389] See *Yearbook of the International Law Commission, 1950*, vol. II, document A/CN.4/25; *ibid.*, *1951*, vol. II, document A/CN.4/44; and *ibid.*, *1954*, vol. II, document A/CN.4/85.

[390] See *ibid., 1950*, vol. II, document A/CN.4/19 and Add.1 and 2; *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54, document A/2162 and Add.1 as well as document A/2162/Add.2. The Commission also examined the comments and observations received from Governments on the formulation of the Nürnberg principles (see *Yearbook of the International Law Commission, 1951,* vol. II, document A/CN.4/45 and Add.1 and 2).

[391] See *Yearbook of the International Law Commission, 1950,* vol. II, document A/CN.4/39 as well as document A/CN.4/72.

[392] See *ibid., 1951*, vol. II, document A/1858, paras. 57 and 59.

As to the scope of the draft Code, the Commission decided to limit the Code to offences containing a political element and endangering or disturbing the maintenance of international peace and security. It therefore omitted such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting of currency, and damage to submarine cables. The Commission also decided that it would deal only with the criminal responsibility of individuals and that no provisions should be included with respect to crimes by abstract entities.[393] (The Nürnberg Tribunal had stated in its judgment that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[394]) Thus, offences enumerated in the draft Code were characterized as "crimes under international law, for which the responsible individuals shall be punishable".[395]

The Commission refrained from providing for institutional arrangements for implementing the Code; it thought that, pending the establishment of an international criminal court, the Code might be applied by national courts.[396] As the Commission deemed it impracticable to prescribe a definite penalty for each offence, it was left to the competent tribunal to determine the penalty for any offence under the Code, taking into account the gravity of the particular offence.[397]

At its sixth session, in 1951, the General Assembly postponed consideration of the draft Code until its next session, in view of the fact that the draft had only recently been communicated to Governments for comments. At the Assembly's seventh session, in 1952, the item was omitted from the final agenda on the understanding that the matter would continue to be considered by the International Law Commission.

The Commission accordingly took up the matter again at its fifth session, in 1953, and requested the Special Rapporteur, Jean Spiropoulos, to prepare a new report for submission at the sixth session.

At its sixth session, in 1954, the Commission considered the report of the Special Rapporteur[398] which discussed the observations received from Governments and proposed certain changes in the text previously

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[393] See *ibid.*, document A/1858, para. 52 (a, b and c).

[394] Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945–1 October 1946, published at Nürnberg, Germany, 1947, p. 223.

[395] See *Yearbook of the International Law Commission, 1951*, vol. II, document A/1858, para. 59, article 1.

[396] See *ibid.*, para. 52 (d).

[397] See *ibid.*, document A/1858, para. 59, article 5 and its commentary.

[398] See *ibid., 1954*, vol. II, document A/CN.4/85.

adopted by the Commission. The Commission decided to modify its previous text in certain respects and added a new offence to the list of crimes, namely, the intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures. It also decided to omit the condition that inhuman acts against a civil population were crimes only when committed in connection with other offences defined in the draft Code. The rule regarding crimes committed under order by a superior was reworded to say that the perpetrator of such a crime would be responsible if, under the circumstances at the time, it was possible for him not to comply with the order. In addition, the Commission decided to omit the provision dealing with the punishment of the offences defined in the draft Code, as the Commission considered that the question of penalties could more conveniently be dealt with at a later stage, after it had been decided how the Code was to become operative.[399]

At the same session, the Commission adopted the revised draft Code of Offences against the Peace and Security of Mankind, with commentaries.[400] The text of the draft Code as revised in 1954 is reproduced in volume II, annex VI, section 3 (a).

The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code raised problems closely related to that of the definition of aggression, decided to postpone further consideration of the draft Code until the new special committee on the question of defining aggression had submitted its report. The report of the special committee was before the General Assembly at its twelfth session, in 1957. At that session, the General Assembly took note of the report and decided to postpone consideration of the question of aggression to a later stage (*see page 91*). In view of that decision and the consideration that the draft Code raised problems related to the question of defining aggression, the General Assembly, in resolution 1186 (XII) of 11 December 1957, deferred consideration of the draft Code until such time as it took up again the question of defining aggression. In the same resolution, the General Assembly requested the Secretary-General to transmit the text of the draft Code to Member States for comment, and to submit their replies to the General Assembly at such time as the item might be placed on its provisional agenda.

As mentioned earlier (*see pages 91 and 92*), the item was brought to the attention of the General Assembly in 1968 and again in 1974. The Assembly decided at its twenty-third session, in 1968, not to take up the item. At its twenty-ninth session, in 1974, it decided to consider whether

[399] See *ibid.*, document A/2693, paras. 50 and 51.

[400] See *ibid.*, document A/2693, paras. 49 and 54.

it should take up again the question of a draft code of offences against the peace and security of mankind.

The Commission, in its report on the work of its twenty-ninth session, in 1977, referred to the advisability of the General Assembly giving consideration to the draft Code, including the possibility of its review by the Commission if the Assembly so wished.[401]

The Assembly, at its thirty-second session, in 1977, acting on the request of seven Member States, decided to include in its agenda the item entitled "Draft Code of Offences against the Peace and Security of Mankind," and to allocate it to the Sixth Committee. However, because of lack of time, the Assembly agreed to defer consideration of the item until its thirty-third session.[402] At that session, the General Assembly adopted resolution 33/97 of 16 December 1978, by which, *inter alia*, it requested the Secretary-General to invite Member States and relevant international intergovernmental organizations to submit their comments and observations on the draft Code, including comments on the procedure to be adopted, and to prepare a report to be submitted to the Assembly at its thirty-fifth session, in 1980.

The comments received further to General Assembly resolution 33/97 were circulated at the thirty-fifth session of the General Assembly, in 1980.[403] At the same session, the General Assembly, in resolution 35/49 of 4 December 1980, requested the Secretary-General to reiterate his invitation to Member States and relevant international intergovernmental organizations to submit or update their comments and observations and in particular to inform him of their views on the procedure to be followed in the future consideration of the item, including the suggestion to have the item referred to the International Law Commission.

(b) Draft Code of Crimes (1996)

The General Assembly, by resolution 36/106 of 10 December 1981, invited the International Law Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

Accordingly, at its thirty-fourth session, in 1982, the Commission included the item "Draft Code of Offences against the Peace and Secu-

[401] See, *ibid., 1977*, vol. II (Part Two), para. 111.

[402] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 131, document A/32/470.

[403] Document A/35/210 and Add.1 and 2 and Add.2/Corr.1.

rity of Mankind" in its agenda and appointed Doudou Thiam as Special Rapporteur for the subject.

The Commission proceeded with its work on the draft code from its thirty-fifth session, in 1983, to its forty-third session, in 1991, and at its forty-sixth and forty-seventh sessions, in 1994 and 1995, respectively. In connection with its further consideration of the draft code, the Commission had before it the reports of the Special Rapporteur,[404] comments and observations received from Governments and international organizations[405] as well as documents prepared by the Secretariat.[406]

At its thirty-fourth session, in 1982, the Commission established a Working Group chaired by the Special Rapporteur that held a preliminary exchange of views on the requests addressed to the Commission by the General Assembly in resolution 36/106. On the recommendation of the Working Group, the Commission indicated its intention to proceed during its thirty-fifth session to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. The Commission further indicated that it would submit to the General Assembly, at its thirty-eighth session, the conclusions of that debate.

The General Assembly, in resolution 37/102 of 16 December 1982, requested the Commission, in conformity with resolution 36/106 of 10 December 1981, to submit to the General Assembly at its thirty-eighth session a preliminary report on, *inter alia*, the scope and the structure of the draft code.

At its thirty-fifth session, in 1983, the Commission proceeded to a general debate on the basis of the first report of the Special Rapporteur,[407]

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[404] See *Yearbook of the International Law Commission, 1983,* vol. II (Part One), document A/CN.4/364; *ibid*., *1984,* vol. II (Part One), document A/CN.4/377; *ibid*., *1985*, vol. II (Part One), document A/CN.4/387; *ibid., 1986,* vol. II (Part One), document A/CN.4/398; *ibid*., *1987*, vol. II (Part One), document A/CN.4/404; *ibid*., *1988,* vol. II (Part One), document A/CN.4/411; *ibid*., *1989,* vol. II (Part One), document A/CN.4/419 and Add.1; *ibid*., *1990,* vol. II (Part One), document A/CN.4/430 and Add.1; *ibid*., *1991,* vol. II (Part One), document A/CN.4/435 and Add.1; *ibid*., *1992,* vol. II (Part One), document A/CN.4/442; *ibid*., *1993*, vol. II (Part One), document A/CN.4/449 (the tenth and eleventh reports of the Special Rapporteur published in the *1992* and *1993 Yearbooks,* respectively, were devoted entirely to the question of the possible establishment of an international criminal jurisdiction); and *ibid*., *1994,* vol. II (Part One), document A/CN.4/460, as well as document A/CN.4/466.

[405] See *ibid., 1982,* vol. II (Part One), document A/CN.4/358 and Add.1–4; *ibid*., *1983,* vol. II (Part One), document A/CN.4/369 and Add.1 and 2; *ibid*., *1985*, vol. II (Part One), document A/CN.4/392 and Add.1 and 2; *ibid*., *1987*, vol. II (Part One), document A/CN.4/407 and Add.1 and 2; *ibid*., *1990,* vol. II (Part One), document A/CN.4/429 and Add.1–4; and *ibid*., *1993,* vol. II (Part One), document A/CN.4/448 and Add.1.

[406] Documents A/CN.4/365 and A/CN.4/368 and Add.1.

[407] See *Yearbook of the International Law Commission, 1983,* vol. II (Part One), document A/CN.4/364.

which focused on three questions: (1) the scope of the draft; (2) the methodology to be followed; and (3) the implementation of the code. On the question of methodology, the Commission considered it advisable to include an introduction recalling the general principles of criminal law, such as the non-retroactivity of criminal law and the theories of aggravating or mitigating circumstances, complicity, preparation and justified acts.[408] On the other two questions, the views of the Commission were as follows:

> "(*a*) The International Law Commission is of the opinion that the draft code should cover only the most serious international offences. These offences will be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject;
>
> "(*b*) With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem;
>
> "(*c*) With regard to the implementation of the code:
>
> (i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;
>
> (ii) Moreover, in view of the prevailing opinion within the Commission, which endorses the principle of criminal responsibility in the case of States, the General Assembly should indicate whether such jurisdiction should also be competent with respect to States."[409]

The General Assembly, in resolution 38/132 of 19 December 1983, invited the Commission to continue its work on the elaboration of the draft code of offences against the peace and security of mankind by elaborating, as a first step, an introduction and a list of the offences in conformity with its report on the work of its thirty-fifth session.

At its thirty-sixth session, in 1984, the Commission proceeded to a general debate on the draft code on the basis of the second report[410] of the Special Rapporteur, which dealt with two questions, namely the

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[408] See *ibid.,* (Part Two), para. 67.

[409] See *ibid.,* para. 69.

[410] See *ibid., 1984*, vol. II (Part One), document A/CN.4/377.

offences covered by the 1954 draft and the offences classified since 1954. In its own report to the General Assembly on the work of that session, the Commission expressed its intention to limit the scope *ratione personae* of the draft code to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, and to begin by drawing up a provisional list of offences while bearing in mind the drafting of an introduction summarizing the general principles of international criminal law relating to offences against the peace and security of mankind. The offences which were mentioned for possible inclusion in the code included, in addition to the offences covered in the 1954 draft, colonialism, apartheid, serious damage to the human environment, economic aggression, the use of atomic weapons and mercenarism.[411]

At its thirty-ninth session, the General Assembly, in resolution 39/80 of 13 December 1984, requested the Commission to continue its work on the elaboration of the draft code of offences against the peace and security of mankind by elaborating an introduction as well as a list of the offences, taking into account the progress made at the thirty-sixth session of the Commission, as well as the views expressed during the thirty-ninth session of the General Assembly.

The Commission began the first reading of the draft code at its thirty-seventh session, in 1985. At its thirty-eighth session, in 1986, the Commission discussed again the problem of the implementation of the code and announced its intention to examine carefully any guidance that might be furnished on various possible options (system of territoriality, system of personality, universal system and system of international criminal jurisdiction).

At its thirty-ninth session, in 1987, the Commission recommended to the General Assembly that it amend the title of the topic in English so that it would read "Draft Code of Crimes against the Peace and Security of Mankind,"[412] a recommendation which the General Assembly endorsed in resolution 42/151 of 7 December 1987.

At its forty-third session, in 1991, the Commission adopted on first reading the draft Code of Crimes against the Peace and Security of Mankind, which included the following crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic

[411] See *ibid.*, (Part Two), para. 65.

[412] See *ibid., 1987*, vol. II (Part Two), para. 65.

drugs; and wilful and severe damage to the environment. The Commission decided to defer the questions of applicable penalties and the crimes which could involve an attempt until the second reading of the draft. The Commission noted that the draft Code constituted the first part of the Commission's work on the topic and that the Commission would continue its work on the question of an international criminal jurisdiction (*see subsection (c) below*). In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the draft Code, through the Secretary-General, to Governments for their comments and observations.[413]

The General Assembly, in resolution 46/54 of 9 December 1991, expressed its appreciation to the Commission for the completion of the provisional draft articles on the draft Code of Crimes against the Peace and Security of Mankind and urged Governments to present in writing their comments and observations on the draft, as requested by the Commission. The request to Governments for their comments and observations on the draft was reiterated by the General Assembly in resolution 47/33 of 25 November 1992. The General Assembly, in resolution 48/31 of 9 December 1993, requested the Commission to resume at its forty-sixth session the consideration of the draft Code.

At its forty-sixth session, in 1994, the Commission began the second reading of the draft code, which was completed at its next session, in 1995. The second reading was held on the basis of the twelfth and thirteenth reports of the Special Rapporteur[414] and in the light of the comments and observations received from Governments.[415] The twelfth report, considered by the Commission at its forty-sixth session, in 1994, focused only on the general part of the draft dealing with the definition of crimes against the peace and security of mankind, characterization and general principles. The Special Rapporteur also indicated his intention to limit the list of crimes to be considered during the second reading to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. At that session, after considering the report, the Commission decided to refer the draft articles dealt with therein to the Drafting Committee, it being understood that the work on the draft code and on the draft statute for an international criminal court should be coordinated by the Special Rapporteur on the draft code and by the Chairman and members of the Drafting Com-

[413] See *ibid.*, vol. II (Part Two), paras. 170–175.

[414] See *ibid., 1994,* vol. II (Part One), document A/CN.4/460; as well as document A/CN.4/466.

[415] See *ibid., 1993,* vol. II (Part One), document A/CN.4/448 and Add.1.

mittee and of the Working Group on a draft statute for an international criminal court (*see subsection (c) below*).

At its forty-seventh session, in 1995, the Commission considered the thirteenth report of the Special Rapporteur. The Special Rapporteur had omitted from his report 6 of the 12 crimes included on first reading, namely: the threat of aggression; intervention; colonial domination and other forms of alien domination; apartheid; the recruitment, use, financing and training of mercenaries; and wilful and severe damage to the environment, in response to the strong opposition, criticisms or reservations of certain Governments with respect to those crimes. Accordingly, the report focused on the remaining crimes contained in the draft code adopted on first reading, namely: aggression, genocide, systematic or mass violations of human rights, exceptionally serious war crimes, international terrorism and illicit traffic in narcotic drugs.[416] The Commission decided to refer to the Drafting Committee articles dealing with aggression, genocide, systematic or mass violations of human rights and exceptionally serious war crimes, on the understanding that the Drafting Committee, in formulating those articles, would bear in mind and at its discretion deal with all or part of the draft articles adopted on first reading concerning intervention; colonial domination and other forms of alien domination; apartheid; recruitment, use, financing and training of mercenaries; and international terrorism. The Commission also decided to continue consultations as regards articles dealing with illicit traffic in narcotic drugs, and wilful and severe damage to the environment.

The Commission decided to establish a Working Group that would meet at the beginning of the forty-eighth session, in 1996, to examine the possibility of covering in the draft code the issue of wilful and severe damage to the environment.[417] The Working Group examined the issue at the forty-eighth session and proposed to the Commission that such crime be considered a war crime, a crime against humanity or a separate crime against the peace and security of mankind. The Commission decided by a vote to refer to the Drafting Committee only the text prepared by the Working Group for inclusion of wilful and severe damage to the environment as a war crime.[418]

At the forty-eighth session, in 1996, the Commission adopted the final text of the draft Code of Crimes against the Peace and Security of Mankind, with commentaries,[419] consisting of 20 articles divided into two parts: Part One, General Provisions (articles 1–15) and Part Two,

[416] See *ibid., 1995*, vol. II (Part Two), paras. 38 and 39.

[417] See *ibid.*, para. 140.

[418] See *ibid., 1996*, vol. II (Part Two), paras. 43 and 44.

[419] See *ibid.*, paras. 45 and 50.

Crimes against the Peace and Security of Mankind (articles 16–20). Part One contains provisions relating to the scope and application of the Code (article 1), individual responsibility (article 2), punishment (article 3), responsibility of States (article 4), order of a Government or a superior (article 5), responsibility of the superior (article 6), official position and responsibility (article 7), establishment of jurisdiction (article 8), obligation to extradite or prosecute (article 9), extradition of alleged offenders (article 10), judicial guarantees (article 11), *non bis in idem* (article 12), non-retroactivity (article 13), defences (article 14), and extenuating circumstances (article 15). Part Two includes the following crimes: aggression (article 16), genocide (article 17), crimes against humanity (article 18), crimes against United Nations and associated personnel (article 19), and war crimes (article 20). The text of the draft Code as adopted in 1996 is reproduced in volume II, annex VI, section 3 (b).

The Commission adopted the draft Code with the following understanding:

> "with a view to reaching consensus, the Commission has considerably reduced the scope of the Code. On first reading in 1991, the draft Code comprised a list of 12 categories of crimes. Some members have expressed their regrets at the reduced scope of coverage of the Code. The Commission acted in response to the interest of adoption of the Code and of obtaining support by Governments. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law."[420]

As agreed to upon the adoption of the draft code on first reading, in 1991, the Commission returned to the questions of penalties and attempt during the second reading. With regard to penalties, the Commission decided to include a general provision indicating that the punishment of an individual for a crime against the peace and security of mankind must be commensurate with the character and gravity of the crime (article 3) rather than to provide specific penalties for each crime. With regard to attempt, the Commission decided to address individual criminal responsibility for attempt with respect to all of the crimes except aggression (article 2, paragraph 3(g)).

The Commission considered various forms which the draft Code of Crimes against the Peace and Security of Mankind could take, including an international convention adopted by a plenipotentiary conference or the General Assembly, incorporation of the Code in the statute of an international criminal court, or adoption of the Code as a declaration by

[420] See *ibid.*, para. 46.

the General Assembly. The Commission recommended that the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code.[421]

The General Assembly, in resolution 51/160 of 16 December 1996, expressed its appreciation to the Commission for the completion of the draft Code; drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work (*see page 113*); and requested the Secretary-General to invite Governments to submit, before the end of the fifty-third session of the General Assembly, their written comments and observations on action which might be taken in relation to the draft Code.

(c) Draft Statute for an International Criminal Court

At its thirty-fifth session, in 1983, the Commission had before it the first report of the Special Rapporteur for the draft code which focused, *inter alia*, on the implementation of the code.[422] Following a general debate on the basis of this report, the Commission requested the General Assembly to indicate whether the Commission's mandate with respect to the draft code extended to the preparation of the statute of a competent international criminal jurisdiction for individuals since some members considered that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective.[423]

At its thirty-eighth session, in 1986, the Commission had before it the fourth report of the Special Rapporteur which addressed, *inter alia*, the implementation of the code.[424] After considering this report, the Commission indicated that it would examine carefully any guidance that might be furnished on the various options for the implementation of the code set out in its report and reminded the General Assembly of the conclusion concerning the ineffectiveness of a code unaccompanied by penalties and a competent jurisdiction contained in the report on the work of its thirty-fifth session, in 1983.[425]

From 1986 to 1989, the General Assembly requested the Secretary-General to seek the views of Members States regarding the Commission's conclusions concerning the implementation of the draft code.[426]

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[421] See *ibid*., paras. 47 and 48.

[422] See *ibid*., vol. II (Part One), document A/CN.4/364.

[423] See *ibid*., (Part Two), para. 69(c)(i).

[424] See *ibid*., *1986*, vol. II (Part One), document A/CN.4/398.

[425] See *ibid*., (Part Two), para. 185.

[426] See General Assembly resolutions 41/75 of 3 December 1986, 42/151 of 7 December 1987, 43/164 of 9 December 1988 and 44/32 of 4 December 1989.

At its thirty-ninth session, in 1987, the Commission had before it the fifth report of the Special Rapporteur[427] which included draft article 4 on the *aut dedere aut punire* principle which was intended to fill the existing gap with regard to jurisdiction.[428] The Commission considered issues relating to an international criminal court in the context of its discussion of draft article 4. The Commission referred the draft article to the Drafting Committee which was unable to formulate a text for article 4 due to lack of time.

At its fortieth session, in 1988, the Commission provisionally adopted draft article 4 (Obligation to try or extradite) which relied on national courts to enforce the code without ruling out the consideration of an international criminal court at a later stage.[429]

In 1989, the General Assembly considered a new agenda item entitled "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes".[430] In resolution 44/39 of 4 December 1989, the Assembly requested the Commission, when considering at its forty-second session the draft code of crimes against the peace and security of mankind, to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session.

At its forty-second session, in 1990, the Commission had before it the eighth report of the Special Rapporteur on the draft code, part three of which dealt with the statute of an international criminal court.[431] The Commission considered extensively the question of the possible establishment of an international criminal jurisdiction for two main reasons: first, because the question concerning the draft code's implementation and, in particular, the possible creation of an international criminal

[427] See *Yearbook of the International Law Commission, 1987*, vol. II (Part One), document A/CN.4/404.

[428] In 2006, the Commission included the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work (*see Part III.B, section 2*).

[429] See *Yearbook of the International Law Commission, 1988*, vol. II (Part Two), paras. 213 and 280 (commentary to article 4).

[430] See *Official Records of the General Assembly, Forty-fourth Session, Annexes*, vol. II, agenda item 152, document A/44/195.

[431] See *Yearbook of the International Law Commission, 1990*, vol. II (Part One), document A/CN.4/430 and Add.1.

jurisdiction to enforce its provisions had always been foremost in the Commission's concerns regarding the topic, and, second, because of the specific request addressed to the Commission by the General Assembly in resolution 44/39 of 4 December 1989. After considering the report, the Commission decided to establish a Working Group to prepare a response by the Commission to the request by the Assembly.[432]

By resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, the General Assembly invited the Commission, within the framework of the draft code, to consider further and analyse the issues raised in the report concerning the question of an international criminal jurisdiction.

From 1991 to 1993, the Special Rapporteur for the draft code submitted three reports which addressed issues relating to the question of an international criminal jurisdiction.[433]

At its forty-fourth session, in 1992, the Commission decided to set up a Working Group to consider further and analyse the main issues relating to the question of an international criminal jurisdiction. The Working Group, at the same session, drew up a report to the Commission, which contained, *inter alia*, a set of specific recommendations on a number of issues related to the possible establishment of an international criminal jurisdiction.[434] The structure suggested in the Working Group's report consisted, in essence, of an international criminal court established by a statute in the form of a multilateral treaty agreed to by States parties. The proposed court would, in the first phase of its operations, at least, exercise jurisdiction only over private persons, as distinct from States. Its jurisdiction should be limited to crimes of an international character defined in specified international treaties in force, including the crimes defined in the draft code of crimes against the peace and security of mankind upon its adoption and entry into force, but not limited thereto. A State should be able to become a party to the statute of the court without thereby becoming a party to the code. The court would be a facility for States parties to its statute (and also, on defined terms, other States) which could be called into operation when and as soon as required and which, in the first phase of its operation, at least, should not have compulsory jurisdiction and would not be a standing full-time body. Furthermore, whatever the precise structure of the court or other

[432] For the report of the Working Group, see document A/CN.4/L.454.

[433] See *Yearbook of the International Law Commission, 1991,* vol. II (Part One), document A/CN.4/435 and Add.1; *ibid*., *1992,* vol. II (Part One), document A/CN.4/442; and *ibid*., *1993,* vol. II (Part One), document A/CN.4/449.

[434] Document A/CN.4/L.471, reproduced in *Yearbook of the International Law Commission, 1992,* vol. II (Part Two), annex. See also *ibid*., para. 99.

mechanisms, it must guarantee due process, independence and impartiality in its procedures.[435]

The Commission noted, at the same session, that a structure along the lines suggested in the Working Group's report could be a workable system but that further work on the issue required a renewed mandate from the General Assembly to draft a statute, and that it was now for the General Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis.[436]

The General Assembly, in resolution 47/33 of 25 November 1992, took note with appreciation of the chapter of the report of the Commission on the work of its forty-fourth session, entitled "Draft Code of Crimes against the Peace and Security of Mankind," which was devoted to the question of the possible establishment of an international criminal jurisdiction; invited States to submit to the Secretary-General, if possible before the forty-fifth session of the Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the Assembly at its forty-eighth session.

At its forty-fifth session, in 1993, the Commission decided to reconvene the Working Group it had established at the previous session to continue its work, as requested by the General Assembly in resolution 47/33 as referred to above.[437] The Working Group prepared a preliminary draft statute for an international criminal court and commentaries thereto.[438] Though the Commission was not able to examine the draft articles in detail at the forty-fifth session and to proceed with their adoption, it felt that, in principle, the proposed draft articles provided a basis

[435] See *ibid*., para. 11 and annex, para. 4.

[436] See *ibid*., paras. 11 and 104.

[437] The Commission had before it comments of Governments on the report of the Working Group established at the previous session submitted pursuant to General Assembly resolution 47/33 (see *ibid., 1993,* vol. II (Part One), document A/CN.4/452 and Add.1–3.)

[438] For the revised report of the Working Group, see document A/CN.4/L.490 and Add.1 reproduced in *ibid.* (Part Two), annex.

for examination by the General Assembly at its forty-eighth session. The Commission therefore decided to annex the report of the Working Group containing the draft statute to its report to the General Assembly. The Commission stated that it would welcome comments by the General Assembly and Member States on the specific questions referred to in the commentaries to the various articles, as well as on the draft articles as a whole. It furthermore decided that the draft articles should be transmitted, through the Secretary-General, to Governments for their comments.[439]

The General Assembly, in resolution 48/31 of 9 December 1993, took note with appreciation of chapter II of the report of the Commission on the work of its forty-fifth session, entitled "Draft Code of Crimes against the Peace and Security of Mankind," which was devoted to the question of a draft statute for an international criminal court; invited States to submit to the Secretary-General, as requested by the Commission, written comments on the draft articles proposed by the Working Group on a draft statute for an international criminal court; and requested the Commission to continue its work as a matter of priority on the question with a view to elaborating a draft statute, if possible at its forty-sixth session, in 1994, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States.

At its forty-sixth session, in 1994, the Commission decided to reestablish the Working Group on a draft statute for an international criminal court. The Working Group re-examined the preliminary draft statute for an international criminal court annexed to the Commission's report at the preceding session,[440] and prepared the draft statute,[441] taking into account, *inter alia*, the comments by Governments on the report of the Working Group submitted to the Commission at its previous session,[442] and the views expressed during the debate in the Sixth Committee of the General Assembly at its forty-eighth session on the report of the International Law Commission on the work of its forty-fifth session.[443]

The draft statute consisted of 60 articles which were divided into eight main parts: Part One on Establishment of the Court; Part Two on Composition and Administration of the Court; Part Three on Jurisdic-

[439] See *ibid.*, paras. 99 and 100.

[440] See *ibid.*, annex.

[441] For the final revised report of the Working Group, see document A/CN.4/L.491/Rev.2 and Add.1–3.

[442] See *Yearbook of the International Law Commission, 1994*, vol. II (Part One), document A/CN.4/458 and Add.1–8.

[443] Document A/CN.4/457, section B.

tion of the Court; Part Four on Investigation and Prosecution; Part Five on the Trial; Part Six on Appeal and Review; Part Seven on International Cooperation and Judicial Assistance; and Part Eight on Enforcement. In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system but, rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions. Careful note was also taken of the various provisions regulating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. It was also noted that the Working Group conceived the statute for an international criminal court as an attachment to a future international convention on the matter and drafted the statute's provisions accordingly.[444]

The Commission adopted the draft Statute for an International Criminal Court, together with its commentaries,[445] prepared by the Working Group, and decided, in accordance with article 23 of its Statute, to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.[446] The text of the draft statute is reproduced in volume II, annex VI, section 8.[447]

The General Assembly, in resolution 49/53 of 9 December 1994, welcomed the report of the Commission on the work of its forty-sixth session, including the recommendations contained therein, and decided to establish an *ad hoc* committee open to all States Members of the United Nations or members of specialized agencies to review the major substantive and administrative issues arising out of the draft statute prepared by the Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries. It also decided that the Ad Hoc Committee should submit its report to the General Assembly at the beginning of its fiftieth session in 1995. By the same resolution, the General Assembly invited States to submit to the Secretary-General written comments on the draft statute

[444] See *Yearbook of the International Law Commission, 1994,* vol. II, (Part Two), paras. 84–86.

[445] See *ibid.,* paras. 88 and 91.

[446] See *ibid.*, para. 90.

[447] The draft statute adopted by the Commission is reproduced because of its historical significance and its relevance as part of the legislative history of the Rome Statute of the International Criminal Court.

and requested the Secretary-General to invite such comments from relevant international organs. It further requested the Secretary-General to submit to the Ad Hoc Committee a preliminary report with provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court. The General Assembly decided to include in the provisional agenda of its fiftieth session an item entitled "Establishment of an international criminal court," in order to study the report of the Ad Hoc Committee and the written comments submitted by States and to decide on the convening of the proposed international conference of plenipotentiaries, including its timing and duration.

The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the Commission and considered arrangements for the convening of an international conference.[448]

The General Assembly, in resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.[449]

The General Assembly, in resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court. The Assembly also decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the

[448] See *Official Records of the General Assembly, Fiftieth session, Supplement No. 22* (A/50/22).

[449] See *ibid., Fifty-first session, Supplement No. 22* (A/51/22), vols. I and II.

Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.[450]

The General Assembly, in resolution 52/160 of 15 December 1997, decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, at Rome from 15 June to 17 July 1998. In the same resolution, the General Assembly requested the Secretary-General to invite to the Conference the following organizations to participate as observers: organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work, as well as interested regional intergovernmental organizations and other interested international bodies, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. In addition, the Secretary-General was requested to invite to the Conference to participate in accordance with the resolution and the rules of procedure to be adopted by the Conference non-governmental organizations accredited by the Preparatory Committee with due regard to the provisions of part VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference. The Assembly further requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Statute of an International Criminal Court, which was transmitted to the Conference.[451]

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[450] Documents A/AC.249/1997/L.5, A/AC.249/1997/L.8/Rev.1 and A/AC.249/1997/L.9/Rev.1.

[451] See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, vol. III, Reports and other documents (United Nations publication, Sales No. 02.I.5), document A/CONF.183/2/Add.1.

The Conference met in Rome from 15 June to 17 July 1998.[452] It was attended by 160 States as well as by the observers of the Palestine Liberation Organization, sixteen intergovernmental organizations and other entities, five specialized agencies and related organizations, and nine United Nations programmes and bodies. Furthermore, representatives of 135 non-governmental organizations participated in the work of the Conference in accordance with General Assembly resolution 52/160 of 15 December 1997.

The Conference had before it the draft Statute which was assigned to the Committee of the Whole for its consideration. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

On 17 July 1998, the Conference adopted the Rome Statute of the International Criminal Court[453] which consists of a preamble and 128 articles contained in thirteen parts: Part 1. Establishment of the Court; Part 2. Jurisdiction, Admissibility and Applicable Law; Part 3. General Principles of Criminal Law; Part 4. Composition and Administration of the Court; Part 5. Investigation and Prosecution; Part. 6. The Trial; Part 7. Penalties; Part 8. Appeal and Revision; Part 9. International Cooperation and Judicial Assistance; Part 10. Enforcement; Part 11. Assembly of States Parties; Part 12. Financing; and Part 13. Final Clauses.

The Rome Statute, which is subject to ratification, acceptance or approval, was opened for signature on 17 July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. It remains open for accession by all States. The Rome Statute entered into force on 1 July 2002. As of 31 December 2011, 120 States were parties to the Rome Statute.[454]

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[452] For the Final Act of the Conference, see *ibid.*, vol. I, Final documents (United Nations publication, Sales No. 02.I.5), document A/CONF.183/10.

[453] See United Nations, *Treaty Series*, vol. 2187, p. 3. See also *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, vol. I, Final documents (United Nations publication, Sales No. 02.I.5), document A/CONF.183/9.

[454] The Rome Statute of the International Criminal Court is not reproduced in the annexes of this publication since it was adopted on the basis of the text of the Preparatory Committee which further elaborated the Commission's draft statute for an international criminal court.

The Final Act of the Conference,[455] of which six resolutions adopted by the Conference form an integral part, was signed on 17 July 1998. In one of the resolutions, resolution E, the Conference recommended that a review conference pursuant to article 123 of the Rome Statute consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court. By another resolution, resolution F, the Conference established the Preparatory Commission for the International Criminal Court consisting of representatives of States-signatories of the Final Act and other States which had been invited to participate in the Conference. The Preparatory Commission was entrusted with the preparation of a number of proposals for the practical arrangements for the establishment and coming into operation of the Court, including the draft texts of the rules of procedure and evidence and of the elements of crimes, as well as proposals for a provision on aggression *(see subsection (d) below*).

In successive resolutions adopted from 1998 to 2001, the General Assembly requested the Secretary-General to convene and reconvene the Preparatory Commission to carry out its mandate set forth in Resolution F and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court. From 1999 to 2002, the Preparatory Commission held ten sessions during which it prepared a number of proposals relating to the establishment and operation of the Court, including the draft Rules of Procedure and Evidence and the draft Elements of Crimes, which were transmitted to the Assembly of States Parties to the Rome Statute of the International Criminal Court.[456]

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[455] See footnote 436 above.

[456] See Proceedings of the Preparatory Commission at its First, Second and Third sessions (16–26 February, 26 July-13 August and 29 November-17 December 1999) (document PCNICC/1999/L.5/Rev.1 and Add.1 and 2); Proceedings of the Preparatory Commission at its Fourth session (13–31 March 2000) (document PCNICC/2000/L.1/Rev.1 and Add.1 and Add.2); Proceedings of the Preparatory Commission at its Fifth session (12–30 June 2000) (document PCNICC/2000/L.3/Rev.1); Proceedings of the Preparatory Commission at its Sixth session (27 November-8 December 2000) (document PCNICC/2000/L.4/Rev.1 and Add.1–3); Proceedings of the Preparatory Commission at its Seventh session (26 February-9 March 2001) (document PCNICC/2001/L.1/Rev.1 and Add.1–3); Proceedings of the Preparatory Commission at its Eighth session (24 September-5 October 2001) (document PCNICC/ 2001/L.3/Rev.1 and Add.1); Proceedings of the Preparatory Commission at its Ninth session (8–19 April 2002) (document PCNICC/2002/L.1/Rev.1 and Add.1 and 2); and Proceedings of the Preparatory Commission at its Tenth session (1–12 July 2002) (document PCNICC/2002/L.4/Rev.1); as well as Report of the Preparatory Commission for the International Criminal Court (contained in documents PCNICC/2000/1 and Add.1 and 2; PCNICC/2001/1 and Add.1–4; PCNICC/2002/1 and Add.1 and 2; and PCNICC/2002/2 and Add.1–3). See also the Guide to the Report of the Preparatory Commission prepared by the Secretariat (document PCNICC/2002/3 and Corr.1).

The General Assembly, in resolution 56/85 of 12 December 2001, requested the Secretary-General to make the preparations necessary to convene, in accordance with article 112, paragraph 1, of the Rome Statute, the Assembly of States Parties upon the entry into force of the Rome Statute.

The Assembly of States Parties has met periodically since its first session, in 2002, when it considered the report of the Preparatory Commission and adopted a number of instruments based on the drafts prepared by the Preparatory Commission, including the Rules of Procedure and Evidence and the Elements of Crimes.[457]

With the establishment of the Permanent Secretariat of the Assembly of States Parties to the Rome Statute, by resolution ICC-ASP/2/Res.3, adopted at the second session of the Assembly, on 12 September 2003, the United Nations Secretariat ceased to serve as the Secretariat of the Assembly on 31 December 2003.

The Secretary-General of the United Nations, in his capacity as depositary of the Rome Statute of the International Criminal Court, convened a Review Conference of the Rome Statute[458]which, in accordance with a decision taken by the Assembly of States Parties to the Rome Statute at its eighth session,[459] was held in Kampala, Uganda from 31 May to 11 June 2010. At the Review Conference, States Parties reviewed and amended the Rome Statute of the International Criminal Court (*see, concerning the crime of aggression, subsection (d), below*), conducted a stocktaking of international criminal justice and adopted declarations and resolutions on a variety of issues.[460]

(d) Crime of aggression

The International Law Commission considered the question of the crime of aggression in the context of its work on the draft code of offences against the peace and security of mankind (*see subsection (a), above*) and the draft code of crimes against the peace and security of mankind (*see subsection (b), above*), both of which include provisions on the crime of

[457] See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3, United Nations publication, Sales No. 03.V.2), paras. 16–23.

[458] Article 123, paragraph 1, of the Rome Statute of the International Criminal Court requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven years after its entry into force.

[459] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009* (ICC-ASP/8/20), vol. I, part II, resolution ICC-ASP/8/Res.6, para.2.

[460] For more information about the 2010 Review Conference of the Rome Statute, see the conference website at http://www.icc-cpi.int/Menus/ASP/ReviewConference.

aggression.[461] Likewise, the draft statute of the international criminal court, adopted by the Commission in 1994 (*see subsection (c), above*), included the crime of aggression within the jurisdiction of the Court.

The Rome Statute of the International Criminal Court, in article 5, paragraph 2, provided that the Court should exercise jurisdiction over the crime of aggression once a provision had been adopted defining the crime and setting out the conditions for the exercise of jurisdiction with respect to this crime; such a provision should be consistent with the Charter of the United Nations.[462]

The Rome Conference, which adopted the Statute, also adopted resolution F on the establishment of the Preparatory Commission for the International Criminal Court, which was annexed to the Final Act of the Conference (*see page 116*).[463] The Preparatory Commission was entrusted with the preparation of proposals for a provision on aggression, including the definition and the elements of the crime of aggression as well as the conditions under which the International Criminal Court will exercise its jurisdiction with regard to this crime. The proposals were to be submitted to the Assembly of States Parties of the Court at a review conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute. The provisions relating to the crime of aggression will enter into force for the States Parties in accordance with the relevant provisions of the Statute.[464]

The Preparatory Commission considered the crime of aggression at its second to tenth sessions held from 1999 to 2002,[465] in the context of

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[461] Article 2, paragraphs 1 and 2, of the draft code of offences against the peace and security of mankind, of 1954, characterized an act of aggression and the threat of aggression as on "offence against the peace and security of mankind" which were crimes under international law "for which the responsible individuals shall be punished" (article 1). Article 6 of the draft code of crimes against the peace and security of mankind, adopted in 1996, provides the following: "[a]n individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression".

[462] See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998,* vol. I, Final documents (United Nations publication, Sales No. 02.I.5), document A/CONF.183/9, article 5. Article 5, paragraph 2, was deleted by resolution RC/Res.6, annex 1, adopted by the Review Conference on 11 June 2010. See p. 118.

[463] See *ibid*., document A/CONF.183/10, Annex I, F.

[464] Rome Statute, articles 121 and 123.

[465] See Proceedings of the Preparatory Commission at its First, Second and Third sessions (16–26 February, 26 July-13 August and 29 November-17 December 1999) (document PCNICC/1999/L.5/Rev.1, paras. 12, 15, 16 and 20); Proceedings of the Preparatory Commission at its Fourth session (13–31 March 2000) (document PCNICC/2000/L.1/Rev.1, paras. 9 and 11); Proceedings of the Preparatory Commission at its Fifth session (12–30 June 2000) (document PCNICC/2000/L.3/Rev.1, paras. 9 and 12); Proceedings of

the Working Group on the Crime of Aggression established as its third session, in 1999.[466] At its tenth session, the Preparatory Commission agreed to include in its report to the Assembly of States Parties the discussion paper[467] on the definition and elements of the crime of aggression prepared by the Coordinator of the Working Group, together with a list of all proposals and related documents on the crime of aggression issued by the Preparatory Commission as well as the historical review of developments relating to aggression[468] prepared by the Secretariat for transmission to the Assembly of States Parties.[469]

The General Assembly, in resolutions 55/155 of 12 December 2000 and 56/85 of 12 December 2001, noted the importance of the growing participation in the work of the Working Group on the Crime of Aggression.

At its first session, in September 2002, the Assembly of States Parties adopted a resolution on the continuity of work in respect of the crime of aggression, by which it took the following decisions: (1) a special working group on the crime of aggression shall be established, open on an equal footing to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, for the purpose of elaborating the proposals for a provision on aggression in accordance with the Rome Statute (article 5, paragraph 2) and Resolution F (paragraph 7); (2) the special working group shall submit such proposals to the Assembly for consideration at a Review Conference; and (3) the special working group shall meet during the regular sessions of the Assembly or at any other time that the Assembly deems appropri-

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the Preparatory Commission at its Sixth session (27 November-8 December 2000) (document PCNICC/2000/L.4/Rev.1, paras. 10 and 11); Proceedings of the Preparatory Commission at its Seventh session (26 February-9 March 2001) (document PCNICC/2001/L.1/Rev.1, paras. 9, 11 and 14); Proceedings of the Preparatory Commission at its Eighth session (24 September-5 October 2001) (document PCNICC/2001/L.3/Rev.1, paras. 10, 11 and 14); Proceedings of the Preparatory Commission at its Ninth session (8–19 April 2002) (document PCNICC/2002/L.1/Rev.1, para. 14); Proceedings of the Preparatory Commission at its Tenth session (1–12 July 2002) (document PCNICC/2002/L.4/Rev.1, paras. 9, 10 and 16); and Report of the Preparatory Commission for the International Criminal Court (document PCNICC/2002/2, paras. 8 and 9 as well as document PCNICC/2002/2/Add.2).

[466] See Proceedings of the Preparatory Commission at its First, Second and Third sessions (16–26 February, 26 July-13 August and 29 November-17 December 1999) (document PCNICC/1999/L.5/Rev.1), para. 16.

[467] Document PCNICC/2002/WGCA/RT.1/Rev.2.

[468] Document PCNICC/2002/WGCA/L.1 and Add.1 reproduced in "Historical Review of Developments relating to Aggression" (United Nations publication, Sales No. E.03.V.10).

[469] See Report of the Preparatory Commission for the International Criminal Court (document PCNICC/2002/2, para. 9, as well as document PCNICC/2002/2/Add.2).

ate and feasible.[470] The Assembly subsequently decided that the Special Working Group on the Crime of Aggression should meet during annual sessions of the Assembly, while leaving open the possibility of informal inter-sessional meetings depending upon the availability of funding for such a meeting by any Government wishing to do so.[471]

At its second session, in 2003, the Assembly of States Parties decided, on the recommendation of the Chairman of the Special Working Group, to annex the discussion paper on the definition and elements of the crime of aggression, prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the International Criminal Court,[472] to the report of the Assembly.[473]

At its third to seventh sessions, from 2004 to 2008, the Assembly took note of the reports of the Special Working Group.[474] At its eighth session, in 2009, the Assembly decided that the Review Conference would be held from 31 May to 11 June 2010, in Kampala, Uganda.[475] The Assembly further decided that the Review Conference should consider, *inter alia*, the proposals on the crime of aggression and on elements of crimes.

At its 13th meeting, on 11 June 2010, the Review Conference adopted the report of the Working Group on the Crime of Aggression.[476] At the same meeting, the Conference adopted, by consensus, resolution RC/Res.6 by which it amended the Rome Statute so as to include a definition of the crime of aggression[477] and the conditions for the exercise by the Court of its jurisdiction with respect to this crime.[478] By the same resolution, the Conference adopted amendments to the Elements of Crimes related to the crime of aggression and deleted paragraph 2 of article 5

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[470] Resolution ICC-ASP/1/Res.1 of 9 September 2002. See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3, United Nations publication, Sales No. 03.V.2), p. 328.

[471] See *ibid., First Session (First and Second Resumptions), New York, 3–7 February and 21–23 April 2003* (ICC-ASP/1/3/Add.1, United Nations publication, Sales No. 03.V.8), paras. 37 and 38.

[472] As contained in document PCNICC/2002/2/Add.2.

[473] See ICC-ASP/2/10, Annex II.

[474] See ICC/ASP/3/25, Annex II (2004); ICC-ASP/4/32, Annex II (2005); ICC-ASP/5/32, Annex II (2006); ICC-ASP/6/20, Annex II (2007); and ICC-ASP/7/20, Annex III (2008).

[475] See ICC-ASP/8/20.

[476] RC/11, Annex III.

[477] Article 8*bis* of the Rome Statute.

[478] Articles 15*bis* and 15*ter* and 25, para. 3*bis* of the Rome Statute.

of the Rome Statute.[479] As of 31 December 2011, no State had ratified or acceded to the Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court.

8. Nationality, including statelessness

At its first session, in 1949, the Commission selected nationality including statelessness as a topic for codification without, however, including it in the list of topics to which it gave priority.

During its second session, in 1950, the Commission was notified of resolution 304 D (XI) of the Economic and Social Council on the nationality of married women, adopted on 17 July 1950, in which the Council proposed that the Commission undertake the drafting of a convention, embodying the principles recommended by the Commission on the Status of Women. After considering the resolution, the Commission deemed it appropriate to entertain the proposal of the Council in connection with its work on the topic of nationality, including statelessness.

At its third session, in 1951, the Commission was notified of another resolution of the Economic and Social Council, resolution 319 B III (XI) of 11 August 1950, urging the Commission to prepare at the earliest possible date a draft international convention or conventions for the elimination of statelessness. The Commission noted that this matter could be considered within the framework of the topic of nationality, including statelessness. At the same session, the Commission decided to initiate work on this topic.

The Commission considered the topic from its third session, in 1951, to its sixth session, in 1954. It appointed Manley O. Hudson and Roberto Córdova as the successive Special Rapporteurs for the topic at its third and fourth sessions, in 1951 and 1952, respectively. At the latter session, the Commission also invited Ivan S. Kerno to serve as an individual expert of the Commission on the question of elimination or reduction of statelessness. In connection with its work on this topic, the Commission had before it the reports of the Special Rapporteurs,[480]

[479] See RC/Res.6, Annex I. Paragraph 2 of article 5 provided that "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

[480] For the report of Manley O. Hudson, see *Yearbook of the International Law Commission, 1952,* vol. II, document A/CN.4/50; and for the reports of Roberto Córdova, see *ibid*., *1953,* vol. II, documents A/CN.4/64 and A/CN.4/75; and *ibid*., *1954,* vol. II, documents A/CN.4/81 and A/CN.4/83.

comments by Governments,[481] documents prepared by the Secretariat[482] as well as memoranda prepared by the expert.[483]

(a) Nationality of married persons

At its fourth session, in 1952, the Special Rapporteur submitted to the Commission, as a part of his report on nationality, including statelessness, a draft of a convention on nationality of married persons.[484] The draft followed very closely the terms proposed by the Commission on the Status of Women and approved by the Economic and Social Council. The Commission, however, decided that the question of the nationality of married women could not suitably be considered by it separately but only in the context, and as an integral part, of the whole subject of nationality. The Commission therefore did not take further action with respect to the draft.[485]

The problem of the nationality of married women continued to be under consideration by other organs of the United Nations. In 1955, the General Assembly took note of the preamble and the first three substantive articles of the draft Convention on the Nationality of Married Women, which had been drafted by the Commission on the Status of Women. After the final clauses of the draft Convention were prepared by the Third (Social) Committee, the Assembly, by resolution 1040 (XI) of 29 January 1957, adopted the Convention, which came into force on 11 August 1958.[486] As of 31December 2011, 74 States were parties to the Convention on the Nationality of Married Women.

(b) Future statelessness

At its fourth session, in 1952, the Commission also had before it, as a part of the report submitted by the Special Rapporteur, Manley O. Hud-

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[481] Document A/CN.4/82 and Add.1–8 reproduced in *Yearbook of the International Law Commission, 1954,* vol. II, document A/2693, annex.

[482] See *ibid., 1950,* vol. II, document A/CN.4/33; *ibid., 1951,* vol. II, document A/CN.4/47; and *ibid., 1954,* vol. II, documents A/CN.4/81 and A/CN.4/84; as well as document A/CN.4/56 and Add.1. In addition, the Secretariat published a volume in the *United Nations Legislative Series* entitled *"Laws Concerning Nationality"* (ST/LEG/SER.B/4, United Nations publication, Sales No. 1954.V.1) and supplement thereto (ST/LEG/SER.B/9, United Nations publication, Sales No. 59.V.3).

[483] Documents A/CN.4/66 and A/CN.4/67.

[484] See *Yearbook of the International Law Commission, 1952,* vol. II, document A/CN.4/50, annex II.

[485] See *ibid.,* document A/2163, para. 30.

[486] United Nations, *Treaty Series,* vol. 309, p. 65.

son, a working paper dealing with statelessness.[487] The Commission then requested the Special Rapporteur to prepare, for consideration at its fifth session, a draft convention on the elimination of statelessness and one or more draft conventions on the reduction of future statelessness.

At its fifth session, in 1953, on the basis of a report containing draft articles submitted by the new Special Rapporteur, Roberto Córdova,[488] the Commission adopted on first reading two draft conventions, one on the elimination of future statelessness and another on the reduction of future statelessness, which were then transmitted to Governments for comment.

At its sixth session, in 1954, the Commission discussed the observations made by Governments on the two draft conventions and redrafted some of the articles in the light of their comments. At the same session, the Commission adopted the final drafts of both conventions.[489] In submitting these final drafts to the General Assembly, the Commission said:

> "The most common observation made by Governments was that some provisions of their legislation conflicted with certain articles of the draft conventions. Since statelessness is, however, attributable precisely to the presence of those provisions in municipal law, the Commission took the view that this was not a decisive objection for, if Governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation."[490]

The draft conventions, each consisting of eighteen articles, aimed, on the one hand, at facilitating the acquisition of the nationality of a country by birth within its borders and, on the other hand, at avoiding the loss of a nationality except when another nationality was acquired. The convention on the elimination of future statelessness (the draft of which is reproduced in volume II, annex VI, section 4), would impose stricter obligations on the contracting parties than the one which had the more modest aim of merely reducing statelessness. The Commission stated in its report that it would be for the General Assembly to consider to which of the draft conventions preference should be given.[491]

At the Assembly's 1954 session, the majority of representatives in the Sixth Committee expressed the opinion that the time was not ripe

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[487] See *Yearbook of the International Law Commission, 1952,* vol. II, document A/CN.4/50, annex III.

[488] See *ibid., 1953,* vol. II, document A/CN.4/64.

[489] See *ibid., 1954,* vol. II, document A/2693, para. 25.

[490] See *ibid.,* para. 12.

[491] See *ibid.*, document A/2693, para. 14.

for immediate consideration of the substance of the draft conventions and that the positions of Member States with respect to the draft conventions had not yet been sufficiently ascertained. The Sixth Committee, however, approved a draft resolution under which the General Assembly would express "its desire that an international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States have communicated to the Secretary-General their willingness to cooperate in such a conference". This resolution was subsequently adopted by the General Assembly on 4 December 1954 as resolution 896 (IX).

The United Nations Conference on the Elimination or Reduction of Future Statelessness[492] met at Geneva from 24 March to 18 April 1959, with representatives of thirty-five States participating. The Conference decided to use as the basis for its discussion the draft convention on the reduction of future statelessness—one of the two drafts prepared by the International Law Commission—and adopted provisions aimed at reducing statelessness at birth.

It did not, however, reach agreement as to how to limit the freedom of States to deprive citizens of their nationality in cases where such deprivation would render them stateless. Consequently, the Conference recommended to the competent organs of the United Nations that it be reconvened at the earliest possible time in order to complete its work.

The second part of the Conference, in which representatives of thirty States participated, met in New York from 15 to 28 August 1961. The Conference adopted the Convention on the Reduction of Statelessness,[493] which was opened for signature from 30 August 1961 to 31 May 1962. Signatures are subject to ratification. The Convention is open for accession by any non-signatory State entitled to become a party. The Convention, which is reproduced in volume II, annex V, section 2, entered into force on 13 December 1975. By 31 December 2011, 42 States were parties to the Convention.

(c) Present statelessness

At its fifth session, in 1953, the Special Rapporteur, Roberto Córdova, prepared an interim report and drafts of conventions bearing on the problem of the elimination or reduction of existing statelessness.[494] The Commission requested the Special Rapporteur to devote further study to the matter and prepare a report for the Commission's sixth session, in 1954.

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[492] For the Final Act of the Conference, see document A/CONF.9/14.

[493] United Nations, *Treaty Series,* vol. 989, p. 175.

[494] See *Yearbook of the International Law Commission, 1953*, vol. II, document A/CN.4/75.

At its sixth session, in 1954, the Commission had before it the report of the Special Rapporteur,[495] containing four draft instruments dealing with elimination or reduction of present statelessness. In the course of the Commission's consideration of the report, the Special Rapporteur withdrew three of the proposed drafts. The Commission accepted as the basis of its discussion the fourth draft instrument proposed by the Special Rapporteur, the Alternative Convention on the Reduction of Present Statelessness.

The Commission considered that it was not feasible to suggest measures for the total and immediate elimination of present statelessness and that present statelessness could only be reduced if stateless persons acquired a nationality which would normally be that of the country of residence. Since, however, the acquisition of nationality is in all countries governed by certain statutory conditions, including residence qualifications, the Commission considered that for the purpose of improving the condition of statelessness it would be desirable that stateless persons should be given the special status of "protected person" in their country of residence prior to the acquisition of nationality. Stateless persons possessing this status would have all civil rights, and would also be entitled to the diplomatic protection of the Government of the country of residence;[496] the protecting State might impose on them the same obligations as it imposed on nationals.[497]

At the same session, the Commission formulated its proposals accordingly and adopted them in the form of seven articles with commentaries.[498] They were submitted to the General Assembly as part of its final report on nationality, including statelessness. In submitting the proposals, the Commission said: "In view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted, though worded in the form of articles, should merely be regarded as suggestions which Governments may wish to take into account when attempting a solution of this urgent problem."[499]

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[495] See *ibid., 1954*, vol. II, document A/CN.4/81.

[496] The Commission included the possibility of the exercise of diplomatic protection of stateless persons by the State in which the person lawfully and habitually resides, in its draft articles on diplomatic protection, article 8, adopted in 2006 (*see section 27 below*). See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 49.

[497] See *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, paras. 29 and 31.

[498] See *ibid.*, paras. 26–37.

[499] See *ibid.*, para. 36. The draft articles to be regarded as suggestions are not reproduced in the annexes of this publication.

(d) Multiple nationality

At its sixth session, in 1954, the Commission held a general discussion on the subject of multiple nationality and had before it a report of the Special Rapporteur, Roberto Córdova,[500] and a memorandum by the Secretariat.[501] Several members expressed the opinion that the Commission should content itself with the work it had done so far in the field of nationality, and the Commission thereupon decided to "defer any further consideration of multiple nationality and other questions relating to nationality".[502]

The Commission returned to the question of nationality in the context of its work on the topics of nationality in relation to the succession of States (*see section 24 below*) and diplomatic protection (*see section 27 below*).

9. Law of the sea

(a) Regime of the high seas

At its first session, in 1949, the Commission selected the regime of the high seas as a topic for codification to which it gave priority and appointed J. P. A. François as Special Rapporteur for it.

The Commission considered this topic at its second, third, fifth, seventh and eighth sessions, in 1950, 1951, 1953, 1955 and 1956, respectively. In connection with its work on the topic, the Commission had before it the reports of the Special Rapporteur,[503] information provided by Governments and international organizations[504] as well as documents prepared by the Secretariat.[505]

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[500] See *ibid.,* document A/CN.4/83.

[501] See *ibid.,* document A/CN.4/84.

[502] See *ibid.,* document A/2693, para. 39.

[503] See *ibid., 1950,* vol. II, document A/CN.4/17; *ibid., 1951*, vol. II, document A/CN.4/42; *ibid., 1952,* vol. II, document A/CN.4/51; *ibid., 1953,* vol. II, documents A/CN.4/60 and A/CN.4/69; *ibid., 1954,* vol. II, document A/CN.4/79; and *ibid., 1956*, vol. II, documents A/CN.4/97 and A/CN.4/103.

[504] See *ibid., 1950,* vol. II, document A/CN.4/19; *ibid., 1953,* vol. II, document A/CN.4/70; *ibid., 1954,* vol. II, document A/CN.4/86; and *ibid., 1956,* vol. II, documents A/CN.4/97/Add.1 and Add.3, A/CN.4/99 and Add.1 to 9 and A/CN.4/100; as well as document A/CN.4/55 and Add.1, Add.1/Rev.1 and Add.2–6 reproduced in *ibid., 1953,* vol. II, document A/2456, annex II.

[505] See *ibid., 1950,* vol. II, documents A/CN.4/30 and A/CN.4/32; and document A/CN.4/38. In addition, the Secretariat published volumes in the *United Nations Legislative Series* entitled *"Laws and Regulations on the Regime of the High Seas"* (volume I of which covers laws and regulations relating to continental shelf, contiguous zones and supervision of foreign vessels on the high seas (ST/LEG/SER.B/1, United Nations publica-

At its second session, in 1950, the Commission surveyed the various questions falling within the scope of the general topic of the regime of the high seas, e.g., nationality of ships, safety of life at sea, slave trade, submarine telegraph cables, resources of the high seas, right of pursuit, right of approach, contiguous zones, sedentary fisheries and the continental shelf.

At its third session, in 1951, the Commission, on the basis of the second report of the Special Rapporteur,[506] provisionally adopted draft articles on the following subjects: the continental shelf; resources of the sea; sedentary fisheries; and contiguous zone.

At its fifth session, in 1953, the Commission, after examining these provisional draft articles once again in the light of comments of Governments, prepared final drafts on the following three questions: continental shelf; fisheries; and contiguous zone. The Commission recommended that the Assembly adopt by resolution the part of the report covering the draft articles on the continental shelf.[507] In respect of the draft articles on fisheries, the Commission recommended that the General Assembly approve the articles by resolution and enter into consultation with the Food and Agriculture Organization of the United Nations with a view to the preparation of a convention or conventions on the subject in conformity with the general principles embodied in the articles.[508] As the Commission had not yet adopted draft articles on the territorial sea, it recommended that the General Assembly take no action with regard to the draft article on the contiguous zone, since the report covering the article was already published.[509]

The General Assembly, by resolution 798 (VIII) of 7 December 1953, decided to defer action until all the problems relating to the regime of the high seas and the regime of territorial waters had been studied by the Commission and reported upon by it to the Assembly. The question of the continental shelf was again brought before the Assembly at its ninth session, in 1954, by ten Member States, which asked the Assembly to avoid undue delay in giving substantive consideration to the question. By resolution 899 (IX) of 14 December 1954, the Assembly again

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tions, Sales No. 1951.V.2) and volume II covers laws relating to jurisdiction over crimes committed abroad or on the high seas (ST/LEG/SER.B/2, United Nations publications, Sales No. 1952.V.1)) and *"Laws Concerning the Nationality of Ships"* (ST/LEG/SER.B/5 and Add.1, United Nations publication, Sales No. 1956.V.1) as well as a supplement to those volumes (ST/LEG/SER.B/8, United Nations publication, Sales No. 59.V.2).

[506] See *Yearbook of the International Law Commission, 1951*, vol. II, document A/CN.4/42.

[507] See *ibid., 1953*, vol. II, document A/2456, paras. 62 and 91.

[508] See *ibid.*, paras. 94 and 102.

[509] See *ibid.*, paras. 105 and 114.

deferred action and requested the Commission to submit its final report on the regime of the high seas, the regime of territorial waters and all related problems in time for their consideration by the Assembly at its eleventh session, in 1956.

At its seventh session, in 1955, the Commission considered certain subjects concerning the high seas which had not been dealt with in its 1953 report and adopted, on the basis of the Special Rapporteur's sixth report,[510] a provisional draft on the regime of the high seas, which was submitted to Governments for comments. The Commission also communicated the draft articles relating to the conservation of the living resources of the sea, which comprised a part of the provisionally adopted draft on the regime of the high seas, and the relevant chapter of its report to the organizations represented by observers at the International Technical Conference on the Conservation of the Living Resources of the Sea, which was convened by the Secretary-General in pursuance of General Assembly resolution 900 (IX) of 14 December 1954 and was held at Rome from 18 April to 10 May 1955. In preparing the articles dealing with the conservation of the living resources of the sea, the Commission took account of the report of that Conference.[511] At its eighth session, in 1956, the Commission examined replies from Governments and from the International Commission for the Northwest Atlantic Fisheries and drew up a final report on the subjects relating to the high seas, which was incorporated by the Commission in its consolidated draft on the law of the sea (*see subsection (c) below*).

(b) Regime of the territorial sea[512]

At its first session, in 1949, the Commission selected the regime of the territorial waters as a topic for codification without, however, including it in the list of topics to which it gave priority. At its third session, in 1951, in pursuance of a recommendation contained in General Assembly resolution 374 (IV) of 6 December 1949, the Commission decided to initiate work on the regime of the territorial waters and appointed J. P. A. François as Special Rapporteur for that topic as well.

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[510] See *ibid., 1954*, vol. II, document A/CN.4/79.

[511] *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April-10 May 1955, Rome* (United Nations publication, Sales No. 1955.II.B.2).

[512] At its fourth session, in 1952, the Commission decided, in accordance with a suggestion of the Special Rapporteur, to use the term "territorial sea" in lieu of "territorial waters". See *Yearbook of the International Law Commission, 1952*, vol. II, document A/2163, para. 37. The General Assembly, in its relevant resolutions, continued using the term "territorial waters" in the title of the topic.

The Commission considered this topic at its fourth and from its sixth to eighth sessions, in 1952 and from 1954 to 1956, respectively. In connection with its work on this topic, the Commission had before it the reports of the Special Rapporteur[513] and information provided by Governments.[514]

At its fourth session, in 1952, the Special Rapporteur submitted a report[515] dealing in particular with the question of baselines and bays. With regard to the delimitation of the territorial sea of two adjacent States, the Commission, at that session, decided to ask Governments for information concerning their practice and for any observations they might consider useful. The Commission also decided that the Special Rapporteur should be free to consult with experts with a view to elucidating certain technical aspects of the problem. The group of experts met at The Hague in April 1953 under the chairmanship of the Special Rapporteur.[516] In his third report on the regime of the territorial sea,[517] which was submitted to the Commission in 1954, the Special Rapporteur incorporated changes suggested by the experts and also took into account the comments received from Governments on the delimitation of the territorial sea between two adjacent States.

At its sixth and seventh sessions, in 1954 and 1955, the Commission adopted provisional articles concerning the regime of the territorial sea, with commentaries, and invited Governments to furnish their observations on the articles.

At its eighth session, in 1956, the Commission drew up its final report on the territorial sea, incorporating a number of changes deriving from the replies of Governments, which was incorporated by the Commission in its consolidated draft on the law of the sea.[518]

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[513] See *ibid*., document A/CN.4/53; *ibid*., *1953,* vol. II, document A/CN.4/61 and Add.1; *ibid*., *1954,* vol. II, document A/CN.4/77; and *ibid*., *1956,* vol. II, document A/CN.4/97; as well as amendments proposed by the Special Rapporteur to the provisional articles concerning the regime of the territorial sea in document A/CN.4/93 (*ibid*., *1955,* vol. II).

[514] See *ibid*., document A/CN.4/71 and Add.1 and 2; and *ibid*., *1956,* vol. II, documents A/CN.4/97/Add.2 and A/CN.4/99 and Add.1–9; as well as document A/CN.4/90 and Add.1–6 reproduced in *ibid*., *1955,* vol. II, document A/2934, annex.

[515] See *ibid*., *1952,* vol. II, document A/CN.4/53.

[516] For the report of the experts, see the annex to the addendum to the second report of the Special Rapporteur; *ibid*., *1953,* vol. II, document A/CN.4/61/Add.1.

[517] See *ibid*., *1954,* vol. II, document A/CN.4/77.

[518] For the use of the Commission in its work on the subject of the territorial sea, the Secretariat published a volume in the *United Nations Legislative Series* entitled *"Laws and Regulations on the Regime of the Territorial Sea"* (ST/LEG/SER.B/6, United Nations publication, Sales No. 1957.V.2).

(c) Consolidated draft on the law of the sea

At the Commission's eighth session, in 1956, all the draft provisions adopted by the Commission concerning the law of the sea were recast so as to constitute a single coordinated and systematic body of rules. At the same session, the Commission adopted a final draft on the law of the sea, containing seventy-three articles and commentaries thereto.[519] The Commission noted that, in order to give effect to the project as a whole, it would be necessary to have recourse to conventional means. Accordingly, in submitting the final draft to the General Assembly in 1956, it recommended that the General Assembly summon an international conference of plenipotentiaries.[520]

In accordance with the recommendation of the Commission, the General Assembly, by resolution 1105 (XI) of 21 February 1957, decided to convene an international conference of plenipotentiaries "to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as the conference may deem appropriate".

The United Nations Conference on the Law of the Sea met at Geneva from 24 February to 27 April 1958. Of the eighty-six States represented there, seventy-nine were Members of the United Nations and seven were members of specialized agencies though not of the United Nations.

The final report of the Commission on the law of the sea had been referred to the Conference by the General Assembly as the basis for its consideration of the various problems involved in the development and codification of the law of the sea. In addition to this, the Conference had before it more than thirty preparatory documents, prepared by the United Nations Secretariat, by certain specialized agencies and by a number of independent experts invited by the Secretary-General to submit studies on various specialized topics. One question which had not been covered in the report of the Commission, namely, the question of free access to the sea of land-locked countries, was dealt with in a memorandum submitted to the Conference by a preliminary conference of land-locked States which met at Geneva from 10 to 14 February 1958 prior to the convening of the United Nations Conference.[521]

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[519] See *Yearbook of the International Law Commission, 1956,* vol. II, document A/3159, para. 33.

[520] See *ibid.,* paras. 27 and 28.

[521] See *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February-27 April 1958,* vol. VII, Fifth Committee (Question of Free Access to the Sea of Land-Locked Countries) (United Nations publication, Sales No. 58.V.4, vol. VII), Annexes, document A/CONF.13/C.5/L.1.

In view of the wide scope of the work before it, the Conference established five main committees: First Committee (territorial sea and contiguous zone); Second Committee (high seas: general regime); Third Committee (high seas: fishing and conservation of living resources); Fourth Committee (continental shelf); and Fifth Committee (question of free access to the sea of land-locked countries). Each committee submitted to the plenary meeting of the Conference a report summarizing the results of its work and appending draft articles as approved. The Conference agreed to embody these draft articles, some in amended form, in the following four separate conventions: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf. The work of the Fifth Committee did not result in a separate convention, but its recommendations were included in article 14 of the Convention on the Territorial Sea and the Contiguous Zone and in articles 2, 3 and 4 of the Convention on the High Seas.[522]

In addition to the four Conventions, the Conference adopted an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, which provides for the compulsory jurisdiction of the International Court of Justice, or, if the parties so prefer, for submission of the dispute to arbitration or conciliation. The texts of the Conventions and Protocol are reproduced in volume II, annex V, section 1. The Conference also adopted nine resolutions on various subjects, including the matter of convening a second United Nations Conference on the Law of the Sea.[523]

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[522] In pursuance of a resolution adopted by the First United Nations Conference on Trade and Development at Geneva in June 1964, the General Assembly, on 10 February 1965, decided to convene an international conference of plenipotentiaries to consider the question of transit trade of land-locked countries and to embody the results of its work in a convention and such other instruments as it might deem appropriate. The United Nations Conference on Transit Trade of Land-locked Countries, at which the Governments of fifty-eight States were represented, met in New York from 7 June to 8 July 1965. The Conference adopted the Convention on Transit Trade of Land-locked States and two resolutions. United Nations, *Treaty Series,* vol. 597, p. 3.

[523] *Ibid.,* vol. 450, p. 58. Resolution VII on Regime of Historic Waters was adopted as a follow-up to the adoption by the Conference of paragraph 6 of article 7 of the Convention on the Territorial Sea and Contiguous Zone, under which the regime established by the Convention for bays "shall not apply to so-called 'historic' bays". Further to this resolution, the General Assembly, by resolution 1453 (XIV) of 7 December 1959, requested the Commission:

> " . . . as soon as it considers it advisable, to undertake the study of the question of the juridical regime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate."

The Final Act of the Conference was signed on 29 April 1958. All the Conventions remained open for signature until 31 October 1958, by all States Members of the United Nations or of any of the specialized agencies and by any other States invited by the General Assembly to become a party; since that date they have been open to accession by all such States. The Optional Protocol was open to all States becoming parties to any of the Conventions. The Conventions were subject to ratification. The Optional Protocol was subject to ratification, where necessary, according to the constitutional requirements of the signatory States. Each of the Conventions was to come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

The Convention on the High Seas[524] and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes[525] came into force on 30 September 1962. The Convention on the Continental Shelf[526] came into force on 10 June 1964; the Convention on the Territorial Sea and the Contiguous Zone[527] on 10 September 1964; and the Convention on Fishing and Conservation of the Living Resources of the High Seas[528] on 20 March 1966. By 31 December 2011, 52 States were parties to the Convention on the Territorial Sea and the Contiguous Zone, 63 States were parties to the Convention on the High Seas, 38 States were parties to the Convention on Fishing and Conservation of the Living Resources of the High Seas, 58 States were parties to the Convention on the Continental Shelf and 38 States were parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

On 10 December 1958, the General Assembly, by resolution 1307 (XIII), asked the Secretary-General to convene a second United Nations

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The Commission requested the Secretariat to undertake a preliminary study of the topic and decided at its fourteenth session, in 1962, to include the topic in its programme of work, but without setting any date for the start of its consideration or appointing a Special Rapporteur. The Secretariat study is reproduced in the *Yearbook of the International Law Commission, 1962,* vol. II, document A/CN.4/143. At its nineteenth session, in 1967, the Commission considered whether to proceed with the study of this topic. The Commission's report summarized the views expressed as follows:

> "Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems, and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study." (See *ibid., 1967*, vol. II, document A/6709/Rev.1, para. 45.)

[524] United Nations, *Treaty Series,* vol. 450, p. 82.

[525] *ibid.,* p. 169.

[526] *ibid.,* vol. 499, p. 311.

[527] *ibid.,* vol. 516, p. 205.

[528] *ibid.,* vol. 559, p. 285.

Conference on the Law of the Sea to consider further the questions of the breadth of the territorial sea and fishery limits, questions which had been left unsettled by the first Conference on the Law of the Sea. Eighty-eight States were represented at the second Conference, which was held in Geneva from 17 March to 26 April 1960. The Conference failed to adopt any substantive proposal on the two questions before it. It did, however, approve a resolution expressing the need for technical assistance in making adjustments to their coastal and distant-waters fishing in the light of developments in international law and practice.[529]

At its twenty-fifth session, the General Assembly, by resolution 2750 C (XXV) of 17 December 1970, decided, *inter alia*, to convene in 1973 a conference on the law of the sea which would deal with the establishment of an equitable international regime—including an international machinery—for the seabed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction. The conference would also deal with issues concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits and contiguous zone), fishing and conservation of the living resources of the high seas (including the question of preferential rights of coastal States), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research. The Assembly, by the same resolution, enlarged the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, established by General Assembly resolution 2467A (XXIII) of 21 December 1968, to eighty-six members, and instructed it to act as a preparatory body for the 1973 conference and to prepare draft treaty articles embodying the international regime—including an international machinery—for the area and resources of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, and a comprehensive list of subjects and issues relating to the law of the sea and draft articles on such subjects and issues.[530]

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[529] See *Official Records of the Second United Nations Conference on the Law of the Sea, Geneva, 17 March-26 April 1960* (United Nations publication, Sales No. 60.V.6), Annexes, document A/CONF.19/L.15, annex.

[530] In 1970, the Secretariat published a volume in the *United Nations Legislative Series* entitled *"National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea"*(ST/LEG/SER.B/15, United Nations publication, Sales No. 70.V.9), followed by three volumes entitled *"National Legislation and Treaties Relating to the Law of the Sea"* (ST/LEG/SER.B/16, United Nations publication, Sales No. 74.V.2; ST/LEG/SER.B/18, United Nations publication, Sales No. 76.V.2; and ST/LEG/SER.B/19, United Nations publication, Sales No. 80.V.3) in 1974, 1976 and 1980, with the main pur-

The Conference held eleven sessions, from 1973 to 1982. On 10 December 1982, it adopted the United Nations Convention on the Law of the Sea,[531] which includes 320 articles and nine annexes. It also adopted a Final Act to which are annexed, *inter alia*, resolutions and a statement of understanding. The Convention remained open for signature until 9 December 1984 at the Ministry of Foreign Affairs of Jamaica and also, from 1 July 1983 until 9 December 1984, at United Nations Headquarters in New York. It entered into force on 16 November 1994, twelve months after the date of deposit of the sixtieth instrument. As of 31 December 2011, 162 States were parties to the treaty. It may be noted that a number of articles of the 1982 Convention are based on those of the 1958 Conventions. In accordance with paragraph 1 of article 311 of the 1982 Convention, that Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.

10. Arbitral procedure

At its first session, in 1949, the Commission selected arbitral procedure as one of the topics for codification to which it gave priority and appointed Georges Scelle as Special Rapporteur. The Commission considered this topic at its second, fourth, fifth, ninth and tenth sessions, in 1950, 1952, 1953, 1957 and 1958, respectively. In connection with its work on this topic, the Commission had before it the reports of the Special Rapporteur,[532] information provided by Governments[533] as well as documents prepared by the Secretariat.[534]

At its fourth session, in 1952, the Commission adopted on first reading a draft on arbitral procedure and communicated it to Governments for comments. At its fifth session, in 1953, the Commission adopted a revised draft on arbitral procedure, which was at that time intended as a final draft.[535] In its report on the fifth session to the General Assembly, the Commission expressed the view that this final draft, as adopted, called for

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pose being to provide as complete and up-to-date information as possible for the participants in the Third United Nations Conference on the Law of the Sea.

[531] United Nations, *Treaty Series,* vol. 1833, p. 3.

[532] See *Yearbook of the International Law Commission, 1950,* vol. II, document A/CN.4/18; *ibid.*, *1951,* vol. II, document A/CN.4/46; *ibid.*, *1952*, vol. II, document A/CN.4/57; *ibid.*, *1957*, vol. II, document A/CN.4/109; and *ibid.*, *1958,* vol. II, document A/CN.4/113.

[533] See *ibid., 1950,* vol. II, document A/CN.4/19; as well as document A/CN.4/68 and Add.1 and 2 reproduced in *ibid., 1953,* vol. II, document A/2456, annex I.

[534] See *ibid., 1950,* vol. II, document A/CN.4/35; as well as documents A/CN.4/29, A/CN.4/36 and A/CN.4/92 (United Nations publication, Sales No. 1955.V.1).

[535] See *Yearbook of the International Law Commission, 1953,* vol. II, document A/2456, para. 57.

action on the part of the Assembly of the kind contemplated in article 23, paragraph 1 (*c*), of the Statute of the Commission, namely, that the draft should be recommended to Member States with a view to the conclusion of a convention; the Commission recommended accordingly.[536]

The Commission emphasized that the draft had a dual aspect, representing both a codification of existing law on international arbitration and a formulation of what the Commission considered to be desirable developments in the field. Thus the Commission had taken as a basis the traditional features of arbitral procedure in the settlement of international disputes, such as those relating to the undertaking to arbitrate, the constitution and powers of an arbitral tribunal, the general rules of evidence and procedure, and the award of arbitrators. At the same time, the Commission had also provided certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate. For example, in order to prevent one of the parties from avoiding arbitration by claiming that the dispute in question was not covered by the undertaking to arbitrate, the draft provided for a binding decision by the International Court of Justice as to the arbitrability of the dispute. Similarly, in order to avoid the frustration that might be caused by one party withdrawing its arbitrator, the draft provided for the immutability of the tribunal once it had been formed, except in specified cases. The draft also included provisions for the drawing up of the compromis—an agreement concerning the undertaking to arbitrate and the arrangements for arbitration proceedings, e.g., nomination of arbitrators, the date and place for the proceedings—by the arbitral tribunal in cases where the parties had failed to reach agreement on the subject.[537]

The draft was considered by the General Assembly at its eighth and tenth sessions, in 1953 and 1955, where it was subjected to considerable criticism, particularly in view of the Commission's recommendation for the conclusion of a convention on the subject. The Assembly, in resolution 989 (X) of 14 December 1955, noting that a number of suggestions for improvements on the draft had been put forward in the comments submitted by Governments and in the observations made in the Sixth Committee at the eighth and tenth sessions of the General Assembly, invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session.

[536] See *ibid.*, para. 55.

[537] See *ibid.*, paras. 15–52.

At its ninth session, in 1957, the Commission appointed a committee to consider the matter in the light of the General Assembly resolution. In accordance with the conclusion of the committee, the Commission considered the ultimate object to be attained in reviewing the draft on arbitral procedure, in particular, whether this object should be a convention or simply a set of model rules which States might use, either wholly or in part, in the drawing up of provisions for inclusion in international treaties and special arbitration agreements. The Commission decided in favour of the second alternative. In doing so, the Commission recognized that the draft, as it stood, went beyond what the majority of Governments would be prepared to accept in advance as a general multilateral convention on arbitration. The Commission, however, was of the opinion that the recasting of the draft with a view to attracting the signature and ratification of a majority of Governments would mean a complete revision, involving in all probability an alteration in the whole concept on which the draft was based. In these circumstances, the Commission took the view that it would be preferable to leave the substance of the draft intact and present it to the General Assembly as a set of draft articles which States could use as models in concluding bilateral or multilateral arbitral agreements or in submitting particular disputes to *ad hoc* arbitration.

At its tenth session, in 1958, the Commission adopted, on the basis of a report by the Special Rapporteur,[538] a set of "Model Rules on Arbitral Procedure" followed by a general commentary.[539] In submitting the final set to the General Assembly, the Commission recommended that the Assembly by resolution adopt the report.[540] The text of the Model Rules on Arbitral Procedure is reproduced in volume II, annex VI, section 5.

With reference to the scope and purpose of the Model Rules, which were intended to apply to arbitrations between States, the Commission observed:

> " . . . now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of utilization for the purposes of arbitrations between States and international organizations or between international organizations.
>
> "In the case of arbitrations between States and foreign private corporations or other juridical entities, different legal considerations

[538] See *ibid., 1958*, vol. II, document A/CN.4/113.

[539] See *ibid.,* document A/3859, paras. 15 and 22–43.

[540] See *ibid.,* para. 17.

arise. However, some of the articles of the draft, if adapted, might be capable of use for this purpose also."[541]

After extensive discussions in the Sixth Committee, the General Assembly, in resolution 1262 (XIII) of 14 November 1958, took note of chapter II on arbitral procedure of the Commission's report on its tenth session; brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use; and invited Governments to send to the Secretary-General any comments they may wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time.

11. Diplomatic intercourse and immunities

In the course of its first session, in 1949, the Commission selected diplomatic intercourse and immunities as one of the topics for codification without, however, including it in the list of topics to which it gave priority. At its fifth session, in 1953, the Commission was apprised of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered possible, the codification of diplomatic intercourse and immunities and to treat it as a priority topic.

At its sixth session, in 1954, the Commission decided to initiate work on the subject and appointed A. E. F. Sandström as Special Rapporteur. The Commission considered this topic at its ninth and tenth sessions, in 1957 and 1958, respectively. In connection with its work on this topic, the Commission had before it the reports of the Special Rapporteur,[542] information provided by Governments[543] as well as a document prepared by the Secretariat.[544]

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[541] See *ibid.,* footnote 16.

[542] See *ibid., 1955*, vol. II, document A/CN.4/91; and *ibid.*, *1958*, vol. II, document A/CN.4/116/Add.1 and 2.

[543] Document A/CN.4/114 and Add.1–6, reproduced in *ibid., 1958*, vol. II, document A/3859, annex; and document A/CN.4/116.

[544] See *ibid., 1956,* vol. II, document A/CN.4/98. In addition, the Secretariat published for the use of the Commission in its work on diplomatic and consular intercourse and immunities a volume in the *United Nations Legislative Series* entitled *"Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities"* (ST/LEG/SER.B/7, United Nations publication, Sales No. 58.V.3), which was supplemented by an additional volume in 1963 (ST/LEG/SER.B/13, United Nations publication, Sales No. 63.V.5).

At its ninth session, in 1957, on the basis of the report by the Special Rapporteur,[545] the Commission adopted on first reading a set of draft articles with commentaries. The draft was circulated to Governments for comments and was also included in the report submitted by the Commission to the Assembly's twelfth session, in 1957. At its tenth session, in 1958, the Commission adopted the final draft on diplomatic intercourse and immunities consisting of forty-five draft articles, with commentaries.[546] In submitting this final draft to the General Assembly, the Commission recommended that the General Assembly recommend the draft to Member States with a view to the conclusion of a convention.[547]

The Commission pointed out that the draft dealt only with permanent diplomatic missions. The Commission had, however, asked the Special Rapporteur to study and, at one of its future sessions, present a report on other forms of diplomatic relations, that is, so-called "*ad hoc* diplomacy," covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission's report also referred to relations between States and international organizations and the privileges and immunities of such organizations. In this respect, the Commission simply remarked that these matters were, as regards most of these organizations, governed by special conventions.[548]

During the Sixth Committee's debate, in 1958, on the report of the International Law Commission, some representatives expressed doubts as to whether it was desirable to codify by convention the rules regarding diplomatic privileges and immunities. It was argued that the matter was adequately governed by custom and usage and that regulation by convention would introduce an element of rigidity. An attempt to lay down strict treaty rules on the subject, it was also contended, might even result in the reduction of the privileges and immunities at present enjoyed in practice by members of diplomatic missions. A restatement of current usage would for these reasons be preferable to regulation by convention.[549]

The majority of members, however, favoured codifying the subject by convention, but were divided into two groups regarding the procedure to be followed. One group proposed that the preparation of a convention be entrusted to the Sixth Committee; the other group preferred the con-

[545] See *Yearbook of the International Law Commission, 1955,* vol. II, document A/CN.4/91.

[546] See *ibid., 1958,* vol. II, document A/3859, para. 53.

[547] See *ibid.,* para. 50.

[548] See *ibid.,* paras. 51 and 52.

[549] See *Official Records of the General Assembly, Thirteenth Session, Annexes*, agenda item 56, document A/4007.

vening of a conference of plenipotentiaries for that purpose. The General Assembly, by resolution 1288 (XIII) of 5 December 1958, deferred action until its fourteenth session, in 1959, at which it finally endorsed the recommendation of the Commission and decided, in resolution 1450 (XIV) of 7 December 1959, to convene a conference of plenipotentiaries not later than the spring of 1961. The Commission's final report on diplomatic intercourse and immunities, containing the draft articles, was referred to the conference by the Assembly. A year later, by resolution 1504 (XV) of 12 December 1960, the Assembly also referred to the conference three draft articles on special missions (*see page 151*) approved by the Commission at its twelfth session, in 1960, so that they could be considered together with the draft articles on permanent diplomatic relations.

The United Nations Conference on Diplomatic Intercourse and Immunities met in Vienna from 2 March to 14 April 1961.[550] It was attended by delegates from eighty-one countries, seventy-five of which were Members of the United Nations and six of related agencies or parties to the Statute of the International Court of Justice. The Conference set up a Committee of the Whole, to which it referred the substantive items on its agenda, namely, consideration of the question of diplomatic intercourse and immunities, consideration of draft articles on special missions, and the adoption of instruments regarding the matters considered and of the Final Act of the Conference. The draft articles on special missions were referred by the Committee of the Whole to a Subcommittee on Special Missions.

The Conference adopted a convention entitled the "Vienna Convention on Diplomatic Relations,"[551] consisting of fifty-three articles and covering most major aspects of permanent diplomatic relations between States. It also adopted an Optional Protocol concerning Acquisition of Nationality[552] and an Optional Protocol concerning the Compulsory Settlement of Disputes.[553] The texts of the Convention and Optional Protocols are reproduced in volume II, annex V, section 3. By a resolution adopted by the Conference, the subject of special missions was referred back to the General Assembly with the recommendation that the Assembly entrust the International Law Commission with the task of further studying the topic (*see section 15 below*).

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[550] See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961*, vol. I (United Nations publication, Sales No. 61.X.2); and *ibid.*, vol. II (United Nations publication, Sales No. 62.X.I).

[551] United Nations, *Treaty Series,* vol. 500, p. 95.

[552] *Ibid.,* p. 223.

[553] *Ibid.,* p. 241.

The Final Act of the Conference was signed on 18 April 1961. The Convention and Optional Protocols remained open for signature until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at United Nations Headquarters. They remain open for accession at any time by all Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly to become a party. The Convention and the two Optional Protocols entered into force on 24 April 1964. By 31 December 2011, 187 States were parties to the Vienna Convention on Diplomatic Relations, 51 States were parties to the Optional Protocol concerning Acquisition of Nationality and 67 States were parties to the Optional Protocol concerning the Compulsory Settlement of Disputes.

12. Consular intercourse and immunities

At its first session, in 1949, the Commission selected the subject of consular intercourse and immunities as one of the topics for codification without, however, including it in the list of topics to which it gave priority. At its seventh session, in 1955, the Commission decided to begin the study of this topic and appointed Jaroslav Zourek as Special Rapporteur.

The Commission considered this topic at its eighth session in 1956, and from its tenth session, in 1958, to its thirteenth session, in 1961. In connection with its work on this topic, the Commission had before it the reports of the Special Rapporteur[554] and information provided by Governments.[555]

At its twelfth session, in 1960, the Commission adopted on first reading sixty-five draft articles, together with commentaries, and transmitted the draft to Governments for their comments. At its thirteenth session, in 1961, the Commission adopted a final draft on consular relations, consisting of seventy-one articles accompanied by commentaries.[556] In submitting the final draft to the General Assembly, the Com-

[554] For the reports of the Special Rapporteur, see *Yearbook of the International Law Commission, 1957,* vol. II, document A/CN.4/108; *ibid.*, *1960,* vol. II, document A/CN.4/131; and *ibid.*, *1961,* vol. II, document A/CN.4/137.

[555] Document A/CN.4/136 and Add.1–11, reproduced in *ibid., 1961,* vol. II, document A/4843, annex I. In addition, the Secretariat published for the use of the Commission in its work on diplomatic and consular intercourse and immunities a volume in the *United Nations Legislative Series* entitled *"Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities"* (ST/LEG/SER.B/7, United Nations publication, Sales No. 58.V.3), which was supplemented by an additional volume in 1963 (ST/LEG/SER.B/13, United Nations publication, Sales No. 63.V.5).

[556] See *Yearbook of the International Law Commission, 1961,* vol. II, document A/4843, para. 37.

mission recommended that the Assembly convene an international conference of plenipotentiaries to study the Commission's draft and conclude one or more conventions on the subject.[557]

The General Assembly, in resolution 1685 (XVI) of 18 December 1961, noted "with satisfaction that the draft articles on consular relations prepared by the International Law Commission constitute a good basis for the preparation of a convention on that subject," decided that an international conference of plenipotentiaries should be convened at Vienna at the beginning of March 1963, and referred to the Conference the report adopted by the Commission containing the draft articles on consular relations. At the same time, in order "to provide an opportunity for completing the preparatory work by further expressions and exchanges of views concerning the draft articles at the seventeenth [1962] session," the Assembly also requested Member States to submit written comments on the draft articles, by 1 July 1962, for circulation to Governments prior to the beginning of the seventeenth session, and decided to place on the provisional agenda of that session the item "Consular relations".

In 1962, after a discussion on the draft articles on consular relations in the Sixth Committee, the General Assembly, by resolution 1813 (XVII) of 18 December 1962, requested the Secretary-General to transmit to the conference of plenipotentiaries the summary records and documentation relating to the consideration of this item at the Assembly's seventeenth session, and invited States intending to participate in the conference to submit to the Secretary-General as soon as possible, for circulation to Governments, any amendment to the draft articles which they might wish to propose in advance of the conference.

The United Nations Conference on Consular Relations, which was attended by delegates of ninety-five States, met at Vienna from 4 March to 22 April 1963.[558] The Conference assigned consideration of the draft articles prepared by the International Law Commission, and certain additional proposals, to two main committees, each composed of all the participating States. After the articles and proposals had been dealt with in the main committees, they were referred to a drafting committee, which prepared texts for submission to the Conference meeting in plenary session. The Conference adopted the Vienna Convention on Consular Relations,[559] consisting of seventy-nine articles, an Optional

[557] See *ibid*., para. 27.

[558] See *Official Records of the United Nations Conference on Consular Relations,* vol. I (United Nations publication, Sales No. 63.X.2); and *ibid*., vol. II (United Nations publication, Sales No. 64.X.I).

[559] United Nations, *Treaty Series,* vol. 596, p. 261.

Protocol concerning Acquisition of Nationality[560] and an Optional Protocol concerning the Compulsory Settlement of Disputes,[561] the texts of which are reproduced in volume II, annex V, section 4.

The Final Act of the Conference was signed on 24 April 1963. The Convention and Optional Protocols remained open for signature until 31 October 1963 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1964, at United Nations Headquarters. They remain open for accession by all Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly to become a party. The Convention and both Optional Protocols came into force on 19 March 1967. By 31 December 2011, 173 States were parties to the Vienna Convention on Consular Relations, 39 States were parties to the Optional Protocol concerning Acquisition of Nationality and 49 States were parties to the Optional Protocol concerning the Compulsory Settlement of Disputes.

13. Extended participation in general multilateral treaties concluded under the auspices of the League of Nations

By resolution 1766 (XVII) of 20 November 1962, the General Assembly requested the International Law Commission to study the question of participation of new States in certain general multilateral treaties, concluded under the auspices of the League of Nations, which by their terms authorized the Council of the League to invite additional States to become parties but to which States that had not been so invited by the League Council before the dissolution of the League were unable to become parties for want of an invitation. This problem had originally been brought to the attention of the Assembly by the International Law Commission. In the report on its fourteenth session, in 1962, the Commission had pointed out that certain difficulties stood in the way of finding a speedy and satisfactory solution to this problem through the medium of the draft articles on the law of treaties, and it therefore suggested that consideration should be given to the possibility of solving the problem more expeditiously by other procedures, such as administrative action by the depositary and a resolution of the General Assembly, to the terms of which the assent of all the States entitled to a voice in the matter might be obtained.[562]

[560] *Ibid.*, p. 469.

[561] *Ibid.*, p. 487.

[562] See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 168 and 169.

In accordance with General Assembly resolution 1766 (XVII), the Commission resumed consideration of the question at its fifteenth session, in 1963. After examining the arrangements which were made in 1946 on the occasion of the dissolution of the League of Nations and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the Commission reached the conclusion that the General Assembly appeared to be entitled, if it so desired, to designate an organ of the United Nations to assume and fulfil the powers which, under the participation clauses of the treaties in question, were formerly exercisable by the Council of the League. This procedure, which was endorsed by the Commission as a simplified and expeditious solution for achieving the object of extending participation in the treaties in question, was accordingly referred to by the Commission, in its report to the General Assembly, in listing various alternate methods which might be adopted. The Commission also observed in its report that a number of the treaties concerned might hold no interest for States and suggested that this aspect of the matter be further examined by the competent authorities. In addition, the Commission suggested that the General Assembly take steps to initiate the examination of those treaties with a view to determining what action might be necessary to adapt them to contemporary conditions.[563]

On the basis of the conclusions reached by the Commission, the General Assembly, in resolution 1903 (XVIII) of 18 November 1963, decided that the Assembly was the appropriate organ of the United Nations to exercise the power conferred on the League Council by twenty-one general multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations to invite States to accede to those treaties; it also placed on record the assent to that decision by those Members of the United Nations which are parties to the treaties concerned.

By the same resolution, the General Assembly requested the Secretary-General: (*a*) to bring the terms of the resolution to the notice of any party not a Member of the United Nations; (*b*) to transmit the resolution to Member States which are parties to those treaties; (*c*) to consult, where necessary, with these States and the United Nations organs and specialized agencies concerned as to whether any of the treaties in question have ceased to be in force, have been superseded, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions; and (*d*) to report to the Assembly at its nineteenth session, in 1964. Finally, the Assembly requested the Secretary-General to invite "each State which is a Member of the United Nations

[563] See *ibid., 1963*, vol. II, document A/5509, para. 50.

or member of a specialized agency or a party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly, and which otherwise is not eligible to become a party to the treaties in question, to accede thereto by depositing an instrument of accession with the Secretary-General of the United Nations".

At its twentieth session, in 1965, the General Assembly considered a report of the Secretary-General[564] submitted in pursuance of resolution 1903 (XVIII), and adopted, on 5 November 1965, resolution 2021 (XX) in which it recognized that nine treaties "listed in the annex to the present resolution may be of interest for accession by additional States" and drew the "attention of the parties to the desirability of adapting some of these treaties to contemporary conditions, particularly in the event that new parties should so request".

14. Law of treaties

At its first session, in 1949, the Commission selected the law of treaties as a topic for codification to which it gave priority. The Commission appointed J. L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock as the successive Special Rapporteurs for the topic at its first, fourth, seventh and thirteenth sessions, in 1949, 1952, 1955 and 1961, respectively. The Commission considered the topic at its second, third, eighth, eleventh and thirteenth to eighteenth sessions, in 1950, 1951, 1956, 1959 and from 1961 to 1966, respectively. In connection with its work on the topic, the Commission had before it the reports of the Special Rapporteurs,[565]

[564] See *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 88, document A/5759 and Add.1.

[565] For the reports of James L. Brierly, see *Yearbook of the International Law Commission, 1950*, vol. II, document A/CN.4/23; *ibid.*, *1951*, vol. II, document A/CN.4/43; and *ibid.*, *1952*, vol. II, document A/CN.4/54 and Corr.1. For the reports of H. Lauterpacht, see *ibid., 1953,* vol. II, document A/CN.4/63; and *ibid.*, *1954,* vol. II, document A/CN.4/87 and Corr.1. For the reports of Sir Gerald Fitzmaurice, see *ibid., 1956,* vol. II, document A/CN.4/101; *ibid.*, *1957,* vol. II, document A/CN.4/107; *ibid.*, *1958,* vol. II, document A/CN.4/115 and Corr.1; *ibid.*, *1959,* vol. II, document A/CN.4/120; and *ibid.*, *1960,* vol. II, document A/CN.4/130. For the reports of Sir Humphrey Waldock, see *ibid., 1962,* vol. II, document A/CN.4/144 and Add.1; *ibid.*, *1963,* vol. II, document A/CN.4/156 and Add.1–3; *ibid.*, *1964,* vol. II, A/CN.4/167 and Add.1–3; *ibid.*, *1965,* vol. II, A/CN.4/177 and Add.1 and 2; and *ibid.*, *1966,* vol. II, document A/CN.4/183 and Add.1–4 and A/CN.4/186 and Add.1–7.

information provided by Governments[566] as well as documents prepared by the Secretariat.[567]

The Commission had originally envisaged its work on the law of treaties as taking the form of "a code of a general character," rather than of one or more international conventions. In its report on its eleventh session, in 1959, to the General Assembly, the Commission stated:

> "In short, the law of treaties is not itself dependent on treaty, but is part of general customary international law. Queries might arise if the law of treaties were embodied in a multilateral convention, but some States did not become parties to the convention, or became parties to it and then subsequently denounced it; for they would in fact be or remain bound by the provisions of the treaty in so far as these embodied customary international law *de lege lata*. No doubt this difficulty arises whenever a convention embodies rules of customary international law. In practice, this often does not matter. In the case of the law of treaties it might matter—for the law of treaties is itself the basis of the force and effect of all treaties. It follows from all this that if it were ever decided to cast the Code, or any part of it, in the form of an international convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required."[568]

At its thirteenth session, in 1961, the Commission changed the scheme of its work from a mere expository statement of the law of treaties to the preparation of draft articles capable of serving as a basis for an international convention. This decision was explained as follows by the Commission in its report on its fourteenth session, in 1962:

> "First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral

[566] See *ibid., 1950,* vol. II, document A/CN.4/19; and documents A/CN.4/175 and Add.1–5 and A/CN.4/182 and Add.1–3, reproduced in *ibid., 1966,* vol. II, document A/6309/Rev.1, annex.

[567] See *ibid*., *1959*, vol. II, document A/CN.4/121; *ibid*., 1963, vol. II, document A/CN.4/154; *ibid*., 1965, vol. II, document A/5687; and *ibid*., 1966, vol. II, document A/CN.4/187. See also documents A/CN.4/31, A/CN.4/37 and A/CN.4/L.55. In addition, the Secretariat published a volume in the United Nations Legislative Series entitled *Laws and Practices Concerning the Conclusion of Treaties with a Select Bibliography on the Law of Treaties* (ST/LEG/SER.B/3, United Nations publication, Sales No. 1952.V.4).

[568] See *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, para. 18.

convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations."[569]

The General Assembly, in resolution 1765 (XVII) of 20 November 1962, recommended that the Commission continue the work on the law of treaties, taking into account the views expressed in the Assembly and the written comments submitted by Governments.

At its fourteenth to sixteenth sessions, from 1962 to 1964, the Commission proceeded with the first reading of the draft articles and submitted the provisionally adopted draft articles to Governments for comment. The Commission completed the first reading of the draft articles at its sixteenth session, in 1964.

At its seventeenth session, in 1965, the Commission began the second reading of the draft articles in the light of the comments of Governments. It re-examined the question of the form ultimately to be given to the draft articles, and adhered to the views it had expressed in 1961 and 1962 in favour of a convention. The Commission noted that, at the General Assembly's seventeenth session, in 1962, the Sixth Committee had stated in its report that the great majority of representatives had approved the Commission's decision to give the codification of the law of treaties the form of a convention.

At its eighteenth session, in 1966, the Commission completed the second reading of the draft articles and adopted its final report on the law of treaties, setting forth seventy-five draft articles together with their commentaries.[570] In submitting the final report to the General Assembly, the Commission recommended that the Assembly convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.[571]

In drawing up the draft articles, the Commission decided to limit the scope of application of those articles to treaties concluded between States, to the exclusion of treaties between States and other subjects of international law (e.g., international organizations) and between such other subjects (*see section 20 below*). It also decided not to deal with international agreements not in written form. In addition, the Commission decided that the draft articles should not contain any provisions concerning the following topics: the effect of the outbreak of hostili-

[569] See *ibid., 1962*, vol. II, document A/5209, para. 17.

[570] See *ibid., 1966*, vol. II, document A/6309/Rev.1, paras. 22 and 38.

[571] See *ibid.*, para. 36.

ties upon treaties (*see section 33 below*); succession of States in respect of treaties (*see section 17(a) below*); the question of the international responsibility of a State with respect to a failure to perform a treaty obligation (*see section 25 below*); "most-favoured-nation clause" (*see section 19 below*); and the application of treaties providing for obligations or rights to be performed or enjoyed by individuals.[572]

Following the discussion in the Sixth Committee on the report of the Commission on the work of its eighteenth session, the General Assembly by resolution 2166 (XXI) of 5 December 1966 decided to convene an international conference of plenipotentiaries to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate. It requested the Secretary-General to convoke the first session of the conference early in 1968 and the second session early in 1969. By the same resolution, the Assembly invited Member States, the Secretary-General and the Directors-General of those specialized agencies which act as depositaries of treaties to submit their written comments and observations on the draft articles. The International Atomic Energy Agency also submitted written comments and observations.

The following year, on the recommendation of the Sixth Committee, the General Assembly, by resolution 2287 (XXII) of 6 December 1967, decided to convene the first session of the United Nations Conference on the Law of Treaties at Vienna in March 1968.

The first session of the United Nations Conference on the Law of Treaties was accordingly held at Vienna from 26 March to 24 May 1968 and was attended by representatives of 103 countries and observers from thirteen specialized and intergovernmental agencies. The second session was held from 9 April to 22 May 1969, also at Vienna, and was attended by representatives of 110 countries and observers from fourteen specialized and intergovernmental agencies.[573] The first session of the Conference was devoted primarily to consideration by a Committee of the Whole and by a Drafting Committee of the set of draft articles adopted by the International Law Commission. The first part of the second session was devoted to meetings of the Committee of the Whole and of the Drafting Committee, completing their consideration of articles reserved from the previous session. The remainder of the second session was devoted to thirty ple-

[572] See *ibid.*, paras. 28–35.

[573] See *Official Records of the United Nations Conference on the Law of Treaties, First Session* (United Nations publication, Sales No. 68.V.7); *ibid.*, *Second Session* (United Nations publication, Sales No. 70.V.6); and *ibid.*, *First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. 70.V.5).

nary meetings which considered the articles adopted by the Committee of the Whole and reviewed by the Drafting Committee.

The Conference adopted the Vienna Convention on the Law of Treaties[574] on 22 May 1969. The Convention is made up of a preamble, eighty-five articles and an annex.

In line with the draft articles prepared by the Commission, the Vienna Convention on the Law of Treaties applies to treaties between States, the term "treaty" being defined for the purposes of the Convention as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Without prejudice to any relevant rules of the organization concerned, the Convention expressly provides that it applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization. Part I of the Convention also provides that the fact that international agreements concluded between States and other subjects of international law or between such other subjects of international law, or international agreements not in written form, are not covered by the Convention shall not affect (*a*) the legal force of such agreements, (*b*) the application to them of any of the rules set forth in the Convention to which they would be subject under international law independently of the Convention, and (*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties. Finally, it is also provided that the Convention applies only to treaties which are concluded by States after the entry into force of the Convention with regard to such States, without prejudice to the application of any of the rules set forth in the Convention to which treaties would be subject under international law independently of the Convention.

The principal matters covered in the Convention are: conclusion and entry into force of treaties (part II), including reservations and provisional application of treaties; observance, application and interpretation of treaties (part III), including treaties and third States; amendment and modification of treaties (part IV); invalidity, termination and suspension of the operation of treaties (part V), including the procedure for the application of the provisions of that part and for the settlement of disputes concerning the application or interpretation of those provisions, and the consequences of the invalidity, termination or suspension of the operation of a treaty; miscellaneous provisions (part VI), reserving cases of State succession, State responsibility and outbreak of hostili-

[574] United Nations, *Treaty Series*, vol. 1155, p. 331.

ties, as well as the case of an aggressor State, and dealing with the severance or absence of diplomatic or consular relations and the conclusion of treaties; and depositaries, notifications, corrections and registration (part VII). The conciliation procedure referred to in article 66 of part V is specified in an annex to the Convention. The text of the Convention is reproduced in volume II, annex V, section 6.

The final provisions of the Convention open it for signature and for ratification or accession by all States Members of the United Nations or members of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and also by any other State invited by the General Assembly to become a party to the Convention. The Convention was opened for signature on 23 May 1969. It remained open for signature until 30 November 1969 at the Federal Ministry for Foreign Affairs of Austria and, subsequently, until 30 April 1970, at United Nations Headquarters. Signatures are subject to ratification. The Convention is open for accession by any non-signatory State entitled to become a party. It entered into force on 27 January 1980. By 31 December 2011, 111 States were parties to the Convention.

In addition to the Vienna Convention on the Law of Treaties, the Conference adopted two declarations (the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties and the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties) and five resolutions which were annexed to the Final Act of the Conference.[575]

In the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties, the Conference stated its conviction that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to universal participation; noted that articles 81 and 83 of the Vienna Convention on the Law of Treaties enable the General Assembly to issue special invitations to States which are not members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency, or parties to the Statute of the International Court of Justice, to become parties to the Convention; and invited the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations in order to ensure the widest possible participation in the

[575] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. 70.V.5), document A/CONF.39/26.

Vienna Convention on the Law of Treaties. At the General Assembly's twenty-fourth session, this matter was referred to the Sixth Committee, which recommended to the Assembly that the question of issuing invitations be deferred until the twenty-fifth session. The Assembly adopted this recommendation without objection. On the recommendation of the General Committee, the General Assembly further deferred the consideration of the matter in 1970, 1971, 1972 and 1973 until the following year. On 12 November 1974, the Assembly adopted resolution 3233 (XXIX) whereby it decided to invite all States to become parties to the Vienna Convention on the Law of Treaties.

15. Special missions

In submitting its final draft on diplomatic intercourse and immunities (*see page 138*) to the General Assembly at its thirteenth session, in 1958, the Commission stated that, although the draft dealt only with permanent diplomatic missions, diplomatic relations also assumed other forms that might be placed under the heading of "*ad hoc* diplomacy," covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. In 1958, the Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and accordingly requested A. E. F. Sandström, the Special Rapporteur for the topic "diplomatic intercourse and immunities," to undertake that study and to submit his report at a future session. The Commission decided at its eleventh session, in 1959, to place the question of *ad hoc* diplomacy as a special topic on the agenda for its twelfth session, and appointed Mr. Sandström as Special Rapporteur for the topic.

At its twelfth session, in 1960, on the basis of the Special Rapporteur's report,[576] the Commission adopted three draft articles on "special missions" together with commentaries. In the report covering the work of its twelfth session, the Commission stated that the draft should be regarded "as constituting only a preliminary survey"; the Commission, nevertheless, recommended that the General Assembly refer the draft to the United Nations Conference on Diplomatic Intercourse and Immunities which was to meet in Vienna in the spring of 1961. Article 1, paragraph 1, of the draft defines "special mission" as follows:

> "The expression 'special mission' means an official mission of State representatives sent by one State to another in order to carry out a

[576] See *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/129.

special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds."[577]

At the same session, the Commission, observing that the question of "diplomatic conferences" was linked not only to that of "special missions" but also to that of "relations between States and international organizations," decided not to deal with the subject of "diplomatic conferences" for the moment.

The General Assembly, by resolution 1504 (XV) of 12 December 1960, decided that the draft articles on special missions should be referred to the Vienna Conference so that they could be considered together with the draft articles on permanent diplomatic missions.

At the Vienna Conference, the question of special missions was referred to a Subcommittee established by the Committee of the Whole. While stressing the importance of the subject of special missions, the Subcommittee noted that, because of lack of time, the draft articles on special missions had, in contrast with the usual practice, not been submitted to Governments for their comments before being drafted in final form, and that the draft articles did little more than indicate which of the rules on permanent missions applied, and which did not apply, to special missions. The Subcommittee considered that, while the basic rules might in fact be the same, it could not be assumed that such an approach necessarily covered the whole field of special missions. Following consideration of the topic by the Subcommittee and by the Committee of the Whole, the Vienna Conference adopted a resolution recommending to the General Assembly that it refer the topic back to the International Law Commission.[578]

At its sixteenth session, the General Assembly adopted resolution 1687 (XVI) of 18 December 1961, requesting the Commission to study further the subject of special missions and to report thereon to the Assembly.

During its fifteenth session, in 1963, the Commission appointed Milan Bartoš as Special Rapporteur for the topic of special missions and decided that he should prepare draft articles, based on the provisions of the 1961 Vienna Convention on Diplomatic Relations but that he should keep in mind that special missions were, by virtue of both their functions and nature, an institution distinct from permanent missions. It was also agreed to await the Special Rapporteur's recommendations before deciding whether the draft articles should be in the form of an additional protocol to the 1961 Vienna Convention or should be

[577] See *ibid*., document A/4425, para. 38.

[578] See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961*, vol. II (United Nations publication, Sales No. 62.X.1), pp. 45–46 and 89–90.

embodied in a separate convention or any other appropriate form. With regard to the scope of the topic, most of the members of the Commission expressed the opinion that for the time being the question of status of government delegates to international conferences should not be covered in the study on special missions.

The Commission considered this topic from its sixteenth session, in 1964, to its nineteenth session, in 1967. In connection with its work on this topic, the Commission had before it the reports of the Special Rapporteur,[579] information provided by Governments[580] as well as a document prepared by the Secretariat.[581]

At its sixteenth session, in 1964, the Commission considered the first report of the Special Rapporteur[582] and provisionally adopted sixteen articles, which were subsequently submitted to the General Assembly and to Governments for information. At the first part of its seventeenth session, in 1965, the Commission considered the second report of the Special Rapporteur[583] and provisionally adopted twenty-eight articles, which follow on from the sixteen articles previously adopted. All draft articles adopted at the sixteenth and seventeenth sessions were submitted to the General Assembly for its consideration and were also transmitted to Governments for comments.

At its eighteenth session, in 1966, the Commission examined certain questions of a general nature affecting special missions which had arisen out of the opinions expressed in the Sixth Committee and the written comments by Governments and which it was important to settle as a preliminary to the later work on the draft articles.

By resolution 2167 (XXI) of 5 December 1966, the General Assembly recommended that the Commission continue its work relating to special missions with the object of presenting a final draft on the topic in its next report.

At its nineteenth session, in 1967, the Commission, after examining the Special Rapporteur's fourth report[584] and taking into account the written comments received from Governments and the views expressed in the Sixth Committee, adopted its final draft on special missions, com-

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[579] See *Yearbook of the International Law Commission, 1964,* vol. II, document A/CN.4/166; *ibid.*, *1965*, vol. II, document A/CN.4/179; *ibid.*, *1966,* vol. II, document A/CN.4/189 and Add.1 and 2; and *ibid.*, *1967,* vol. II, document A/CN.4/194 and Add.1–5.

[580] Documents A/CN.4/188 and Add.1–4 as well as A/CN.4/193 and Add.1–5, all reproduced in *ibid., 1967,* vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, annex I.

[581] See *ibid., 1962,* vol. II, documentA/CN.4/147; and *ibid.*, *1963,* vol. II, document A/CN.4/155.

[582] See *ibid.*, *1964,* vol. II, document A/CN.4/166.

[583] See *ibid., 1965,* vol. II, document A/CN.4/179.

[584] See *ibid.*, vol. II, document A/CN.4/194 and Add.1–5.

prising fifty draft articles, with commentaries,[585] and submitted them to the General Assembly with a recommendation "that appropriate measures be taken for the conclusion of a convention on special missions".[586]

The Sixth Committee subsequently recommended that an item entitled "Draft convention on special missions" be placed on the provisional agenda of the General Assembly's twenty-third session with a view to the adoption of such a convention by the Assembly. By resolution 2273 (XXII) of 1 December 1967, the Assembly adopted the recommendation of the Sixth Committee and invited Member States to submit comments and observations on the draft articles.

At the General Assembly's twenty-third and twenty-fourth sessions, in 1968 and 1969, the Sixth Committee considered the item "Draft convention on special missions" on the basis of the draft adopted by the International Law Commission. At each session, Switzerland[587] was invited to participate in the relevant proceedings of the Sixth Committee as an observer without the right to vote. By resolution 2530 (XXIV) of 8 December 1969, the General Assembly, upon the recommendation of the Sixth Committee, adopted the Convention on Special Missions[588] and the Optional Protocol concerning the Compulsory Settlement of Disputes relating thereto,[589] which are reproduced in volume II, annex V, section 5. On the same date, 8 December 1969, while adopting the Convention on Special Missions, the General Assembly, in resolution 2531 (XXIV), also recommended that "the sending State should waive the immunity of members of its special mission in respect of civil claims of persons in the receiving State, when it can do so without impeding the performance of the functions of the special mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims". For the purposes of the Convention, a "special mission" means "a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task".

The final provisions of the Convention open it for signature and for ratification or accession by all States Members of the United Nations or members of any of the specialized agencies or of the International Atomic Energy Agency or Parties to the Statute of the International

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[585] See *ibid.*, document A/6709/Rev.1 and Rev.1/Corr.1, paras. 32 and 35.

[586] See *ibid.*, para. 33.

[587] Switzerland was admitted to the United Nations membership on 10 September 2002.

[588] United Nations, *Treaty Series,* vol. 1400, p. 231.

[589] *ibid.*, p. 339.

Court of Justice, and also by any other State invited by the General Assembly to become a party to the Convention. The final provisions of the Optional Protocol open it for signature and for ratification or accession by all States which may become parties to the Convention. The Convention and the Optional Protocol were opened for signature on 16 December 1969 and remained open for signature until 31 December 1970. Signatures are subject to ratification. The Convention and the Optional Protocol are open for accession by any non-signatory State entitled to become a party. The Convention and the Optional Protocol came into force on 21 June 1985. By 31 December 2011, 38 States had become parties to the Convention and 17 States had become parties to the Optional Protocol.

Also by resolution 2530 (XXIV), the General Assembly decided to consider at its twenty-fifth session the question of issuing invitations in order to ensure the widest possible participation in the Convention. The Assembly deferred consideration of the matter in 1970, 1971, 1972 and 1973 until the following year. On 12 November 1974, on the recommendation of the Sixth Committee, the General Assembly adopted resolution 3233 (XXIX) whereby it noted the Declaration on Universal Participation in the Vienna Convention on the Law of Treaties, adopted by the United Nations Conference on the Law of Treaties, in which the Assembly was invited to give consideration to the matter of issuing invitations in order to ensure the widest possible participation in that Convention. The Assembly by that resolution decided to invite all States to become parties to the Convention on Special Missions and its Optional Protocol concerning the Compulsory Settlement of Disputes.

16. Relations between States and international organizations[590]

In the course of the consideration by the Sixth Committee, during the General Assembly's thirteenth session, in 1958, of the Commission's final report on diplomatic intercourse and immunities (*see page 138*), the representative of France proposed that the General Assembly request the Commission to include in its agenda the study of the subject of relations between States and international organizations. In support of this proposal, he pointed out that the development of international organizations had increased the number and scope of the legal problems arising out of relations between the organizations and States and that these problems had only partially been solved by special conventions governing privileges

[590] At its twentieth session, in 1968, the Commission decided to amend the title of the topic, without altering its meaning, by changing the word "intergovernmental" to "international".

and immunities of international organizations. It was therefore necessary, he stressed, not only to codify those special conventions but also to work out general principles which would serve as a basis for the progressive development of international law in the field.

On the recommendation of the Sixth Committee, the General Assembly adopted resolution 1289 (XIII) of 5 December 1958, inviting the Commission "to give further consideration to the question of relations between States and intergovernmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly".

At its eleventh session, in 1959, the Commission took note of the resolution and decided to consider the question in due course. At its fourteenth session, in 1962, the Commission decided to place the question on the agenda of its next session, and appointed Abdullah El-Erian as Special Rapporteur for the topic.

At its fifteenth and sixteenth sessions, in 1963 and 1964, respectively, the Commission considered the scope of and approach to the topic of relations between States and intergovernmental organizations on the basis of the report and working papers submitted by the Special Rapporteur.[591] A majority of the Commission concluded that, while agreeing that in principle the topic of relations between States and intergovernmental organizations had a broad scope, for the purpose of its immediate study "the question of diplomatic law in its application to relations between States and intergovernmental organizations should receive priority". Subsequently, the Commission concentrated its work with respect to the topic on the study of the status, privileges and immunities of representatives of States to international organizations. After completing its work on the first part of the topic, the Commission, at its twenty-eighth session, in 1976, commenced its consideration of the second part of the topic dealing with the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States.[592]

[591] See *Yearbook of the International Law Commission, 1963,* vol. II, documents A/CN.4/161 and Add.1, and A/CN.4/L.103; as well as document A/CN.4/L.104.

[592] In order to assist the Commission in its work on the topic, the Secretariat published two volumes in the *United Nations Legislative Series* entitled *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.B/10, United Nations publication, Sales No. 60.V.2; and ST/LEG/SER.B/11, United Nations publication, Sales No. 61.V.3).

(a) Status, privileges and immunities of representatives of States to international organizations

The Commission considered the first part of the topic from its twentieth session, in 1968, to its twenty-third session, in 1971. In connection with its consideration of the topic, the Commission had before it the reports of the Special Rapporteur,[593] information provided by Governments and international organizations[594] as well as documents prepared by the Secretariat.[595]

From its twentieth session, in 1968, to its twenty-second session, in 1970, the Commission proceeded with the first reading of the draft articles and transmitted the provisionally adopted draft articles with commentaries to Governments of Member States and Switzerland as well as the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency for their observations.

By resolutions 2501 (XXIV) of 12 November 1969 and 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission continue its work on relations between States and international organizations, with the object of presenting in 1971 a final draft on the topic. It was also recommended that the Commission take into account the views expressed in the General Assembly and the written comments submitted by Governments.

At its twenty-third session, in 1971, the Commission held the second reading of the draft articles. It established a working group that studied the whole draft from the standpoint of its general economy and structure and made recommendations thereon to the Commission.[596]

At the same session, the Commission adopted the final set of eighty-two draft articles, with commentaries,[597] and submitted it to the General

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[593] See *Yearbook of the International Law Commission, 1967,* vol. II, document A/CN.4/195 and Add.1; *ibid.*, *1968,* vol. II, document A/CN.4/203 and Add.1–5; *ibid.*, *1969,* vol. II, document A/CN.4/218 and Add.1; *ibid.*, *1970,* vol. II, document A/CN.4/227 and Add.1 and 2; *ibid., 1971,* vol. II (Part One), document A/CN.4/241 and Add.1–6; and documents A/CN.4/L.136, A/CN.4/L.151, A/CN.4/L.166, A/CN.4/L.171 and A/CN.4/L.173.

[594] Documents A/CN.4/221 and Add.1 and Corr.1, A/CN.4/238 and Add.1 and 2, A/CN.4/239 and Add.1–3 and A/CN.4/240 and Add.1–7, reproduced in *ibid., 1971,* vol. II (Part One), document A/8410/Rev.1, Annex I.

[595] See *Yearbook of the International Law Commission, 1967,* vol. II, document A/CN.4/L.118 and Add.1 and 2; *ibid.*, *1968,* vol. II, document A/CN.4/L.129; as well as documents A/CN.4/L.162/Rev.1, A/CN.4/L.163, A/CN.4/L.164, A/CN.4/L.165 and A/CN.4/L.167.

[596] For the report of the Working Group, see documents A/CN.4/L.174 and Add.1–6 and A/CN.4/L.177 and Add.1–3.

[597] See *Yearbook of the International Law Commission, 1971,* vol. II (Part One), document A/8410/Rev.1, paras. 39 and 60.

Assembly with a recommendation that it convene an international conference of plenipotentiaries to study the draft articles and to conclude a convention on the subject.[598] In the light of the contents of the final draft, the title was changed to "Draft articles on the representation of States in their relations with international organizations".[599]

The scope of the draft was limited to international organizations having a universal character, to organs of such organizations in which States were parties and to conferences convened under the auspices of those organizations. Because the set of provisions on observer delegations to organs and conferences had not been included in the provisional sets of draft articles transmitted to Governments and international organizations, the Commission deemed it appropriate to present its provisions on observer delegations in the form of an annex to the final draft articles.[600]

The General Assembly, in resolution 2780 (XXVI) of 3 December 1971, expressed its desire that an international convention be elaborated and concluded expeditiously on the basis of the Commission's draft articles. By the same resolution, Member States and Switzerland were requested to submit written comments and observations on the draft articles and on the procedure to be adopted for the elaboration and conclusion of a convention on the subject. The Secretary-General and the Directors-General of the specialized agencies and the International Atomic Energy Agency were also invited to submit their written comments and observations on the draft articles.

The following year the General Assembly, by resolution 2966 (XXVII) of 14 December 1972, decided to convene the international conference as soon as practicable. In 1973 the Assembly, by resolution 3072 (XXVIII) of 30 November, decided that the conference would be held early in 1975 in Vienna.

The United Nations Conference on the Representation of States in Their Relations with International Organizations[601] was thus held at Vienna from 4 February to 14 March 1975. It was attended by representatives of eighty-one States as well as observers from two States, seven specialized and related agencies, three other intergovernmental organizations and seven national liberation movements recognized by

[598] See *ibid.* para. 57.

[599] See *ibid.*, paras. 51 and 52.

[600] See *ibid.*, paras. 40–56.

[601] See *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February-14 March 1975*, vol. I (United Nations publication, Sales No. 75.V.11); and *ibid.*, vol. II (United Nations publication, Sales No. 75.V.12).

the Organization of African Unity and/or by the League of Arab States. The Conference established a Committee of the Whole and assigned to it the consideration of the draft articles adopted by the International Law Commission. It also set up a Drafting Committee, to which it entrusted, in addition to the responsibilities for drafting and for coordinating and reviewing all the texts adopted, the preparation of the title, preamble and final clauses of the Convention, as well as the preparation of the Final Act of the Conference.

On 13 March 1975, the Conference adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[602] consisting of ninety-two articles, the text of which is reproduced in volume II, annex V, section 8. The Convention was opened for signature on 14 March 1975. It remained open for signature until 30 September 1975 at the Federal Ministry of Foreign Affairs of the Republic of Austria and, subsequently, until 30 March 1976 at United Nations Headquarters. Signatures are subject to ratification. The Convention remains open for accession by any State. It will enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession. As of 31 December 2011, 34 States had become contracting States to the Convention.

In addition to the Vienna Convention, the Conference adopted two resolutions relating, respectively, to the status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States and to the application of the Convention in future activities of international organizations. These resolutions are annexed to the Final Act of the Conference.[603] In light of the provisions of those resolutions, an item was placed on the agenda of the thirtieth session of the General Assembly, in 1975, entitled "Resolutions adopted by the United Nations Conference on the Representation of States in Their Relations with International Organizations: (*a*) resolution relating to the observer status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States; (*b*) resolution relating to the application of the Convention in future activities of international organizations". From its thirtieth to thirty-fourth sessions, the General Assembly deferred consideration of the item to its next session. It considered it at its thirty-fourth, thirty-fifth, thirty-seventh, thirty-ninth,[604] forty-first, forty-third, forty-fifth, forty-

[602] See *ibid.*, vol. II (United Nations publication, Sales No. 75.V.12), document A/CONF.67/16.

[603] See *ibid.*, document A/CONF.67/15.

[604] Since the thirty-ninth session of the General Assembly, the subject matter of the item has been confined to the observer status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States.

seventh and forty-ninth sessions, and adopted resolutions 35/167 of 15 December 1980, 37/104 of 16 December 1982, 39/76 of 13 December 1984, 41/71 of 3 December 1986, 43/160 of 9 December 1988, 45/37 of 28 November 1990 and 47/29 of 25 November 1992, and decisions 34/433 and 49/423. The General Assembly by its decision 49/423 deferred the consideration of the subject matter to its future session.

(b) Status, privileges and immunities of international organizations

At its twenty-eighth session, in 1976, the Commission requested the Special Rapporteur for the topic, Abdullah El-Erian, to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities who are not representatives of States.

At its twenty-ninth session, in 1977, the Commission decided to authorize the Special Rapporteur to continue his study on the lines indicated in his preliminary report[605] and to prepare a further report having regard to the views expressed and the questions raised during the debate at the twenty-ninth session. It also decided to authorize the Special Rapporteur to seek additional information and expressed the hope that he would carry out his research in the customary manner, namely by investigating the agreements and practices of international organizations, whether within or outside the United Nations system, as well as the legislation and practice of States.

In resolution 32/151 of 19 December 1977, the General Assembly endorsed the conclusions reached by the Commission regarding the second part of the topic of relations between States and international organizations.

At the thirtieth session of the Commission, in 1978, the Commission approved the conclusions and recommendations set out in the second report of the Special Rapporteur[606] that:

(*a*) General agreement existed both in the Commission and in the Sixth Committee of the General Assembly on the desirability of the Commission taking up the study of the second part of the topic "Relations between States and international organizations";

[605] See *Yearbook of the International Law Commission, 1977,* vol. II (Part One), document A/CN.4/304.

[606] See *ibid.*, *1978,* vol. II (Part One), document A/CN.4/311 and Add.1.

(*b*) The Commission's work on the second part of the topic should proceed with great prudence;

(*c*) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in the eventual codification could be taken only when the study was completed;

(*d*) The same broad outlook should be adopted in connection with the subject matter of the study, inasmuch as the question of priority would have to be deferred until the study was completed.

At its thirty-first session, in 1979, the Commission appointed Leonardo Díaz-Gonzalez as Special Rapporteur for this part of the topic.

The Commission considered the topic on the basis of the reports of the new Special Rapporteur,[607] as well as documents prepared by the Secretariat,[608] at its thirty-fifth, thirty-seventh, thirty-ninth, forty-second and forty-third sessions, in 1983, 1985, 1987, 1990 and 1991, respectively. The Commission proceeded with the first reading of the draft articles on the basis of the fourth, fifth and sixth reports of the Special Rapporteur[609] at its forty-second and forty-third sessions, in 1990 and 1991, respectively.

At its forty-fourth session, in 1992, the Commission noted that the Planning Group had established a Working Group to review the progress so far achieved on the topic and to make a recommendation as to whether the Commission should continue with it and, if in the affirmative, in what direction. The Commission observed that the discussion of the first part of the topic, dealing with the status, privileges and immunities of representatives of States to international organizations, had resulted in draft articles which had formed the basis of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. States had been slow to ratify the Convention or adhere to it and doubts had therefore arisen as to the advisability of continuing the work undertaken in 1976 on the second part of the topic, dealing with the status, privileges and immunities of international organizations and their personnel, a mat-

[607] See *Yearbook of the International Law Commission, 1983,* vol. II (Part One), document A/CN.4/370; *ibid*., 1985, vol. II (Part One), document A/CN.4/391 and Add.1; *ibid*., 1986, vol. II (Part One), document A/CN.4/401; *ibid*., 1989, vol. II (Part One), document A/CN.4/424; and *ibid*., 1991, vol. II (Part One), documents A/CN.4/438 and A/CN.4/439.

[608] See *ibid., 1985*, vol. II (Part One), addendum, document A/CN.4/L.383 and Add.1–3.

[609] See *ibid*., document A/CN.4/424; and *ibid*., *1991,* vol. II (Part One), documents A/CN.4/438 and A/CN.4/439.

ter which seemed to a large extent covered by existing agreements. The Commission also noted that the passage of time had failed to bring any sign of increased acceptance of the Convention and the Commission had not given very active consideration to the topic. Eight reports had been presented by two successive Special Rapporteurs and all of the 22 articles contained therein had been referred to the Drafting Committee, but the Committee had not taken any action on them. Neither in the Commission nor in the Sixth Committee had the view been expressed that the topic should be more actively considered. Under the circumstances, the Commission, accepting the recommendation of the Planning Group that the topic should not be pursued further for the time being, decided not to pursue further during the term of office of its members the consideration of the topic, unless the General Assembly decided otherwise.

The General Assembly, in resolution 47/33 of 25 November 1992, endorsed the above decision of the Commission.

17. Succession of States and Governments

At its first session, in 1949, the Commission selected the subject of succession of States and Governments as one of the topics for codification without, however, including it in the list of topics to which it gave priority. At its fourteenth session, in 1962, the Commission was apprised of General Assembly resolution 1686 (XVI) of 18 December 1961, recommending that the Commission include on its priority list the topic of succession of States and Governments. In principle, all members of the Commission were in favour of including the topic on its priority list, but there were divergent views concerning the scope of the topic and the best approach to its study. The Commission decided to set up a Subcommittee on the Succession of States and Governments whose task was to submit to the Commission a preliminary report containing suggestions on the scope of the subject, the method of approach to the study and the means of providing the necessary documentation.[610]

At its fifteenth session, in 1963, the Commission considered and unanimously approved the report of the Subcommittee.[611] In the opinion of the Commission, the priority given to the study of the question of State succession was fully justified, and it was agreed that the question of the succession of Governments would, for the time being, be consid-

[610] The Subcommittee had before it the studies prepared by the Secretariat published in *Yearbook of the International Law Commission, 1962,* vol. II, documents A/CN.4/149 and Add.1, A/CN.4/150 and A/CN.4/151.

[611] See *ibid., 1963,* vol. II, document A/5509, annex II. At that session, the Commission had also before it a study prepared by the Secretariat. See *ibid.*, document A/CN.4/157.

ered only to the extent necessary to supplement the study on State succession. Several members of the Commission stressed the importance which State succession had for new States and for the international community in view of the phenomenon of decolonization, and agreed with the Subcommittee's view that special attention should be given in the study to the problems of concern to new States.

The Commission expressed its agreement with the broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Subcommittee: succession in respect of treaties; succession in respect of rights and duties resulting from other sources than treaties (revised in 1968 to read "succession of States in respect of matters other than treaties"[612]) and succession in respect of membership of international organizations. The Commission approved the Subcommittee's recommendations concerning the relationship between the topic of State succession and other topics on the Commission's agenda, in particular that the succession in respect of treaties would be considered in connection with the succession of States rather than in the context of the law of treaties.

The objectives proposed by the Subcommittee—a survey and evaluation of the current state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law—were approved by all members of the Commission. The Commission appointed Manfred Lachs as Special Rapporteur for the topic.

The General Assembly, in resolution 1902 (XVIII) of 18 November 1963, recommended that the Commission "continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Subcommittee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War".

Following the resignation of Mr. Lachs, the Commission decided, at its nineteenth session, in 1967, to deal with the three aspects of the topic in accordance with the broad outline of the subject laid down in the report of the Subcommittee in 1963. The Commission appointed Special Rapporteurs for the first two aspects of the topic, succession in respect of treaties and succession of States in respect of matters other than treaties, and decided to leave aside for the time being the third aspect, succession in respect of membership of international organizations, without assigning it to a Special Rapporteur. It was considered that the third

[612] See footnote 623.

aspect related both to succession in respect of treaties and to relations between States and international organizations. In accordance with the decision taken in 1963, it was agreed to give priority to the study of State succession, considering the study of succession of Governments only to the extent necessary to supplement the study of State succession.

(a) Succession of States in respect of treaties

The Commission considered the sub-topic at its twentieth, twenty-second, twenty-fourth and twenty-sixth sessions, in 1968, 1970, 1972 and 1974, respectively. The Commission appointed Sir Humphrey Waldock and Sir Francis Vallat as the successive Special Rapporteurs for the sub-topic at its nineteenth and twenty-fifth sessions, in 1967 and 1973, respectively. In connection with its consideration of the topic, the Commission had before it the reports of the Special Rapporteurs,[613] information provided by Governments and international organizations[614] as well as documents prepared by the Secretariat.[615]

At its twenty-fourth session, in 1972, the Commission conducted the first reading of the draft articles on succession of States in respect of treaties. At that session, the Commission adopted on first reading a provisional draft with commentaries and, in accordance with articles 16 and 21 of its Statute, decided to transmit it to Governments of Member States for their observations.

The General Assembly, in resolution 2926 (XXVII) of 28 November 1972, recommended that the Commission continue its work on the sub-topic in the light of comments received from Member States on the provisional draft. In resolution 3071 (XXVIII) of 30 November 1973,

[613] For the reports of Sir Humphrey Waldock, see *Yearbook of the International Law Commission, 1968,* vol. II, document A/CN.4/202; *ibid.*, *1969*, vol. II, document A/CN.4/214 and Add.1 and 2; *ibid.*, *1970,* vol. II, document A/CN.4/224 and Add.1; *ibid.*, *1971,* vol. II (Part One), document A/CN.4/249; and *ibid.*, *1972,* vol. II, documents A/CN.4/256 and Add.1–4 and A/CN.4/L.184. For the report of Sir Francis Vallat, see *ibid.*, *1974,* vol. II (Part One), document A/CN.4/278 and Add.1–6.

[614] Documents A/CN.4/275 and Add.1 and 2, A/CN.4/L.205 and A/9610/Add.1 and 2, reproduced in *ibid., 1974,* vol. II (Part One), document A/9610/Rev.1, annex I; as well as document A/CN.4/L.213.

[615] See *ibid., 1968,* vol. II, document A/CN.4/200 and Add.1 and 2; *ibid.*, *1969,* vol. II, document A/CN.4/210; *ibid.*, *1970,* vol. II, documents A/CN.4/225 and A/CN.4/229; and *ibid.*, *1971,* vol. II (Part Two), document A/CN.4/243 and Add.1. Furthermore, for the use of the Commission in its work on the topic, the Secretariat published a volume in the *United Nations Legislative Series* entitled *"Materials on Succession of States"* containing information related mainly to succession of States in respect of treaties (see ST/LEG/SER.B/14, United Nations publication, Sales No. 68.V.5). A supplement thereto was published in 1972 as a document of the twenty-fourth session of the Commission (document A/CN.4/263).

the General Assembly recommended that the Commission complete at its twenty-sixth session, in 1974, the second reading of the draft on succession of States in respect of treaties, in the light of comments received from Member States.

At its twenty-sixth session, in 1974, the Commission adopted the final text of the draft articles on the succession of States in respect of treaties, with commentaries,[616] and submitted it to the General Assembly with a recommendation that the General Assembly invite Member States to submit their written comments and observations on the draft articles and convene a conference of plenipotentiaries to study the draft articles and conclude a convention on the subject.[617]

The General Assembly, in resolution 3315 (XXIX) of 14 December 1974, invited Member States to submit their written comments and observations on the draft articles prepared by the Commission and on the procedure by which and the form in which work on the draft articles should be completed. The following year, the Assembly, by resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider the draft articles and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. In the resolution, the Assembly urged Member States which had not yet done so to submit as soon as possible their written comments and observations on the draft articles. On 24 November 1976, the Assembly adopted resolution 31/18 by which it decided that the United Nations Conference on Succession of States in Respect of Treaties would be held from 4 April to 6 May 1977 at Vienna.

The Conference was held as scheduled but, having been unable to conclude its work in the time available, it recommended on 6 May 1977 that the General Assembly decide to reconvene the Conference in the first half of 1978 for a final session.[618]

The resumed session of the Conference, approved by General Assembly resolution 32/47 of 8 December 1977, was held at Vienna from 31 July to 23 August 1978.[619]

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[616] See *Yearbook of the International Law Commission, 1974,* vol. II (Part One), document A/9610/Rev.1, paras. 43 and 85.

[617] See *ibid*., para. 84.

[618] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III, Documents of the Conference, First and Resumed Sessions (United Nations publication, Sales No. 79.V.10), Report of the Conference (1977 session), document A/CONF.80/15, para. 26.

[619] See *ibid*., vol. I (United Nations publication, Sales No. 78.V.8); *ibid*., vol. II (United Nations publication, Sales No. 79.V.9); and *ibid*., vol. III (United Nations publi-

The delegations of one hundred States participated in the Conference (eighty-nine States in the 1977 session and ninety-four States in the resumed session). Two States were represented by observers at each of the 1977 and resumed sessions. In addition, the United Nations Council for Namibia[620] participated in the Conference and the Palestine Liberation Organization and the South West Africa People's Organization (SWAPO) were represented by observers, SWAPO at the 1977 session only. Four specialized and related agencies and one other intergovernmental organization sent observers to the 1977 session and two other intergovernmental organizations to both the 1977 and resumed sessions.

The Conference assigned to a Committee of the Whole the consideration of the draft articles adopted by the International Law Commission and entrusted to a Drafting Committee, in addition to its responsibilities for drafting and coordinating and reviewing all texts adopted, the preparation of the title, preamble and final clauses of the Convention and the Final Act of the Conference. The Conference also established an Informal Consultations Group for the purpose of considering draft articles 6, 7 and 12 and, at the resumed session, an Ad hoc Group on Peaceful Settlement of Disputes. The Conference, on 22 August 1978, adopted the Vienna Convention on Succession of States in Respect of Treaties[621] consisting of a preamble, fifty articles and an annex, the text of which is reproduced in volume II, annex V, section 9. The Convention retains, to a considerable degree, the structure and the text of the draft articles adopted by the International Law Commission. The annex to the Convention specifies the conciliation procedure to which article 42 of the Convention relates.

The Final Act of the Conference, of which five resolutions adopted by the Conference form an integral part, was signed on 23 August 1978. The Convention was opened for signature on 23 August 1978 until 28 February 1979 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 August 1979 at United Nations Headquarters. Signatures are subject to ratification. The Convention remains open for accession by any State. The Convention entered into force on 6 November 1996. As of 31 December 2011, 22 States had become parties to the Convention.

Of the five resolutions adopted by the Conference, one, relating to incompatible treaty obligations and rights arising from a uniting of States, recommends that in such cases the successor States and the other States parties to the treaties in question make every effort to

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cation, Sales No. 79.V.10).

[620] Namibia was admitted to the United Nations membership on 23 April 1990.

[621] United Nations, *Treaty Series,* vol. 1946, p. 3.

resolve the matter by mutual agreement. In another resolution, concerning Namibia, the Conference resolved that the relevant articles of the Convention shall be interpreted, in the case of Namibia, in conformity with United Nations resolutions on the question of Namibia and that South Africa was not the predecessor State of the future independent State of Namibia.[622]

(b) Succession of States in respect of matters other than treaties

At its nineteenth session, in 1967, the Commission appointed Mohammed Bedjaoui as Special Rapporteur for the sub-topic of succession in respect of rights and duties resulting from sources other than treaties.[623]

The Commission considered this sub-topic at its twentieth, twenty-first, twenty-fifth and from its twenty-seventh to thirty-third sessions, in 1968, 1969, 1973 and from 1975 to 1981, respectively. In connection with its consideration of this topic, the Commission had before it the reports of the Special Rapporteur,[624] information provided by Governments[625] as well as documents prepared by the Secretariat.[626]

At its twenty-fifth session, in 1973, the Commission decided to limit its study for the time being to only one category of public property,

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[622] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978,* vol. III, Documents of the Conference, First and Resumed Sessions (United Nations publication, Sales No. 79.V.10), document A/CONF.80/32, Annex.

[623] At its twentieth session, in 1968, the Commission decided to delete from the title of the topic all reference to sources in order to avoid any ambiguity regarding its delimitation, adopting as the new title "Succession in respect of matters other than treaties."

[624] See *Yearbook of the International Law Commission, 1968,* vol. II, document A/CN.4/204; *ibid.*, *1969,* vol. II, document A/CN.4/216/Rev.1; *ibid., 1970,* vol. II, document A/CN.4/226; *ibid.*, *1971,* vol. II (Part One), document A/CN.4/247 and Add.1; *ibid.*, *1972,* vol. II, document A/CN.4/259; *ibid.*, *1973,* vol. II, document A/CN.4/267; *ibid., 1974,* vol. II (Part One), document A/CN.4/282; *ibid.*, *1976,* vol. II (Part One), document A/CN.4/292; *ibid.*, *1977,* vol. II (Part One), document A/CN.4/301 and Add.1; *ibid.*, *1978,* vol. II (Part One), document A/CN.4/313; *ibid.*, *1979,* vol. II (Part One), document A/CN.4/322 and Add.1 and 2; *ibid.*, *1980,* vol. II (Part One), document A/CN.4/333; and *ibid.*, *1981*, vol. II (Part One), document A/CN.4/345 and Add. 1–3.

[625] Document A/CN.4/338 and Add.1–4 reproduced in *ibid., 1981,* vol. II (Part Two), annex I.

[626] See *ibid., 1970,* vol. II, document A/CN.4/232. Furthermore, apart from the volume in the *United Nations Legislative Series* entitled *"Materials on Succession of States"* and supplement thereto (*see footnote 615 above*), the Secretariat published a separate volume in the *United Nations Legislative Series* containing exclusively materials provided by Governments on succession of States in respect of matters other than treaties (ST/LEG/SER.B/17, United Nations publication, Sales No. 77.V.9).

namely property of the State. At the same session, it began the first reading of the draft articles.

The Commission completed the first reading of the draft articles on succession of States in respect of State property and State debts at its thirty-first session, in 1979, and on succession in respect of State archives, at its following session, in 1980. In accordance with articles 16 and 21 of its Statute, the draft articles adopted by the Commission on first reading were transmitted, through the Secretary-General, to Governments of Member States for their observations.

The General Assembly, in paragraph 4 (*a*) of resolution 35/163 of 15 December 1980, recommended that, taking into account the written comments of Governments and views expressed in debates in the General Assembly, the Commission complete, at its thirty-third session, the second reading of the draft articles on succession of States in respect of matters other than treaties adopted at its thirty-first and thirty-second sessions.

At its thirty-third session, in 1981, the Commission re-examined the draft articles in the light of the comments of Governments and adopted the final text of its draft articles on succession of States in respect of State property, archives and debts, as a whole, with commentaries.[627] In accordance with its Statute, the Commission submitted the final draft articles to the General Assembly with a recommendation that the Assembly convene a conference of plenipotentiaries to study the draft articles and conclude a convention on the subject.[628]

The General Assembly, in resolution 36/113 of 10 December 1981, decided to convene an international conference of plenipotentiaries to consider the draft articles on succession of States in respect of State property, archives and debts, and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. In that resolution, the General Assembly also invited Member States to submit their written comments and observations on the final draft articles. In resolution 37/11 of 15 November 1982, the General Assembly decided that the United Nations Conference on Succession of States in respect of State Property, Archives and Debts would be held from 1 March to 8 April 1983 at Vienna.

The Conference was accordingly held at Vienna from 1 March to 8 April 1983. The delegations of ninety States participated in the Conference, as did also Namibia, represented by the United Nations Council for Namibia. In addition, the Palestine Liberation Organization, the

[627] See *Yearbook of the International Law Commission, 1981,* vol. II (Part Two), paras. 61 and 87.

[628] See *ibid.*, para. 86.

African National Congress of South Africa and the Pan Africanist Congress of Azania were represented at the Conference. Two specialized and related agencies and two other intergovernmental organizations were represented by observers.

The Conference had before it written comments of Governments on the final draft articles on succession of States in respect of State property, archives and debts pursuant to General Assembly resolution 36/113 of 10 December 1981, as well as comments made orally on the draft articles in the Sixth Committee of the General Assembly at the thirty-sixth and thirty-seventh sessions of the Assembly. The comments were contained in an analytical compilation prepared by the Secretariat of the United Nations.[629]

The Conference assigned to the Committee of the Whole the consideration of the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission. It entrusted to the Drafting Committee, in addition to the responsibility of drafting and coordinating and reviewing all the texts adopted, the preparation of the title, preamble and final clauses of the Convention, as well as the preparation of the Final Act of the Conference. The Conference, on 7 April 1983, adopted the Vienna Convention on Succession of States in respect of State Property, Archives and Debts,[630] consisting of a preamble, fifty-one articles and an annex, the text of which is reproduced in volume II, annex V, section 10. The Annex to the Convention specifies the conciliation procedure to which article 43 of the Convention relates. The Convention was opened for signature on that date until 31 December 1983 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1984, at United Nations Headquarters. The Convention is subject to ratification. The Convention remains open for accession by any State. The Convention shall enter into force on the thirtieth day following the date of the deposit of the fifteenth instrument of ratification or accession. As of 31 December 2011, seven States had become contracting States to the Convention.

The Final Act of the Conference, of which six resolutions adopted by the Conference form an integral part, was signed on 8 April 1983. One of the resolutions adopted by the Conference recognizes that the provisions of the Convention may not in any circumstances impair

[629] Document A/CONF.117/5 and Add.1.

[630] See *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1 March-8 April 1983,* vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. 94.V.6), document A/CONF/117/14.

the exercise of the lawful right to self-determination and independence, in accordance with the Purposes and Principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, for peoples struggling against colonialism, alien domination, alien occupation, racial discrimination and *apartheid,* and recognizes that the peoples in question possess permanent sovereignty over their resources and natural wealth and their rights to development, to information concerning their history and to the conservation of their cultural heritage. Another resolution, concerning Namibia, provides that the relevant articles of the Convention shall be interpreted, in the case of Namibia, in conformity with United Nations resolutions on the question of Namibia and that, in consequence, all the rights of the future independent State of Namibia should be reserved.[631]

At its forty-seventh session, in 1995, the Commission took up another aspect of the topic of succession of States and Governments, namely "Nationality in relation to the succession of States" (*see section 24 below*).

18. Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

At the twenty-third session of the Commission, in 1971, it was suggested that the Commission consider whether it would be possible to produce draft articles regarding such crimes as the murder, kidnapping and assaults upon diplomats and other persons entitled to special protection under international law. Though recognizing the importance and the urgency of the matter, the Commission had to defer its decision in view of the priority that had to be given to another topic. In considering its programme of work for 1972, however, the Commission decided that, if the General Assembly requested it to do so, it would prepare at its 1972 session a set of draft articles on that subject.

The General Assembly, in resolution 2780 (XXVI) of 3 December 1971, requested the Commission to study as soon as possible the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law with a view to preparing a set of draft articles dealing with offences committed against such agents and persons for submission to the Assembly at the earliest date which the Commission would consider appropriate. It

[631] See *ibid.*, document A/CONF.117/15.

also requested the Secretary-General to invite comments from Member States on the question of the protection of diplomats and to transmit them to the Commission.

At its twenty-fourth session, in 1972, the Commission, after an initial general discussion, set up a Working Group to review the problem involved and prepare a set of draft articles for submission to the Commission.[632] This step, in contrast with the traditional procedure of appointing a Special Rapporteur to make a study of the subject and prepare draft articles, was based on the view of most of the members who participated in the general discussion that the subject was one of sufficient urgency and importance to justify the Commission adopting a more expeditious method of producing a set of draft articles for submission to the General Assembly at its twenty-seventh session.

At the conclusion of the initial stage of its work, the Working Group submitted to the Commission a first report[633] containing a set of twelve draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons. Following the Commission's consideration of the draft articles, the Working Group revised them and referred them back to the Commission in two further reports.[634] The Commission considered those reports and provisionally adopted the draft of twelve articles, which it submitted to the General Assembly as well as to Governments for comments.

The General Assembly, in resolution 2926 (XXVII) of 28 November 1972, decided to consider at its twenty-eighth session the draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons with a view to the final elaboration of such a convention by the Assembly. It also invited States and the specialized agencies and interested intergovernmental organizations to submit their written comments and observations on the draft articles prepared by the Commission.

At the twenty-eighth session of the General Assembly, in 1973, the Sixth Committee considered the provisions of the draft convention in

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[632] At that session, the Commission had before it observations of Member States, transmitted to the Commission in accordance with General Assembly resolution 2780 (XXVI) of 3 December 1971 (document A/CN.4/253 and Add.1–5, incorporated in *Yearbook of the International Law Commission, 1972*, vol. II, document A/8710/Rev.1, annex), a working paper containing the text of a draft convention prepared by the delegation of Uruguay (document A/C.6/L.822) as well as a working paper by a member of the Commission, Richard D. Kearney (see *ibid*., document A/CN.4/L.182).

[633] Document A/CN.4/L.186.

[634] Documents A/CN.4/L.188 and Add.1 and A/CN.4/L.189.

two stages.[635] In the first stage, it considered all the draft articles and the new articles proposed as well as the preamble and the final clauses and, except for article 9 which it decided to delete, referred them to a Drafting Committee either in their original form or in amended form, together with amendments submitted, as appropriate. In a second stage, it considered and adopted, in their original form or in amended form, the texts recommended by the Drafting Committee. The Drafting Committee was then entrusted with the coordination and further review of the text as a whole, before its adoption by the Sixth Committee for recommendation to the General Assembly. On 14 December 1973, the General Assembly adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[636] consisting of a preamble and twenty articles, annexed to resolution 3166 (XXVIII) of 14 December 1973. The text of the Convention, together with that of resolution 3166 (XXVIII),[637] is reproduced in volume II, annex V, section 7.

The Convention, which is subject to ratification, was opened for signature by all States at United Nations Headquarters until 31 December 1974. It remains open for accession by any State. The Convention came into force on 20 February 1977. As of 31 December 2011, 173 States had become parties to the Convention.

19. The most-favoured-nation clause (1978)

The topic of the most-favoured-nation clause was first raised in 1964 when the Commission was examining the question of treaties and third States. After considering the matter, the Commission concluded that it did not think it advisable to deal with the most-favoured-nation clause in the codification of the general law of treaties, although it felt that such clauses might at some future time appropriately form the subject of a special study.

At its nineteenth session, in 1967, in view of the manageable scope of the topic, of the interest expressed in it by representatives in the Sixth Committee and of the fact that the clarification of its legal aspects might be of assistance to the work of the United Nations Commission on International Trade Law, the Commission decided to place on its programme

[635] See *Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 90, document A/9407.

[636] United Nations, *Treaty Series*, vol. 1035, p. 167.

[637] Resolution 3166 (XXVIII) of 14 December 1973 requires, in its paragraph 6, that it be always published together with the Convention annexed thereto.

of work the topic of the most-favoured-nation clause in the law of treaties.

By resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended that the Commission should study the topic of most-favoured-nation clauses in the law of treaties.

The Commission considered this topic at its twentieth, twenty-first, twenty-fifth, twenty-seventh, twenty-eighth and thirtieth sessions, in 1968, 1969, 1973, 1975, 1976 and 1978, respectively. The Commission appointed Endre Ustor and Nikolai A. Ushakov as the successive Special Rapporteurs for the topic at its nineteenth and twenty-ninth sessions, in 1967 and 1977, respectively. In connection with its consideration of the topic, the Commission had before it the working paper and reports of the Special Rapporteurs,[638] information provided by Governments and international organizations[639] as well as a document prepared by the Secretariat.[640]

At its twentieth session, in 1968, after a general discussion on the matter, the Commission instructed the Special Rapporteur, Mr. Ustor, not to confine his studies to the domain of international trade but to explore the major fields of application of the clause. The Commission considered that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application.

The Commission proceeded with the first reading of the draft articles at its twenty-fifth, twenty-seventh and twenty-eighth sessions, in 1973, 1975 and 1976. At its twenty-eighth session, in 1976, the Commission decided to transmit the draft articles adopted on first reading, through the Secretary-General, to Governments of Member States for their observations in accordance with articles 16 and 21 of its Statute.

The General Assembly, in resolution 31/97 of 15 December 1976, welcomed the completion of the first reading of the draft articles and recommended that the Commission conclude the second reading of them at its thirtieth session in the light of comments received from Member States, from organs of the United Nations which had competence on the subject matter and from interested intergovernmental

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[638] For the working paper and reports of Endre Ustor, see *Yearbook of the International Law Commission, 1968,* vol. II, document A/CN.4/L.127; *ibid.*, *1969,* vol. II, document A/CN.4/213; *ibid.*, *1970,* vol. II, document A/CN.4/228 and Add.1; *ibid., 1972,* vol. II, document A/CN.4/257 and Add.1; *ibid., 1973,* vol. II, document A/CN.4/266; *ibid., 1974,* vol. II (Part One), document A/CN.4/280; *ibid.*, *1975,* vol. II, document A/CN.4/286; and *ibid.*, *1976,* vol. II (Part One), document A/CN.4/293 and Add.1. For the report of Nikolai A. Ushakov, see *ibid.*, *1978,* vol. II (Part One), document A/CN.4/309 and Add.1 and 2.

[639] Documents A/CN.4/308 and Add.1, Add.1/Corr.1 and Add.2 as well as A/CN.4/L.268 reproduced in *ibid., 1978,* vol. II (Part Two), annex.

[640] See *ibid., 1973*, vol. II, document A/CN.4/269.

organizations. This recommendation was reiterated by the Assembly in resolution 32/151 of 19 December 1977.

At its thirtieth session in 1978, the Commission re-examined the draft articles on the basis of the first report submitted by the new Special Rapporteur, Mr. Ushakov,[641] comments received from Member States and international organizations and proposals submitted by certain members of the Commission for additional articles as follows: article 21 *bis,* "The most-favoured-nation clause in relation to arrangements between developing countries";[642] article A, "The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States";[643] article 21 *ter* "The most-favoured-nation clause and treatment extended under commodity agreements";[644] article 23 *bis* "The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member"[645] and article 28 entitled "Settlement of disputes" with an annex.[646]

At the same session, the Commission adopted the final text of thirty draft articles, with commentaries, on most-favoured-nation clauses.[647] The text of the final draft is reproduced in volume II, annex VI, section 6.

In considering the relationship between the most-favoured-nation clause and the different levels of economic development, the Commission found that the operation of the clause in the sphere of economic relations, with particular reference to the developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in article 15 of the Statute of the Commission, because the requirements for that process described therein, namely, extensive State practice, precedents and doctrine, were not easily discernible. The Commission, therefore, attempted to enter into the field of progressive development by adopting, *inter alia*, article 24, which was based on the proposal for a new article 21 *bis* mentioned above. The Commission, however, did not agree on the appropriateness of including in its final draft further provisions based on the two proposals for additional articles A and 21 *ter,* and decided instead to bring their texts to the attention of the General Assembly so that Member States might take them into account as appropriate when undertaking the final codification of the topic. With

[641] See *ibid., 1978*, vol. II (Part One), document A/CN.4/309 and Add.1 and 2.

[642] Document A/CN.4/L.266.

[643] Document A/CN.4/L.264.

[644] Document A/CN.4/L.265.

[645] Document A/CN.4/L.267.

[646] Document A/CN.4/L.270.

[647] See *Yearbook of the International Law Commission, 1978*, vol. II (Part Two), paras. 45 and 74.

regard to the question of most-favoured-nation clauses in relation to customs unions and similar associations of States, on which a proposal for a new article 23 *bis* had been submitted, the Commission, bearing in mind the inconclusiveness of the comments made thereon and the lack of time, agreed not to include an article on a customs union exception in the final draft. It was understood that the silence of the draft articles could not be interpreted as an implicit recognition of the existence or non-existence of such a rule but should, rather, be interpreted to mean that the ultimate decision was one to be taken by the States to which the draft was submitted, at the final stage of the codification of the topic. Likewise, the Commission decided not to include in its final draft a provision on the settlement of disputes such as that contained in the proposal for an additional article 28 but to refer the question to the General Assembly and Member States, and, ultimately, to the body which might be entrusted with the task of finalizing the draft articles.[648]

The Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that the draft articles be recommended to Member States with a view to the conclusion of a convention on the subject.[649]

The General Assembly, by resolution 33/139 of 19 December 1978, *inter alia*, invited all States, organs of the United Nations which have competence on the subject matter and interested intergovernmental organizations to submit their written comments on the draft articles on most-favoured-nation clauses adopted by the International Law Commission as well as on those provisions relating to such clauses on which the Commission was unable to take decisions. The Assembly also requested States to comment on the Commission's recommendation regarding the conclusion of a convention on the subject. The Assembly reiterated these invitations at its thirty-fifth, thirty-sixth, thirty-eighth and fortieth sessions, in 1980, 1981, 1983 and 1985.[650]

By its decision 43/429 of 9 December 1988, the General Assembly, noting the complexity of codification or progressive development of the international law on most-favoured-nation clauses, and considering that additional time should be given to Governments for thorough study of the draft articles and for determining their respective positions on the most appropriate procedure for future work, decided to include the item in the provisional agenda of its forty-sixth session, in 1991.

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[648] See *ibid.*, paras. 47–72.

[649] See *ibid.*, para. 73.

[650] General Assembly resolutions 35/161 of 15 December 1980, 36/111 of 10 December 1981, 38/127 of 19 December 1983 and 40/65 of 11 December 1985.

The General Assembly, at its forty-sixth session, in 1991, gave further consideration to the topic. In its decision 46/416 of 9 December 1991, the Assembly, having noted with appreciation the valuable work done by the Commission on the most-favoured-nation clauses, as well as the observations and comments of Member States, of organs of the United Nations, of the specialized agencies and of interested intergovernmental organizations, decided to bring the draft articles on most-favoured-nations clauses, as contained in the report of the Commission on the work of its thirtieth session,[651] to the attention of Member States and interested intergovernmental organizations for their consideration in such cases and to the extent as they deemed appropriate.

At its fifty-eighth session, in 2006, the Commission considered a proposal to include the topic "most-favoured-nation clauses" in its long-term programme of work. It recalled the outcome of its previous consideration of the topic, and noted that some of its members believed that the topic should not be reopened since the basic policy differences that caused the General Assembly to take no action on the Commission's draft article had not been resolved, and should first be dealt with in international forums with the necessary technical expertise and policy mandate. Other members considered that, given the changes in the international situation and the continued importance of the most-favoured-nation clause in contemporary treaties, in particular in the fields of trade law and international investments, the time had come to undertake further work on the question (*see Part III.B, section 5*).[652]

20. Question of treaties concluded between States and international organizations or between two or more international organizations

The United Nations Conference on the Law of Treaties, held in 1969 at Vienna, adopted a resolution entitled "Resolution relating to article 1 of the Vienna Convention on the Law of Treaties," annexed to the Final Act, recommending that the General Assembly should refer to the Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations. Acting on this recommendation, the General Assembly, in resolution 2501 (XXIV) of 12 November 1969, recommended that the

[651] See *Yearbook of the International Law Commission, 1978*, vol. II (Part Two), para. 74.

[652] See *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), paras. 32–33 and 259.

International Law Commission study the question, in consultation with the principal international organizations.

At its twenty-second session, in 1970, the Commission included this question in its programme of work and set up a Subcommittee to consider the preliminary problems involved in the study of the topic. The Subcommittee's report,[653] as adopted by the Commission, requested the Secretariat to undertake certain preparatory work, in particular as regards United Nations practice, and asked the Chairman of the Subcommittee to submit to members of the Subcommittee a questionnaire concerning the method of treating the topic and its scope.

At the Commission's twenty-third session, in 1971, the Subcommittee submitted to the Commission a report,[654] containing a summary of the views expressed by members of the Subcommittee in reply to the questionnaire prepared by its Chairman, and recommendations to the Commission, in particular to appoint a Special Rapporteur for the topic and confirm the request addressed to the Secretary-General concerning certain preparatory work. The Commission considered the report and adopted it without change. At the same session, the Commission appointed Paul Reuter as Special Rapporteur for the topic.

The Commission considered the topic from its twenty-fifth to twenty-seventh and from its twenty-ninth to thirty-fourth sessions, from 1973 to 1975 and from 1977 to 1982, respectively. In connection with its consideration of the topic, the Commission had before it the reports of the Special Rapporteur,[655] information provided by Governments and international organizations[656] as well as documents prepared by the Secretariat.[657]

At its twenty-fifth session, in 1973, the Commission requested the Special Rapporteur to begin the preparation of a set of draft articles on

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[653] Document A/CN.4/L.155 reproduced in *Yearbook of the International Law Commission, 1970*, vol. II, document A/8410/Rev.1, para. 89.

[654] See *ibid., 1971*, vol. II (Part Two), document A/CN.4/250, also reproduced in *ibid.*, vol. II (Part One), document A/8410/Rev.1, annex.

[655] See *ibid., 1972,* vol. II, document A/CN.4/258; *ibid., 1973,* vol. II, document A/CN.4/271; *ibid., 1974,* vol. II (Part One), document A/CN.4/279; *ibid., 1975,* vol. II, document A/CN.4/285; *ibid., 1976,* vol. II (Part One), document A/CN.4/290 and Add.1; *ibid., 1977,* vol. II (Part One), document A/CN.4/298; *ibid., 1978,* vol. II (Part One), document A/CN.4/312; *ibid., 1979,* vol. II (Part One), document A/CN.4/319; *ibid., 1980,* vol. II (Part One), document A/CN.4/327; *ibid., 1981,* vol. II (Part One), document A/CN.4/341 and Add.1; and *ibid., 1982,* vol. II (Part One), document A/CN.4/353.

[656] Document A/CN.4/339 and Add.1–8, reproduced in *ibid., 1981,* vol. II (Part Two), annex II; as well as document A/CN.4/350 and Add.1–6, Add.6/Corr.1 and Add.7–11, reproduced in *ibid., 1982,* vol. II (Part Two), annex.

[657] Document A/CN.4/L.161 and Add.1 and 2; as well as *ibid., 1974,* vol. II (Part Two), documents A/CN.4/277 and A/CN.4/281.

the basis of his first two reports and the comments made during that session.

At its twenty-sixth session, in 1974, the Commission began the first reading of the draft articles, which was completed at its thirty-second session, in 1980. In accordance with the decision taken by the Commission at its thirtieth session, in 1978, the Commission, upon provisional adoption of certain sets of draft articles, transmitted them to Governments and principal international organizations[658] for comments and observations, before the draft as a whole was adopted on the first reading. That procedure was seen as making it possible for the Commission to undertake the second reading without much delay.

The General Assembly, in resolution 35/163 of 15 December 1980, invited the Commission to commence the second reading of the draft articles.

The Commission proceeded with the second reading of the draft articles at its thirty-third and thirty-fourth sessions, in 1981 and 1982, respectively, in accordance with the General Assembly recommendation contained in resolution 36/114 of 10 December 1981. At the latter session, the Commission adopted the final text of the draft articles, with commentaries, on the law of treaties between States and international organizations or between international organizations, and submitted it to the General Assembly with the recommendation that the Assembly convoke a conference to conclude a convention on the subject under article 23, subparagraph 1 (*d*) of its Statute.[659]

By resolution 37/112 of 16 December 1982, the General Assembly decided that an international convention should be concluded on the basis of the draft articles adopted by the Commission. In addition, the Assembly invited States and the principal international organizations to submit comments on the final draft as well as on other questions, such as the participation of international organizations in the conference and the solution of the problem of how international organizations would be associated with the convention.

At its thirty-eighth session, the General Assembly, by resolution 38/139 of 19 December 1983, decided that the appropriate forum for the final consideration of the draft articles was a conference of plenipotentiaries, to be convened not earlier than 1985. It also appealed to potential participants in the Conference to undertake consultations on the draft

[658] In the light of Commission practice regarding its work on the topic, the organizations in question were the United Nations and the intergovernmental organizations invited to send observers to United Nations codification conferences.

[659] See *Yearbook of the International Law Commission, 1982,* vol. II (Part Two), paras. 33 and 57.

articles and related questions prior to the thirty-ninth session of the Assembly, in order to facilitate the successful conclusion of the work of the Conference. The following year the General Assembly, by resolution 39/86 of 13 December 1984, decided that the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations would be held at Vienna from 18 February to 21 March 1986 and referred to the Conference as the basic proposal for its consideration the final set of draft articles adopted by the Commission at its thirty-fourth session, in 1982. It also appealed to participants in the Conference to organize consultations, primarily on the organization and methods of work of the Conference, including rules of procedure, and on major issues of substance, including final clauses and settlement of disputes, prior to the convening of the Conference in order to facilitate a successful conclusion of its work through the promotion of general agreement.

Informal consultations were held between 18 March and 1 May and between 8 and 12 July 1985.[660] By resolution 40/76 of 11 December 1985, the General Assembly considered that those informal consultations had proven useful in enabling thorough preparation for successful conduct of the Conference. The Assembly decided to transmit to the Conference, and to recommend that it adopt, the draft rules of procedure for the Conference, worked out during the informal consultations (annex I of the resolution). Also, the Assembly decided to transmit to the Conference for its consideration and action, as appropriate, a list of draft articles of the basic proposal, for which substantive consideration was deemed necessary (annex II of the resolution). Finally, the Assembly referred to the Conference for its consideration the draft final clauses presented by the co-Chairmen of the informal consultations on which an exchange of views had been held (annex III of the resolution).

The Conference was held at Vienna from 18 February to 21 March 1986. Ninety-seven States participated in the Conference, as did also Namibia, represented by the United Nations Council for Namibia. The Palestine Liberation Organization, the African National Congress of South Africa and the Pan Africanist Congress of Azania were represented by observers. Nineteen international intergovernmental organizations, including the United Nations, were represented at the Conference.

The Conference assigned to the Committee of the Whole those draft articles of the basic proposal which required substantive consideration as well as the preparation of the preamble and the final provisions of the Convention. It referred all other draft articles of the basic proposal directly

[660] The informal summing-up by the co-Chairman of the informal consultations is contained in document A/C.6/40/10.

to the Drafting Committee, which was furthermore responsible for considering the draft articles referred to it by the Committee of the Whole and for coordinating and reviewing the drafting of all texts adopted, as well as for the preparation of the Final Act of the Conference.

On 20 March 1986, the Conference adopted the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[661] which consists of a preamble, 86 articles and an annex. The text of the Convention is reproduced in volume II, annex V, section 11.

The Convention applies to treaties between one or more States and one or more international organizations and to treaties between international organizations, the term "treaty" being defined for the purposes of the Convention as an international agreement governed by international law and concluded in written form between one or more States and one or more international organizations or between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation. The Convention does not apply to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or international organizations are parties, to international agreements to which one or more international organizations, and one or more subjects of international law other than States or organizations are parties, to international agreements not in written form between one or more States and one or more international organizations, or between international organizations, or to international agreements between subjects of international law other than States or international organizations. That fact shall not affect (*a*) the legal force of such agreements; (*b*) the application to them of any of the rules set forth in the Convention to which they would be subject under international law independently of the Convention; or (*c*) the application of the Convention to the relations between States and international organizations or to the relations of organizations between themselves, where those relations are governed by international agreements to which other subjects of international law are also parties.

The principal matters covered in the Convention are: conclusion and entry into force of treaties (part II); observance, application and interpretation of treaties (part III); amendment and modification of treaties (part IV); invalidity, termination and suspension of the operation of

[661] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986*, vol. II, Documents of the Conference (United Nations publication, Sales No. 94.V.5), document A/CONF.129/15.

treaties (part V); miscellaneous provisions (part VI), dealing, *inter alia*, with the relationship of the Convention to the Vienna Convention on the Law of Treaties, and reserving questions that may arise in regard to a treaty from a succession of States, from the international responsibility of a State or from the outbreak of hostilities between States, from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization, as well as questions that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party; and depositaries, notifications, corrections and registration (part VII). The procedures for judicial settlement, arbitration and conciliation referred to in article 66 of the Convention are specified in an annex to the Convention.

On 21 March 1986, the Convention was opened for signature by all States, Namibia, represented by the United Nations Council for Namibia, and international organizations invited to participate in the Conference.[662] It remained open for signature until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 30 June 1987 at United Nations Headquarters. The Convention is subject to ratification by States and to acts of formal confirmation by international organizations. The Convention remains open for accession by any State and by any international organization which has the capacity to conclude treaties. The Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by a State. By 31 December 2011, 29 States had deposited instruments of ratification, accession or succession.[663]

In addition, the Conference adopted five resolutions which were annexed to the Final Act of the Conference.[664] In accordance with one of the resolutions, the expenses of any arbitral tribunal and conciliation commission that may be set up under article 66 of the Convention shall be borne by the United Nations.

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[662] Ten international organizations, including the United Nations, had signed the Convention.

[663] Instruments of formal confirmation or accession deposited by international organizations are not counted toward the entry into force of the Convention. By 31 December 2011, 12 international organizations had deposited instruments of formal confirmation or accession.

[664] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986,* vol. II, Documents of the Conference (United Nations publication, Sales No. 94.V.5), document A/CONF.129/14.

21. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

The General Assembly, by resolution 3501 (XXX) of 15 December 1975, while reaffirming the need for strict implementation by States of the provisions of the 1961 Vienna Convention on Diplomatic Relations, deplored instances of violations of the rules of diplomatic law and in particular of the provisions of that Convention. It further invited Member States to submit to the Secretary-General their comments and observations on ways and means to ensure the implementation of the provisions of the Convention as well as on the desirability of elaborating provisions concerning the status of the diplomatic courier.

By resolution 31/76 of 13 December 1976, the General Assembly, being concerned at continuing instances of violations of the rules of diplomatic law relating, in particular, to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, again invited Member States to comment on the desirability of elaborating provisions concerning the status of the diplomatic courier with due regard also to the question of the status of the diplomatic bag not accompanied by diplomatic courier. At the same time, the Assembly requested the International Law Commission at the appropriate time to study the proposals made or to be made by Member States on the elaboration of a protocol concerning the status of such courier and bag, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations.

The Commission accordingly included in the agenda of its twenty-ninth session, in 1977, an item entitled "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier," and established a Working Group to ascertain the most suitable ways and means of dealing with the topic. The Working Group agreed to recommend a number of conclusions to the Commission,[665] including the following: (1) the topic should be inscribed on the Commission's programme of work for study, as requested by the General Assembly; (2) the Commission should undertake the study of the topic at its next session without curtailing the time allocated for the consideration of the topics on the current programme of work to which priority had been given pursuant to the relevant recommendations of the General Assembly and the corresponding decisions of the Commission; and (3) in order to fulfill this aim, it would seem more appropriate for the Commission to adopt a procedure similar, *mutatis mutandis*, to the one it followed with respect to

[665] For the report of the Working Group, see document A/CN.4/305.

the protection and inviolability of diplomatic agents and other persons (*see page 170*) by having the Working Group undertake the first stage of the study of the topic and report thereon to the Commission without appointing a Special Rapporteur. The Commission approved the conclusions reached by the Working Group concerning the ways and means of dealing with the item.[666]

At its thirtieth session, in 1978, the Commission reconvened the Working Group, which studied at that session the proposals for the elaboration of a protocol as well as the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations,[667] the 1963 Vienna Convention on Consular Relations,[668] the 1969 Convention on Special Missions,[669] and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[670] The Working Group adopted as its basic position that the relevant provisions of those conventions, if any, should form the basis for any further study of the question. The Working Group tentatively identified the relevant issues relating to the diplomatic courier and the diplomatic bag and considered the extent to which these issues were covered by the conventions. Although the issues were formulated to apply to the "diplomatic" courier and the "diplomatic" bag as requested by the General Assembly, some members of the Working Group were of the view that the issues were also relevant to other couriers and bags and should eventually be extended to them as well. The Commission included the report of the Working Group[671] in its report to the General Assembly on the session.[672]

At its thirty-third session, in 1978, the General Assembly discussed the results of the Commission's work under two separate agenda items in the Sixth Committee, namely "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: report of the Secretary-General" (item 116) and "Report of the International Law Commission on the work of its thirtieth session" (item 114). In resolution 33/139 on the latter item, adopted on 19 December 1978, the General Assembly recommended that the Commission continue the study, including on those issues it had already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by

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[666] See *Yearbook of the International Law Commission, 1977*, vol. II (Part Two), paras. 83 and 84.

[667] See volume II, annex V, section 3.

[668] See volume II, annex V, section 4.

[669] See volume II, annex V, section 5.

[670] See volume II, annex V, section 8.

[671] Document A/CN.4/L.285.

[672] See *Yearbook of the International Law Commission, 1978*, vol. II (Part Two), paras. 137–144.

diplomatic courier, in the light of comments made during the debate on the item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument. With regard to the former item, the Assembly adopted, on the same day, resolution 33/140. The Assembly noted with appreciation the study by the Commission of the proposals on the elaboration of a protocol which could constitute a further development of international diplomatic law, decided that it would give further consideration to this question and expressed the view that, unless Member States indicated the desirability of an earlier consideration, it would be appropriate to do so when the International Law Commission submitted to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the topic.

At its thirty-first session, in 1979, the Commission again re-established a Working Group, which studied issues on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The results of the study were set out in the Commission's report to the General Assembly.[673] At the same session, the Commission decided to appoint Alexander Yankov as Special Rapporteur for the topic.

The Commission proceeded with its work on the topic from its thirty-second to thirty-eighth sessions and at its fortieth and forty-first sessions, from 1980 to 1986 and in 1988 and 1989, respectively. In connection with its consideration of the topic, the Commission had before it the reports of the Special Rapporteur,[674] information provided by Governments[675] as well as documents prepared by the Secretariat.[676]

The Commission began the first reading of the draft articles at its thirty-third session, in 1981, which was completed at its thirty-eighth

[673] See *ibid., 1979*, vol. II (Part Two), chapter VI, sections B to D. For the report of the Working Group, see document A/CN.4/L.310.

[674] See *Yearbook of the International Law Commission, 1980*, vol. II (Part One), document A/CN.4/335; *ibid.*, *1981,* vol. II (Part One), document A/CN.4/347 and Add.1 and 2; *ibid.*, *1982*, vol. II (Part One), document A/CN.4/359 and Add.1; *ibid.*, *1983,* vol. II (Part One), document A/CN.4/374 and Add.1–4; *ibid.*, *1984,* vol. II (Part One), document A/CN.4/382; *ibid.*, *1985*, vol. II (Part One), document A/CN.4/390; *ibid.*, *1986,* vol. II (Part One), document A/CN.4/400; and *ibid.*, *1988,* vol. II (Part One), document A/CN.4/417.

[675] See *ibid., 1979,* vol. II (Part One), document A/CN.4/321 and Add.1–7; *ibid.*, *1982,* vol. II (Part One), document A/CN.4/356 and Add.1–3; *ibid.*, *1983,* vol. II (Part One), document A/CN.4/372 and Add.1 and 2; *ibid.*, *1984,* vol. II (Part One), document A/CN.4/379 and Add.1; *ibid.*, *1988,* vol. II (Part One), document A/CN.4/409 and Add. 1–5; and *ibid.*, *1989,* vol. II (Part One), document A/CN.4/420.

[676] See *ibid., 1977,* vol. II (Part One), document A/CN.4/300, as well as working papers A/CN.4/WP.4 and 5.

session, in 1986. The draft adopted on first reading was transmitted, in accordance with articles 16 and 21 of the Commission's Statute, through the Secretary-General, to Governments for comments and observations.

The General Assembly, in resolutions 41/81 of 3 December 1986 and 42/156 of 7 December 1987, *inter alia*, urged Governments to give full attention to the request of the Commission for comments and observations on the draft articles adopted on first reading by the Commission.

At its fortieth session, in 1988, the Commission began the second reading of the draft articles. It re-examined the draft articles on the basis of the eighth report submitted by the Special Rapporteur.[677] In that report, the Special Rapporteur analysed the comments and observations of Governments in connection with each draft article and proposed the revision of certain draft articles. In his view, the elaboration of the draft articles should be based on a comprehensive approach leading to a coherent and, as much as possible, uniform regime concerning all kinds of couriers and bags. He also underscored the significance which should be attached to functional necessity as the basic factor in determining the status of all kinds of couriers and bags. These considerations of the Special Rapporteur were generally shared by the Commission.

At its forty-first session, in 1989, the Commission adopted the final text of thirty-two draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as a whole, as well as a draft optional protocol on the status of the courier and the bag of special missions, and a draft optional protocol on the status of the courier and the bag of international organizations of a universal character, with commentaries thereto.[678] The texts of the final draft articles and optional protocols are reproduced in volume II, annex VI, section 7. In accordance with article 23 of its Statute, the Commission decided to recommend to the General Assembly that it convene an international conference of plenipotentiaries to study the draft articles and the optional protocols and to conclude a convention on the subject.[679]

By resolution 44/36 of 4 December 1989, the General Assembly decided to hold at its forty-fifth session, in 1990, informal consultations, in the framework of the Sixth Committee, to study the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the draft optional protocols thereto, as well as the question of how to deal further with those draft instruments with a view to facilitating the reaching of a generally acceptable decision in the latter respect. Those consultations were continued at the forty-

[677] See *ibid., 1988,* vol. II (Part One), document A/CN.4/417.

[678] See *ibid., 1989,* vol. II (Part Two), paras. 30 and 72.

[679] See *ibid.,* para. 66.

sixth and forty-seventh sessions, pursuant to General Assembly resolutions 45/43 of 28 November 1990 and 46/57 of 9 December 1991. Various proposals were made to reconcile the divergences of views which existed on some articles, in particular article 28 on the inviolability of the bag, but no agreement was reached. On the recommendation of the Sixth Committee, the General Assembly decided, by its decision 47/415 of 25 November 1992, that the informal consultations would be resumed at the fiftieth session, in 1995.

At its fiftieth session, in 1995, the General Assembly adopted decision 50/416 of 11 December 1995, by which it decided to bring the draft articles, together with the observations made during the debates on them in the Sixth Committee, to the attention of Member States, and to remind Member States of the possibility that this field of international law and any further developments within it may be subject to codification at an appropriate time in the future.

22. Jurisdictional immunities of States and their property

At its first session, in 1949, the Commission selected the subject of jurisdictional immunities of States and their property as one of the topics for codification without, however, including it in the list of topics to which it gave priority. At its twenty-ninth session, in 1977, the Commission considered possible additional topics for study. The topic "Jurisdictional immunities of States and their property" was recommended for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.

The General Assembly, in resolution 32/151 of 19 December 1977, invited the Commission, at an appropriate time and in the light of progress made on other topics on its agenda, to commence work on the topic of jurisdictional immunities of States and their property.

At its thirtieth session, in 1978, the Commission set up a Working Group to consider the question of the future work of the Commission on the topic and to report thereon to the Commission. The Working Group submitted to the Commission a report[680] that dealt, *inter alia*, with general aspects of the topic and contained a number of recommendations. The Commission took note of the report of the Working Group and, on the basis of the recommendations contained therein, decided to begin its consideration of the topic "Jurisdictional immunities of States and their property". It also appointed Sompong Sucharitkul as Special Rap-

[680] Document A/CN.4/L.279/Rev.1. Section III of the report is reproduced in *ibid., 1978*, vol. II (Part Two), para. 190, annex.

porteur for the topic and invited him to prepare a preliminary report at an early juncture for consideration by the Commission. The Commission, further, requested the Secretary-General to invite Governments of Member States to submit relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence, and requested the Secretariat to prepare working papers and materials on the topic as the need arose and as requested by the Commission or the Special Rapporteur.[681]

The Commission considered the topic from its thirty-first to thirty-eighth and from its forty-first to forty-third sessions, from 1979 to 1986 and from 1989 to 1991. The Commission appointed Motoo Ogiso as the new Special Rapporteur for the topic at its thirty-ninth session, in 1987. In connection with its consideration of the topic, the Commission had before it the reports of the Special Rapporteurs[682] and information provided by Governments.[683]

At its thirty-first session, in 1979, the Commission had before it a preliminary report on the topic submitted by the Special Rapporteur, Mr. Sucharitkul.[684] The report was designed to present an overall picture of the topic without proposing any solution for each or any of the substantive issues identified. During the discussion in the Commission at that session, a consensus emerged to the effect that for the immediate future the Special Rapporteur should continue his study, concentrating on general principles and thus confining the areas of initial interest to the substantive contents and constitutive elements of the general rules of jurisdictional immunities of States. It was also understood that the question of the extent of, or limitations on, the application of the rules of State immunity required an extremely careful and balanced approach, and that the exceptions identified in the preliminary report were merely

[681] See *ibid.*, paras. 179, 180 and 188–190.

[682] For the reports of Sompong Sucharitkul, see *ibid., 1979*, vol. II (Part One), document A/CN.4/323; *ibid.*, *1980,* vol. II (Part One), document A/CN.4/331 and Add.1; *ibid.*, *1981,* vol. II (Part One), document A/CN.4/340 and Add.1; *ibid.*, *1982*, vol. II (Part One), document A/CN.4/357; *ibid.*, *1983,* vol. II (Part One), document A/CN.4/363 and Add.1; *ibid.*, *1984*, vol. II (Part One), document A/CN.4/376 and Add.1 and 2; *ibid.*, *1985*, vol. II (Part One), document A/CN.4/388; and *ibid.*, *1986,* vol. II (Part One), document A/CN.4/396. For the reports of Motoo Ogiso, see *ibid.*, *1988,* vol. II (Part One), document A/CN.4/415; *ibid.*, *1989*, vol. II (Part One), document A/CN.4/422 and Add.1; and *ibid.*, *1990,* vol. II (Part One), document A/CN.4/431.

[683] Document A/CN.4/343 and Add.1–4, reproduced in a volume in the *United Nations Legislative Series* entitled *"Materials on Jurisdictional Immunities of States and Their Property"* (ST/LEG/SER.B/20, United Nations publication, Sales No. 81.V.10); and *Yearbook of the International Law Commission, 1988,* vol. II (Part One), document A/CN.4/410 and Add.1–5.

[684] See *Yearbook of the International Law Commission, 1979*, vol. II (Part One), document A/CN.4/323.

noted as possible limitations, without any assessment or evaluation of their significance in State practice. It was furthermore agreed, in terms of priorities to be accorded in the treatment of the topic, that the Special Rapporteur should continue his work on the immunities of States from jurisdiction, leaving aside for the time being the question of immunity from execution of judgement. Another point which was noted was the widening functions of the State, which had enhanced the complexities of the problem of State immunities. Controversies had existed in the past concerning the divisibility of the functions of the State or the various distinctions between the activities carried on by modern States in fields of activity formerly undertaken by individuals, such as trade and finance. No generally accepted criterion for identifying the circumstances or areas in which State immunity could be invoked or accorded had been found. The greatest care was therefore called for in the treatment of this particular aspect of the topic.

The Commission began the first reading of the draft articles at its thirty-second session, in 1980, which was concluded at its thirty-eighth session, in 1986. At that session, the Commission transmitted the draft articles adopted on first reading through the Secretary-General to Governments for comments and observations in accordance with articles 16 and 21 of its Statute.

The General Assembly, in resolutions 41/81 of 3 December 1986 and 42/156 of 7 December 1987, *inter alia*, urged Governments to give full attention to the request of the Commission for comments and observations on the draft articles adopted on first reading by the Commission.

The Commission began the second reading of the draft articles based on the three reports of the new Special Rapporteur, Mr. Ogiso, at its forty-first session, in 1989, which was concluded at its forty-third session, in 1991. In his preliminary report, the Special Rapporteur analysed some of the comments and observations of Governments and proposed to revise or merge some of the draft articles based on those comments. In his second report, the Special Rapporteur gave further consideration to some of the draft articles on the basis of the written comments and observations of Governments and his analysis of relevant treaties, laws and State practice, and proposed certain revisions, additions or deletions complementary to those contained in his preliminary report. Responding to a request from some members of the Commission, the Special Rapporteur also included a brief review of the recent development of general State practice concerning State immunity. In his third report, the Special Rapporteur reviewed once again the entire set of draft articles and suggested certain reformulations, taking into account the views expressed by members of the Commission at its forty-first session, in

1989, as well as by Governments in their written comments and in the Sixth Committee of the General Assembly at its forty-fourth session.

In undertaking the second reading of the draft articles, at its forty-first session, in 1989, the Commission agreed with the Special Rapporteur that it should avoid entering yet again into a doctrinal debate on the general principles of State immunity, which had been extensively debated in the Commission and on which the views of the Commission remained divided; the Commission should instead concentrate its discussion on individual articles, so as to arrive at a consensus as to what kind of activities of the State should, or should not, enjoy immunity from jurisdiction of another State. This, in the view of the Commission, was the only pragmatic way of preparing a convention which would command wide support of the international community. The Commission also noted that the law of State jurisdictional immunity was in a state of flux as some States were in the process of amending their basic laws or had done so recently, and thus it was essential that the draft articles be given the opportunity to reflect such Government practice, and, moreover, to leave room for further development of the law of jurisdictional immunity of States.[685]

At its forty-third session, in 1991, the Commission adopted the final text of twenty-two draft articles on the jurisdictional immunities of States and their property, with commentaries.[686] In accordance with article 23 of its Statute, the Commission submitted the draft articles to the General Assembly, together with a recommendation that the Assembly convene an international conference of plenipotentiaries to examine the draft articles and to conclude a convention on the subject.[687]

The General Assembly, by resolution 46/55 of 9 December 1991, invited States to submit their written comments and observations on the draft articles, and decided to establish at its forty-seventh session an open-ended working group of the Sixth Committee to examine, in the light of the written comments of Governments, as well as views expressed in debates at the forty-sixth session of the Assembly: (*a*) issues of substance arising out of the draft articles, in order to facilitate a successful conclusion of a convention through the promotion of general agreement; and (*b*) the question of the convening of an international conference, to be held in 1994 or subsequently, to conclude a convention on jurisdictional immunities of States and their property.

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[685] See *ibid., 1989,* vol. II (Part Two), paras. 406 and 407.

[686] See *ibid.*, *1991,* vol. II (Part Two), paras. 23 and 28.

[687] See *ibid.*, para. 25.

The Working Group began its work at the forty-seventh session of the General Assembly[688] and resumed it, in accordance with General Assembly decision 47/414 of 25 November 1992, at the forty-eighth session.[689] By its decision 48/413 of 9 December 1993, the General Assembly decided that consultations should be held in the framework of the Sixth Committee at its forty-ninth session, to continue consideration of the substantive issues regarding which the identification and attenuation of differences was desirable in order to facilitate the successful conclusion of a convention through general agreement; and also decided that, at its forty-ninth session, in the light of the progress thus far achieved and of the results of the said consultations, it would give full consideration to the recommendation of the International Law Commission that an international conference of plenipotentiaries be convened to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on the subject.

At the forty-ninth session of the General Assembly, in 1994, the Sixth Committee, in accordance with General Assembly decision 48/413, decided to convene informal consultations. The consultations were held at six meetings, from 27 September to 3 October 1994. At the same session, the Chairman of the informal consultations introduced a document[690] containing conclusions he had drawn from the consultations.[691]

By resolution 49/61 of 9 December 1994, the General Assembly accepted the above-cited recommendation of the International Law Commission, invited States to submit to the Secretary-General their comments on the conclusions of the Chairman of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993, and on the reports of the Working Group established under General Assembly resolution 46/55 of 9 December 1991 and decision 47/414 of 25 November 1992, and decided to resume consideration, at its fifty-second session, in 1997, of the issues of substance, in the light of the reports mentioned above and the comments submitted by States thereon, and to determine, at its fifty-second or fifty-third session, the arrangements for the conference, including the date and place, due consideration being given to ensuring the widest possible agreement at the conference. It further decided to include in the provisional agenda of its fifty-second session the item entitled "Convention on jurisdictional immunities of States and their property".

[688] For the report of the Working Group, see document A/C.6/47/L.10.

[689] For the report of the Working Group, see document A/C.6/48/L.4.

[690] Document A/C.6/49/L.2.

[691] See document A/49/744, paras. 3–7.

The item was considered at the fifty-second and fifty-third sessions of the General Assembly, in 1997 and 1998. By resolution 52/151 of 15 December 1997, the General Assembly, *inter alia*, decided to consider the item again at its fifty-third session with a view to establishing a working group at its fifty-fourth session, taking into account the comments submitted by States in accordance with resolution 49/61 of 9 December 1994. By resolution 53/98 of 8 December 1998, the General Assembly decided to establish at its fifty-fourth session, in 1999, an open-ended working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles. taking into account, *inter alia*, recent developments in State practice and legislation as well as the comments submitted by States on the topic. It also invited the International Law Commission to present any preliminary comments that it might have regarding outstanding substantive issues related to the draft articles in the light of the results of the informal consultations held in the Sixth Committee, in 1994, pursuant to General Assembly decision 48/413 of 9 December 1993.

At its fifty-first session, in 1999, the Commission established a Working Group on Jurisdictional Immunities of States and Their Property in accordance with General Assembly resolution 53/98. The Working Group concentrated its work on the five main issues identified in the conclusions of the Chairman of the informal consultations held in the Sixth Committee, in 1994, namely: (1) the concept of a State for purposes of immunity, (2) the criteria for determining the commercial character of a contract or transaction; (3) the concept of a State enterprise or other State entity in relation to commercial transactions; (4) contracts of employment; and (5) measures of constraint against State property. The Working Group also considered the question of the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms of international law, which was identified as an issue that might be considered in the light of recent State practice. In its report to the Commission,[692] the Working Group made a number of suggestions regarding possible ways of solving the five issues. The Commission took note of the report of the Working Group and adopted the suggestions contained therein.

At the fifty-fourth session of the General Assembly, in 1999, an open-ended working group of the Sixth Committee established under General Assembly resolution 53/98 of 8 December 1998 considered the same five outstanding substantive issues as well as the possible form of the outcome of the work on the topic. It also considered the question

[692] See *Yearbook of the International Law Commission, 1999,* vol. II (Part Two), paras. 481–484.

identified by the Working Group of the Commission on the existence or non-existence of immunity in the case of violation by a State of *jus cogens* norms.[693] The working group continued its consideration of the future form of, and outstanding substantive issues related to, the draft articles, at the fifty-fifth session of the General Assembly, in 2000, pursuant to General Assembly resolution 54/101 of 9 December 1999.[694] As a result of the later discussions, the Chairman prepared a number of texts on the five outstanding issues as a possible basis for further discussions on the topic.[695]

By resolution 55/150 of 12 December 2000, the General Assembly, having considered the reports of the working group of the Sixth Committee, decided to establish an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property open to all States Members of the United Nations and to States Members of the specialized agencies, with the mandate to further the work done, consolidate areas of agreement and resolve outstanding issues with a view to elaborating a generally acceptable instrument based on the draft articles, and also on the discussions of the working group of the Sixth Committee and their results. By resolution 56/78 of 12 December 2001, the General Assembly decided that the Ad Hoc Committee should meet in February 2002, and that it should report to the General Assembly at its fifty-seventh session on the outcome of its work.

The Ad Hoc Committee on Jurisdictional Immunities of States and Their Property proceeded with its work in a Working Group of the Whole in two stages by discussing, first, the five outstanding substantive issues and, second, the remainder of the draft articles with a view to identifying and resolving any further issues arising from the text.[696] This was the first time that the entire draft articles had been considered in the General Assembly since their adoption by the Commission in 1991, taking into account subsequent developments in State practice. The Working Group made substantial progress on the five substantive issues by reducing the number of outstanding issues and narrowed the divergent views with respect to the remaining issues. The Working Group decided to reflect the remaining divergent views on certain draft articles in the revised text of the draft articles contained in its report. The Ad Hoc Committee emphasized the importance of elaborating in a timely manner a generally acceptable instrument and urged States to make every

[693] For the report of the Working Group, see document A/C.6/54/L.12.

[694] For the report of the Working Group, see document A/C.6/55/L.12.

[695] Document A/C.6/55/L.12.

[696] For the report of the Ad Hoc Committee, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 22* (A/57/22). For the documents before the Ad Hoc Committee, see *ibid*., para. 7.

effort to resolve the remaining outstanding issues in the interest of arriving at an agreement.[697]

After considering the report of the Ad Hoc Committee at its fifty-seventh session, in 2002, the General Assembly adopted resolution 57/16 of 19 November 2002 in which, noting that few issues remained outstanding and stressing the importance of uniformity and clarity in the law applicable to jurisdictional immunities of States and their property, decided that the Ad Hoc Committee should be reconvened in February 2003 and requested the Ad Hoc Committee to report to the General Assembly at its fifty-eighth session on the outcome of its work.

In 2003, the Ad Hoc Committee proceeded with the substantive discussion of the outstanding issues in a Working Group of the Whole. The Working Group established two informal consultative groups. It discussed and resolved all of the outstanding issues. The Ad Hoc Committee adopted its report[698] containing the text of the draft articles,[699] together with understandings with respect to draft articles 10 (Commercial transactions), 11 (Contracts of employment), 13 (Ownership, possession and use of property), 14 (Intellectual and industrial property), 17 (Effect of an arbitration agreement) and 19[700] (State immunity from post-judgement measures of constraint) as well as a general understanding that the draft articles did not cover criminal proceedings.[701] The Ad Hoc Committee recommended that the General Assembly take a decision on the form of the draft articles and noted that, if the General Assembly decided to adopt the draft articles as a convention, the draft articles would need a preamble and final clauses, including a general saving provision concerning the relationship between the articles and other international agreements relating to the same subject.[702]

The Ad Hoc Committee was reconvened in 2004, pursuant to General Assembly resolution 58/74 of 9 December 2003, with the mandate to formulate a preamble and final clauses, with a view to completing a convention on jurisdictional immunities of States and their property. A preamble and set of final clauses for a draft Convention on jurisdictional immunities and their property, as well as the chapeau for the understandings with respect to certain provisions of the draft Convention, were subsequently developed by the Working Group of the Whole con-

[697] See *ibid.*, paras. 8–13.

[698] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 22* (A/58/22). For the documents before the Ad Hoc Committee, see *ibid.*, para. 7.

[699] See *ibid.,* annex I.

[700] As renumbered (previously article 18).

[701] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 22* (A/58/22), annex II.

[702] See *ibid.,* para.12.

vened by the Ad Hoc Committee. The Working Group further reiterated the general understanding that the draft Convention did not cover criminal proceedings, but proposed to deal with the issue in a General Assembly resolution as opposed to the draft convention itself. The Ad Hoc Committee subsequently adopted the report of the Working Group and recommended to the General Assembly the adoption of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property, contained in its report.[703] The Ad Hoc Committee also recommended that the General Assembly include in its resolution adopting the United Nations Convention on Jurisdictional Immunities of States and Their Property, the general understanding that the Convention did not cover criminal proceedings.

The General Assembly, in resolution 59/38 of 2 December 2004, having considered the report of the Ad Hoc Committee on Jurisdictional Immunities of States and their property, expressed its deep appreciation to the Commission and the Ad Hoc Committee on jurisdictional immunities of States and their property for their valuable work on the law of jurisdictional immunities of States and their property. It further agreed with the general understanding reached in the Ad Hoc Committee that the United Nations Convention on jurisdictional immunities of States and their property did not cover criminal proceedings.

By the same resolution, the General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property, consisting of thirty-three articles and an annex to the Convention relating to the understanding with respect to certain provisions of the Convention. The text of the Convention is reproduced in volume II, annex V, section 13.

The Convention was open for signature by all States from 17 January 2005 until 17 January 2007, at United Nations Headquarters in New York. The Convention is subject to ratification, acceptance, approval or accession by States. Signatures are subject to ratification, acceptance or approval. It shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. As of 31 December 2011, 13 States had become contracting States to the Convention.

[703] See *ibid., Fifty-ninth Session, Supplement No. 22* (A/59/22), annex I.

23. The law of the non-navigational uses of international watercourses

The General Assembly, by resolution 2669 (XXV) of 8 December 1970, recommended that the Commission take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, consider the practicability of taking the necessary action as soon as the Commission deemed it appropriate.

At its twenty-third session, in 1971, the Commission included the subject of non-navigational uses of international watercourses in its programme of work. The Commission also agreed that, for studying the rules of international law on that subject with a view to their progressive development and codification, all relevant materials on State practice should be compiled and analysed.[704]

The General Assembly, by resolution 2780 (XXVI) of 3 December 1971, recommended that the Commission decide upon the priority to be given to the topic.

At its twenty-fourth session, in 1972, the Commission indicated its intention to take up the Assembly's recommendation when it came to discuss its long-term programme of work. The Commission furthermore reached the conclusion that the problem of the pollution of international waterways was of both substantial urgency and complexity. Accordingly, it requested the Secretariat to continue compiling the material relating to the topic with specific reference to the problems of the pollution of international watercourses.

At its twenty-fifth session, in 1973, the Commission gave special attention to the question of the priority to be given to the topic. It concluded, however, that a formal decision on the commencement of the substantive work should be taken after members had had an opportunity to review the supplementary report on the legal problems relating to the non-navigational uses of international watercourses being prepared by the Secretariat, which was issued in 1974.[705]

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[704] The Commission noted that a considerable amount of such material had already been published in 1963 in the Secretary-General's report entitled "Legal problems relating to the utilization and use of international rivers" (see *Yearbook of the International Law Commission, 1974,* vol. II (Part Two), document A/5409), prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in a volume in the *United Nations Legislative Series* entitled *"Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation"* (ST/LEG/SER.B/12, United Nations publication, Sales No. 63.V.4).

[705] The General Assembly, in resolution 2669 (XXV) of 8 December 1970, requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal

At its twenty-sixth session, in 1974, the Commission, pursuant to the recommendation contained in General Assembly resolution 3071 (XXVIII) of 30 November 1973, set up a Subcommittee to consider the question. The Subcommittee submitted a report to the Commission[706] that dealt with the nature of international watercourses and pointed out that a preliminary question to be examined was the scope of the term "international watercourses". Recognizing the variations in practice and theory, the report proposed to request States to comment on a series of questions concerning the appropriate scope of "international watercourses" to be adopted in a study of the legal aspects of their non-navigational uses. It stated that another preliminary question was the type of activities to be included within the term "non-navigational uses". Since uses could be conflicting, both on the national and on the international levels, the report proposed that the views of States be sought as to the range of uses that the Commission should take account of in its work and as to whether certain special problems needed to be considered. Furthermore, the report recommended that States be requested to reply to the questions whether the Commission should take up the problem of pollution of international watercourses at the initial stage in its study, and whether special arrangements should be made for ensuring that the Commission be provided with technical, scientific and economic advice. At the same session, the Commission adopted the report without change.

The General Assembly, by resolution 3315 (XXIX) of 14 December 1974, recommended that the Commission continue its study of the law of the non-navigational uses of international watercourses, taking into account, *inter alia*, comments received from Member States on the questions mentioned in the Subcommittee's report.

The Commission proceeded with its work on the topic at its twenty-eighth, thirty-first and thirty-second sessions, from its thirty-fifth to forty-third sessions and at its forty-fifth and forty-sixth sessions, in 1976, 1979 and 1980, from 1983 to 1991 and in 1993 and 1994, respectively. The Commission appointed Richard D. Kearney, Stephen M. Schwebel, Jens Evensen, Stephen McCaffrey and Robert Rosenstock as the successive Special Rapporteurs for the topic at its twenty-sixth, twenty-ninth, thirty-fourth, thirty-seventh and forty-fourth sessions, in 1974, 1977, 1982, 1985 and 1992, respectively. In connection with its consideration of the topic,

problems relating to the question, taking into account the updated application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter. The Secretary-General submitted a supplementary report in 1974, which was reproduced in *Yearbook of the International Law Commission, 1974,* vol. II (Part Two), document A/CN.4/274.

[706] Document A/CN.4/283, reproduced in *ibid.,* (Part One), document A/9610/Rev.1, chapter V, annex.

the Commission had before it the reports of the Special Rapporteurs,[707] information provided by Governments[708] as well as documents prepared by the Secretariat.[709]

At its twenty-eighth session, in 1976, the Commission held a general debate on the topic which led to agreement in the Commission that the question of determining the scope of the term "international watercourses" did not need to be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses. In so doing, every effort should be made to devise rules which would maintain a delicate balance between rules too detailed to be generally applicable and rules too general to be effective. Furthermore, the rules should be designed to promote the adoption of regimes for individual international rivers and for that reason should have a residual character. Effort should also be devoted to making the rules as widely acceptable as possible and the sensitivity of States regarding their interests in water must be taken into account.

At its thirty-second session, in 1980, the Commission began the first reading of the draft articles. It decided to use, at least in the early stages of its work on the topic, the provisional working hypothesis recommended by the Drafting Committee as to the meaning of the term "international watercourse system".[710]

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[707] For the report of Richard D. Kearney, see *ibid., 1976,* vol. II (Part One), document A/CN.4/295. For the reports of Stephen M. Schwebel, see *ibid., 1979,* vol. II (Part One), document A/CN.4/320; *ibid.*, *1980,* vol. II (Part One), document A/CN.4/332 and Add.1; and *ibid.*, *1982,* vol. II (Part One), document A/CN.4/348. For the reports of Jens Evensen, see *ibid., 1983,* vol. II (Part One), document A/CN.4/367; and *ibid., 1984,* vol. II (Part One), document A/CN.4/381. For the reports of Stephen McCaffrey, see *ibid., 1985*, vol. II (Part One), document A/CN.4/393; *ibid.*, *1986,* vol. II (Part One), document A/CN.4/399 and Add.1 and 2; *ibid.*, *1987,* vol. II (Part One), document A/CN.4/406 and Add.1 and 2; *ibid.*, *1988*, vol. II (Part One), document A/CN.4/412 and Add. 1 and 2; *ibid.*, *1989,* vol. II (Part One), document A/CN.4/421 and Add.1 and 2; *ibid.*, *1990,* vol. II (Part One), document A/CN.4/427 and Add.1; and *ibid.*, *1991*, vol. II (Part One), document A/CN.4/436. For the reports of Robert Rosenstock, see *ibid., 1993,* vol. II (Part One), document A/CN.4/451; and *ibid.*, *1994,* vol. II (Part One), document A/CN.4/462.

[708] See *ibid., 1976,* vol. II (Part One), document A/CN.4/294 and Add.1; *ibid.*, *1978,* vol. II (Part One), document A/CN.4/314; *ibid.*, *1979*, vol. II (Part One), document A/CN.4/324; *ibid.*, *1980,* vol. II (Part One), document A/CN.4/329 and Add.1; *ibid.*, *1982,* vol. II (Part One), document A/CN.4/352 and Add.1; and *ibid.*, *1993,* vol. II (Part One), document A/CN.4/447 and Add.1–3.

[709] Apart from the documents mentioned above, see also *ibid., 1971,* vol. II (Part Two), document A/CN.4/244/Rev.1; *ibid.*, *1973*, vol. II, document A/CN.4/270; as well as document A/CN.4/L.241.

[710] The hypothesis was contained in a note which reads as follows:

"A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and ground water constituting by virtue of their physical relation-

At its forty-third session, in 1991, the Commission adopted on first reading the draft articles as a whole. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments of Member States for comments and observations.

The General Assembly, in resolution 46/54 of 9 December 1991, expressed its appreciation to the Commission for the completion of the first reading of the draft articles on the topic and urged the Governments to present their comments and observations on the draft in writing, as requested by the Commission.

At its forty-fifth session, in 1993, and forty-sixth session, in 1994, the Commission proceeded with its second reading of the draft articles on the basis of the reports submitted by the new Special Rapporteur for the topic, Mr. Rosenstock. In his first report,[711] the Special Rapporteur analysed the written comments and observations received from Governments and raised two issues of a general character, namely whether the eventual form of the articles should be a convention or model rules, and the question of dispute settlement procedure. He also raised the possibility of including in the draft articles provisions on "unrelated confined groundwaters". At its forty-fifth session, in 1993, the Commission requested the Special Rapporteur to undertake a study on the question of "unrelated confined groundwaters" in order to determine the feasibility of incorporating them in the topic. In his second report,[712] the Special Rapporteur suggested amending certain draft articles adopted on first reading to include provisions on "unrelated confined groundwaters,"[713] in order to encourage their management in a rational manner and pre-

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ship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

"An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.

"To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse." See *ibid., 1980,* vol. II (Part Two), para. 90.

[711] See *ibid., 1993*, vol. II (Part One), document A/CN.4/451.

[712] See *ibid., 1994,* vol. II (Part One), document A/CN.4/462.

[713] The term "unrelated confined groundwaters" is conceived as a shared aquifer which is an independent water resource body, not contributing water to a "common terminus" via a river system, or receiving significant amounts of water from any extant surface water body. See *ibid.*, annex, para. 38.

vent their depletion and pollution, and proposed a new article dealing with dispute settlement.

At its forty-sixth session, in 1994, having considered the second report of the Special Rapporteur, the Commission decided to refer the entire set of the draft articles to the Drafting Committee and invited it to proceed with their consideration, without the amendments on "unrelated confined groundwaters," and to submit suggestions to the Commission on how the Commission should proceed on the question of "unrelated confined groundwaters". At the same session, the Commission adopted the final text of a set of thirty-three draft articles on the law of the non-navigational uses of international watercourses, with commentaries, and a resolution on confined transboundary groundwater.[714] In accordance with article 23 of its Statute, the Commission submitted the draft articles and the resolution to the General Assembly, together with a recommendation that a convention on the subject be elaborated by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.[715]

The General Assembly, by resolution 49/52 of 9 December 1994, expressed its appreciation to the Commission for its valuable work on the law of the non-navigational uses of international watercourses, and to the successive Special Rapporteurs for their contribution to that work, invited States to submit written comments and observations on the draft articles adopted by the Commission, and decided that, at its fifty-first session, in 1996, the Sixth Committee would convene as a Working Group of the Whole, open to States Members of the United Nations or members of specialized agencies, to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the Commission in the light of the written comments and observations of States and views expressed in the debate at the forty-ninth session of the General Assembly. It also decided that the Working Group of the Whole would, without prejudice to the rules of procedure of the General Assembly, follow the methods of work and procedures outlined in the annex to the resolution, subject to any modifications which it might deem appropriate, and further decided to include in the provisional agenda of its fifty-first session an item entitled "Convention on the law of the non-navigational uses of international watercourses".

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[714] See *ibid., 1994*, vol. II (Part Two), paras. 218 and 222. The question of transboundary groundwaters was subsequently taken up by the Commission, in the context of the topic "Shared natural resources" (*see section 30 below*).

[715] See *ibid.,* para. 219.

The Working Group of the Whole of the Sixth Committee held two sessions, from 7 to 25 October 1996 and from 24 March to 4 April 1997, the second having been held pursuant to General Assembly resolution 51/206 of 17 December 1996. It had before it the draft articles on the topic adopted by the Commission, and comments, observations and proposals by States. The Working Group of the Whole established a Drafting Committee. As mandated by General Assembly resolution 51/206, upon completion of its mandate, the Working Group reported directly to the General Assembly.[716]

By resolution 51/229 of 21 May 1997, the General Assembly, upon recommendation of the Working Group of the Whole, adopted the Convention on the Law of the Non-navigational Uses of International Watercourses, consisting of a preamble, thirty-seven articles and an appendix on arbitration. The text of the Convention is reproduced in volume II, annex V, section 12.

The Convention was open for signature by all States and by regional economic integration organizations until 21 May 2000 at United Nations Headquarters in New York. The Convention is subject to ratification, acceptance, approval or accession by States and by regional economic integration organizations. It shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession. As of 31 December 2011, 24 States had become contracting States to the Convention.[717]

24. Nationality in relation to the succession of States[718]

At its forty-fifth session, in 1993, the Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, decided to include in the Commission's agenda, subject to the approval of the General Assembly, the topic "State succession and its impact on the nationality of natural and legal persons".

The General Assembly, by resolution 48/31 of 9 December 1993, endorsed the above decision of the Commission on the understanding

[716] For the reports of the Working Group of the Whole, see documents A/51/624 and A/51/869.

[717] In accordance with article 36, paragraph 3, of the Convention, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States for the purposes, *inter alia*, of entrance into force of the Convention.

[718] The Commission's study on the topic has proceeded under this title following the completion by the Commission of the preliminary study of the topic "State succession and its impact on the nationality of natural and legal persons" at its forty-eighth session, in 1996.

that the final form to be given to the work on the topic would be decided after a preliminary study was presented to the Assembly.

At its forty-sixth session, in 1994, the Commission appointed Václav Mikulka as Special Rapporteur for the topic.

In resolution 49/51 of 9 December 1994, the General Assembly again endorsed the decision of the Commission on the understanding reflected above and requested the Secretary-General to invite Governments to submit relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

At its forty-seventh and forty-eighth sessions, in 1995 and 1996, respectively, the Commission convened a Working Group entrusted with the mandate to identify issues arising out of the topic, categorize those issues which were closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of actions.[719] In accordance with the Working Group's conclusions,[720] the Commission recommended to the General Assembly that it take note of the completion of the preliminary study of the topic and that it request the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States," on the understanding that, *inter alia*:

(*a*) consideration of the question of the nationality of natural persons would be separated from that of the nationality of legal persons and that priority would be given to the former;

(*b*) without prejudicing a final decision, the result of the work on the question of the nationality of natural persons should take the form of a declaration of the General Assembly consisting of articles with commentaries; and

(*c*) the decision on how to proceed with respect to the question of the nationality of legal persons would be taken upon completion of the work on the nationality of natural persons and in the light of the comments that the General Assembly may invite States to submit to it

[719] At these sessions, the Commission considered, respectively, the Special Rapporteur's first and second reports reproduced in *Yearbook of the International Law Commission, 1995*, vol. II (Part One), document A/CN.4/467, and *ibid., 1996*, vol. II, document A/CN.4/474.

[720] For the report of the Working Group at the Commission's forty-seventh session, see document A/CN.4/L.507, reproduced in *ibid., 1995*, vol. II (Part Two), annex. For the summary of the oral report to the plenary on the work of the Working Group at the Commission's forty-eighth session, see *ibid., 1996*, vol. II (Part Two), paras. 78–87.

on the practical problems raised by a succession of States in the field of legal persons.[721]

The General Assembly, in resolution 51/160 of 16 December 1996, endorsed the Commission's recommendations.

(a) Nationality of natural persons in relation to the succession of States

The Commission proceeded with its work on this part of the topic at its forty-ninth and fifty-first sessions, in 1997 and 1999, respectively, on the basis of the report of the Special Rapporteur,[722] information provided by Governments[723] and a memorandum by the Secretariat.[724]

At its forty-ninth session, in 1997, the Commission adopted on first reading a draft preamble and a set of twenty-seven draft articles on nationality of natural persons in relation to the succession of States, with commentaries. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit them, through the Secretary-General, to Governments for comments and observations.

The General Assembly, in resolution 52/156 of 15 December 1997, drew the attention of Governments to the importance for the Commission of having their views on the draft articles, and urged them to submit their comments and observations in writing.

At its fifty-first session, in 1999, the Commission decided to establish a Working Group to review the text of the draft articles adopted on first reading, taking into account comments and observations by Governments. On the basis of the report of the Chairman of the Working Group,[725] the Commission referred the draft preamble and a set of twenty-six draft articles to the Drafting Committee. Having considered the report of the Drafting Committee, the Commission adopted the final draft articles on nationality of natural persons in relation to the succession of States, with commentaries.[726] The Commission decided to recommend to the General Assembly the adoption of the draft articles in the form of a declaration.[727]

The final draft consists of a draft preamble and twenty-six draft articles divided into two parts: Part I–General provisions (articles 1–19) and

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[721] See *ibid., 1996*, vol. II (Part Two), para. 88.

[722] See *ibid.*, *1997*, vol. II (Part One), document A/CN.4/480 and Add.1.

[723] See *ibid., 1999*, vol. II (Part One), document A/CN.4/493 (incorporating document A/CN.4/493/Corr.1).

[724] See *ibid.,* document A/CN.4/497.

[725] Document A/CN.4/L.572.

[726] See *Yearbook of the International Law Commission, 1999*, vol. II (Part Two), paras. 42, 43, 47 and 48.

[727] See *ibid.*, para. 44.

Part II Provisions relating to specific categories of succession of States (articles 20–26). Part II–comprises four sections: Section 1 deals with succession in the case of a transfer of part of the territory; Section 2 deals with the case of unification of States; Section 3 deals with dissolution of a State; and Section 4 deals with separation of part or parts of the territory. The text of the draft articles is reproduced in volume II, annex VI, section 9.

By resolution 54/112 of 9 December 1999, the General Assembly decided to include in the provisional agenda of its fifty-fifth session, in 2000, an item entitled "Nationality of natural persons in relation to the succession of States," with a view to the consideration of the draft articles and their adoption as a declaration. The General Assembly also invited Governments to submit comments and observations on the question of a convention on nationality of natural persons in relation to the succession of States, with a view to the General Assembly considering the elaboration of such a convention at a future session.

By resolution 55/153 of 12 December 2000, the Assembly took note of the articles, which were annexed to the resolution, invited Governments to take into account, as appropriate, the provisions contained in the articles in dealing with issues of nationality of natural persons in relation to the succession of States and recommended that all efforts be made for the wide dissemination of the text of the articles. It also decided to include in the provisional agenda of its fifty-ninth session, in 2004, an item entitled "Nationality of natural persons in relation to the succession of States".

The General Assembly, in resolution 59/34 of 2 December 2004, reiterated its invitation to Governments to take into account, as appropriate, the provisions of the articles contained in the annex to the resolution 55/135, in dealing with issues of nationality of natural persons in relation to succession of States and encouraged States to consider, as appropriate, at the regional or subregional levels, the elaboration of legal instruments regulating questions of nationality of natural persons in relation to the succession of States, with a view, in particular, to preventing the occurrence of statelessness as a result of a succession of States. The General Assembly further invited Governments to submit comments concerning the advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, including the avoidance of statelessness as a result of a succession of States and decided to include an item entitled "Nationality of natural persons in relation to the succession of States" in the provisional agenda of its sixty-third session, in 2008.

By resolution 63/118 of 11 December 2008, the General Assembly reiterated its invitation to Governments to take into account, as appropriate, the provisions of the articles in dealing with issues of nationality

of natural persons in relation to the succession of States, with a view, in particular, to preventing the occurrence of statelessness as a result of a succession of States. The Assembly also invited Governments to submit comments concerning the advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States and decided to include the topic in the provisional agenda of its sixty-sixth session (2011) with the aim of examining the subject, including the question of the form that might be given to the draft articles.

By resolution 66/92 of 9 December 2011, the General Assembly reiterated once again its invitation to Governments to take into account, as appropriate, the provisions of the articles in dealing with issues of nationality of natural persons in relation to the succession of States; encouraged once again States to consider, as appropriate, at the regional or subregional levels, the elaboration of legal instruments regulating questions of nationality of natural persons in relation to the succession of States, with a view, in particular, to preventing the occurrence of statelessness as a result of a succession of States; emphasized the value of the articles in providing guidance to the States dealing with issues of nationality of natural persons in relation to the succession of States, in particular concerning the avoidance of statelessness; and decided that, upon the request of any State, it will revert to the question of nationality of natural persons in relation to the succession of States at an appropriate time, in the light of the development of State practice in these matters.

(b) Nationality of legal persons in relation to the succession of States

At its fiftieth session, in 1998, the Commission considered the second part of the topic on the basis of the report of the Special Rapporteur.[728] On the suggestion of the Special Rapporteur, the Commission established a Working Group to consider the question of the possible orientation to be given to the second part of the topic, in order to facilitate the Commission's decision on this issue. The Working Group agreed that there were, in principle, two options for enlarging the scope of the study of problems falling within the second part of the topic: either expand the study of the question of the nationality of legal persons beyond the context of the succession of States, or keep the study within the context of the succession of States, but go beyond the problem of nationality to include other questions. The Working Group noted, however, that in the absence of positive comments from States, the Commission would have to conclude that States were not interested in the study of the second

[728] See *ibid., 1998,* vol. II (Part One), document A/CN.4/489.

part of the topic. The preliminary conclusions of the Working Group were endorsed by the Commission.[729]

At its fifty-first session, in 1999, taking into account that no positive comments had been received from States with respect to the Commission's study of the second part of the topic, the Commission recommended to the General Assembly that, with the adoption of the draft articles on nationality of natural persons in relation to the succession of States, the work of the Commission on the topic "Nationality in relation to the succession of States" be considered concluded.[730]

25. State responsibility[731]

At its first session, in 1949, the Commission selected State responsibility as one of the topics for codification without, however, including it in the list of topics to which it gave priority. At its sixth session, in 1954, the Commission took note of General Assembly resolution 799 (VIII) of 7 December 1953, requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law governing State responsibility.[732]

At its seventh session, in 1955, the Commission decided to begin the study of State responsibility and appointed F. V. García Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports,[733] dealing, on the whole, with the question of responsibility for injuries to the persons or property of aliens.

In pursuance of General Assembly resolution 1686 (XVI) of 18 December 1961, in which the Assembly recommended that the Commission continue its work on State responsibility, the Commission, at its fourteenth session, in 1962, held a debate on its programme of future work in the field of State responsibility. The idea that the topic of State responsibility should be one of those which should receive priority met

[729] See *ibid., 1998*, vol. II (Part Two), paras. 460–468. For the report of the Working Group, see document A/CN.4/L.557.

[730] See *ibid., 1999*, vol. II (Part Two), para. 45.

[731] At its fifty-third session, in 2001, the Commission decided to amend the title of the topic to "Responsibility of States for internationally wrongful acts".

[732] The Commission also had before it the memorandum presented by its member, F. V. García Amador (see *Yearbook of the International Law Commission, 1954,* vol. II, document A/CN.4/80).

[733] See *ibid., 1956,* vol. II, document A/CN.4/96; *ibid*., *1957,* vol. II, document A/CN.4/106; *ibid*., *1958,* vol. II, document A/CN.4/111; *ibid*., *1959,* vol. II, document A/CN.4/119; *ibid*., *1960,* vol. II, document A/CN.4/125; and *ibid*., *1961,* vol. II, document A/CN.4/134 and Addendum.

with the general approval of the Commission. There were divergent views, however, concerning the best approach to the study of the question and the issues the study should cover. As a result, the Commission decided to set up a subcommittee whose task was to submit to the Commission at its next session a preliminary report containing suggestions concerning the scope and approach of the future study.

At its fifteenth session, in 1963, the Commission considered the report of the Subcommittee on State Responsibility.[734] All members of the Commission who took part in the discussion agreed with the general conclusions of the report, namely: (1) that priority should be given to the definitions of the general rules governing the international responsibility of the State; and (2) that, in defining these general rules, the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on State responsibility. The Subcommittee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, be left aside also met with the general approval of the members of the Commission. At the same session, the Commission appointed Roberto Ago as Special Rapporteur for the topic.

The General Assembly, in resolution 1902 (XVIII) of 18 November 1963, recommended that the Commission "continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Subcommittee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". In resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended that the Commission expedite the study of the topic of State responsibility and, by resolution 2400 (XXIII) of 11 December 1968, recommended that the Commission "make every effort to begin substantive work" on the topic as from its next session.

The Commission proceeded with its work on the topic at its nineteenth, twenty-first and twenty-second sessions, from its twenty-fifth to thirty-eighth sessions, at its forty-first and forty-second sessions and from its forty-fourth to fifty-third sessions, in 1967, 1969 and 1970, from 1973 to 1986, in 1989 and 1990 and from 1992 to 2001, respectively. Following the resignation of Roberto Ago from the Commission in 1978, the Commission appointed Willem Riphagen, Gaetano Arangio-Ruiz and James

[734] Document A/CN.4/152, reproduced in *ibid., 1963,* vol. II, document A/5509, annex I.

Crawford as the successive Special Rapporteurs for the topic at its thirty-first, thirty-ninth and forty-ninth sessions, in 1979, 1987 and 1997, respectively. In connection with its consideration of the topic, the Commission had before it a note and the reports of the Special Rapporteurs,[735] comments and observations received from Governments[736] as well as documents prepared by the Secretariat.[737]

At its twenty-first session, in 1969, the Commission, after examining the first report of the Special Rapporteur,[738] requested the Special Rapporteur, Mr. Ago, to prepare a report containing a first set of draft articles on the topic, the aim being "to establish, in an initial part of the proposed draft articles, the conditions under which an act which

[735] For a note and the reports of Roberto Ago, see *ibid., 1967,* vol. II, document A/CN.4/196; *ibid*., *1969,* vol. II, document A/CN.4/217 and Add.1; *ibid*., *1970,* vol. II, document A/CN.4/233; *ibid*., *1971,* vol. II (Part One), documents A/CN.4/217/Add.2 and A/CN.4/246 and Add.1–3; *ibid*., *1972,* vol. II, document A/CN.4/264 and Add.1; *ibid*., *1976,* vol. II (Part One), document A/CN.4/291 and Add.1 and 2; *ibid*., *1977,* vol. II (Part One), document A/CN.4/302 and Add.1–3; *ibid*., *1978,* vol. II (Part One), document A/CN.4/307 and Add.1 and 2; *ibid*., *1979,* vol. II (Part One), document A/CN.4/318 and Add.1–4; and *ibid*., *1980,* vol. II (Part One), document A/CN.4/318/Add.5–7. For the reports of Willem Riphagen, see *ibid*., *1980,* vol. II (Part One), document A/CN.4/330; *ibid*., *1981,* vol. II (Part One), document A/CN.4/344; *ibid*., *1982,* vol. II (Part One), document A/CN.4/354 and Add.1 and 2; *ibid*., *1983,* vol. II (Part One), document A/CN.4/366 and Add.1; *ibid*., *1984,* vol. II (Part One), document A/CN.4/380; *ibid*., *1985,* vol. II (Part One), document A/CN.4/389; and *ibid*., *1986,* vol. II (Part One), document A/CN.4/397 and Add.1. For the reports of Gaetano Arangio-Ruiz, see *ibid*., *1988,* vol. II (Part One), document A/CN.4/416 and Add.1; *ibid*., *1989,* vol. II (Part One), document A/CN.4/425 and Add.1; *ibid*., *1991,* vol. II (Part One), document A/CN.4/440 and Add.1; *ibid*., *1992,* vol. II (Part One), document A/CN.4/444 and Add.1–3; *ibid*., *1993,* vol. II (Part One), document A/CN.4/453 and Add.1–3; *ibid*., *1994,* vol. II (Part One), document A/CN.4/461 and Add.1–3; as well as *ibid., 1995,* vol. II (Part One), document A/CN.4/469 and Add.1 and 2; and *ibid., 1996*, vol. II (Part One), document A/CN.4/476 and Add.1. For the reports of James Crawford, see *ibid., 1998,* vol. II (Part One), document A/CN.4/490 and Add.1–7; *ibid., 1999,* vol. II (Part One), document A/CN.4/498 and Add.1–4; *ibid., 2000,* vol. II (Part One), document A/CN.4/507 and Add.1–4; and *ibid., 2001,* vol. II (Part One), document A/CN.4/517 and Add.1.

[736] See *ibid., 1980,* vol. II (Part One), document A/CN.4/328 and Add.1–4; *ibid*., *1981,* vol. II (Part One), document A/CN.4/342 and Add.1–4; *ibid*., *1982,* vol. II (Part One), document A/CN.4/351 and Add.1–3; *ibid*., *1983,* vol. II (Part One), document A/CN.4/362; *ibid*., *1988,* vol. II (Part One), document A/CN.4/414; as well as *ibid., 1998,* vol. II (Part One) document A/CN.4/488 and Add.1–3; and *ibid., 1999,* vol. II (Part One) A/CN.4/492.

[737] See *ibid., 1964*, vol. II. documents A/CN.4/165 and A/CN.4/169; *ibid*., *1969,* vol. II, documents A/CN.4/208 and A/CN.4/209; *ibid*., *1978,* vol. II (Part One), document A/CN.4/315 (a survey of State practice, international jurisprudence and doctrine relating to "*force majeure*" and "fortuitous event" as circumstances precluding wrongfulness); and *ibid*., *1980,* vol. II (Part One), document A/CN.4/318/Add.8 (a list of the principal works cited in the reports of Mr. Ago).

[738] See *ibid., 1969,* vol. II, document A/CN.4/217 and Add.1.

is internationally illicit and which, as such, generates an international responsibility, can be imputed to a State".[739] The criteria laid down by the Commission as a guide for its future work on the topic were summarized as follows:

(*a*) The Commission intended to confine its study of international responsibility, for the time being, to the responsibility of States;

(*b*) The Commission would first examine the question of the responsibility of States for internationally wrongful acts. The question of responsibility arising from certain lawful acts, such as space and nuclear activities, would be examined as soon as the Commission's programme of work permitted;

(*c*) The Commission agreed to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and that of defining the rules that place obligations on States, the violation of which may generate responsibility;

(*d*) The study of the international responsibility of States would comprise two broad separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task was to determine what facts and circumstances must be established in order to be able to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task was to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, forms and degrees of responsibility. Once these tasks had been accomplished, the Commission would be able to decide whether a third phase should be added in the same context, covering the examination of certain problems relating to what has been termed the "implementation" of the international responsibility of States and questions concerning the settlement of disputes with regard to the application of the rules on responsibility.

At the Commission's twenty-second session, in 1970, the Special Rapporteur presented a second report,[740] entitled "The origin of international responsibility," which examined the following general rules governing the topic as a whole: the principle of the internationally wrongful act as a source of responsibility; the essential conditions for the existence of an internationally wrongful act; and the capacity to commit such acts. Draft articles were submitted in respect of these fundamental rules. The

[739] See *ibid.*, document A/7610/Rev.1, para. 80.

[740] See *ibid., 1970*, vol. II, document A/CN.4/233.

Commission's discussion of the report led it to a series of conclusions as to the method, substance and terminology essential for the continuation of its work on State responsibility.

The draft articles, which were cast in a form that would have permitted them to be used as the basis for the conclusion of a convention if so decided, related solely to the *responsibility of States for internationally wrongful acts.* The Commission fully recognized the importance not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any injurious consequences arising out of certain activities not prohibited by international law (especially those which, because of their nature, present certain risks). The Commission took the view, however, that the latter category of questions could not be treated jointly with the former. Being obliged to bear any injurious consequences of an activity which is itself lawful, and being obliged to face the consequences (not necessarily limited to compensation) of the breach of a legal obligation, are not comparable situations. The limitation of the draft articles to responsibility of States for internationally wrongful acts merely meant that the Commission would make its study of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law separately from that of responsibility for internationally wrongful acts, so that two matters, which, in spite of certain appearances, are quite distinct, would not be dealt with in one and the same draft. Thus, the Commission emphasized that the expression "State responsibility," which appeared in the title of the draft, was to be understood as meaning only "responsibility of States for internationally wrongful acts".

The Commission also pointed out that the purpose of the draft articles was not to define the rules imposing on States, in one sector or another of inter-State relations, obligations whose breach could be a source of responsibility and which, in a certain sense, may be described as "primary". On the contrary, in preparing its draft, the Commission undertook to define other rules which, in contradistinction to the primary rules, may be described as "secondary," inasmuch as they were aimed at determining the legal consequences of failure to fulfil obligations established by the "primary" rules. Only these "secondary" rules fall within the actual sphere of responsibility for internationally wrongful acts. This does not mean that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law are of no significance in determining the rules governing responsibility for internationally wrongful acts. The essential fact nevertheless remains that it is one thing to state a rule and the content of the obligation it imposes, and another to determine whether that obligation has been breached and what the consequences of the breach must be. Only

this second aspect comes within the actual sphere of the international responsibility that is the subject matter of the draft.

The draft articles are concerned only with the determination of the rules governing the international responsibility of the State for internationally wrongful acts, that is to say, the rules that govern all the new legal relationships to which an internationally wrongful act on the part of a State may give rise in different cases. They codify the rules governing the responsibility of States for internationally wrongful acts "in general," not simply in certain particular sectors. The international responsibility of the State is made up of a set of legal situations which result from the breach of any international obligation, whether imposed by the rules governing one particular matter or by those governing another.[741]

It was on the basis of these conclusions that the Commission undertook the preparation of draft articles on the topic, beginning the first reading thereof at its twenty-fifth session, in 1973.

The General Assembly, by resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission continue on a priority basis at its twenty-sixth session its work on State responsibility with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts, and that the Commission undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of other activities.

At its twenty-fifth to thirtieth sessions, from 1973 to 1978, the Commission provisionally adopted on first reading chapters I, II and III of Part One of the draft articles on State responsibility for internationally wrongful acts. In 1978, in conformity with the pertinent provisions of its Statute, the Commission requested the Governments of Member States to transmit their observations and comments on those chapters.

The General Assembly, in resolution 33/139 of 19 December 1978, endorsed this decision of the Commission.

At its thirty-second session, in 1980, the Commission provisionally adopted on first reading the whole of Part One of the draft articles, concerning "the origin of international responsibility". The Commission decided, in conformity with articles 16 and 21 of its Statute, to transmit the provisions of chapters IV and V to the Governments of Member States, through the Secretary-General, and to request them to transmit their observations and comments on those provisions. The Commission also decided to renew its request to Governments to transmit their observations and comments on chapters I, II and III.

[741] See *ibid., 1973,* vol. II, document A/9010/Rev.1, paras. 36–57.

At its forty-eighth session, in 1996, the Commission completed the first reading of Parts Two and Three of the draft articles and decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles provisionally adopted by the Commission on first reading to Governments for comments and observations.

The General Assembly, in resolution 51/160 of 16 December 1996, expressed its appreciation to the Commission for the completion of the provisional draft articles and urged Governments to submit their comments and observations on the draft in writing, as requested by the Commission.

At its forty-ninth session, in 1997, the Commission began the second reading of the draft articles on the basis of the four reports submitted by the new Special Rapporteur, Mr. Crawford, as well as comments by Governments. At the same session, it established a working group on State Responsibility to address matters dealing with the second reading of the topic.[742]

At its fiftieth session, in 1998, the Commission held an extensive debate[743] on the issue of the treatment of State "crimes" and "delicts" in the draft articles based on the first report of the Special Rapporteur.[744] Following the debate, the Commission noted that no consensus existed on this issue and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 concerning international crimes and delicts would be put aside for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations *erga omnes,* peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic and also in the Special Rapporteur's second report; and (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the first report as to draft article 19,

[742] For the guidelines on the consideration of this topic on second reading adopted by the Commission on the recommendation of the Working Group, see *ibid., 1997,* vol. II (Part Two), para. 161. For the report of the Working Group, see document A/CN.4/L.538.

[743] See *Yearbook of the International Law Commission, 1998,* vol. II (Part Two), paras. 241–330.

[744] See *ibid.,* (Part One), document A/CN.4/490 and Add.1–7.

with a view to taking a decision thereon.[745] At the same session, the Commission established a Working Group to assist the Special Rapporteur in the consideration of various issues during the second reading of the draft articles.

The Commission completed the second reading of the draft articles at its fifty-third session, in 2001. At that session, the Commission established two Working Groups on the topic: one open-ended Working Group to deal with the main outstanding issues on the topic, and the other Working Group to consider the commentaries to the draft articles.

On the recommendation of the first Working Group, the Commission agreed as an exception to its long-standing practice in adopting draft articles on second reading to include a brief summary of the debate concerning the main outstanding issues in the light of the importance of the topic and the complexity of the issues as well as the Working Group's recommendations on those issues.[746] On the basis of the Working Group's recommendations,[747] the Commission reached the following understandings:

(*a*) Serious breaches of obligations to the international community as a whole: Part Two, chapter III, would be retained; article 42, paragraph 1, concerning damages reflecting the gravity of the breach would be deleted; and previous references to serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which mostly dealt with the question of invocation as expressed by the International Court of Justice in the *Barcelona Traction* case, would be replaced with the category of peremptory norms. Use of the category of peremptory norms was preferred since it concerned the scope of secondary obligations, and not their invocation, and the notion of peremptory norms was well established in the Vienna Convention on the Law of Treaties (*see volume II, annex V, section 6*). The new formulation would not deal with trivial or minor breaches of peremptory norms, but only with serious breaches of peremptory norms. The Drafting Committee would give further consideration to aspects of consequences of serious breaches in order to simplify these, to avoid excessively vague formulas and to narrow the scope of its application to cases falling properly within the scope of the chapter.

(*b*) Countermeasures: It was undesirable to include all or a substantial part of the articles on countermeasures in article 23, which was devoted only to one aspect of the question. Such an attempt would over-

[745] See *ibid.,* (Part Two), para. 331.

[746] See *ibid., 2001,* vol. II (Part Two), document A/56/10, para. 44.

[747] Reproduced in *ibid.*, paras. 49, 55, 60 and 67.

burden article 23 and could even make it incomprehensible. Article 23 would remain in chapter V of Part One and the chapter on countermeasures would remain in Part Three, but article 54, which dealt with countermeasures by States other than the injured State, would be deleted. Instead, there would be a saving clause leaving all positions on this issue unaffected. In addition, article 53, dealing with conditions relating to countermeasures, would be reconsidered and the distinction between countermeasures and provisional countermeasures would be deleted. That article would be simplified and brought substantially into line with the decisions of the arbitral tribunal in the *Air Services* case and of the International Court of Justice in the *Gabčíkovo-Nagymaros* case. Articles 51 and 52 on the obligations not subject to countermeasures and proportionality would be reconsidered, as necessary.

(*c*) Dispute settlement provisions: The Commission would not include provisions for a dispute settlement machinery, but would draw attention to the machinery elaborated by the Commission in the first reading draft as a possible means for settlement of disputes concerning State responsibility; and would leave it to the General Assembly to consider whether and what form of provisions for dispute settlement would be included in the event that the Assembly should decide to elaborate a convention.

(*d*) Form of the draft articles: The Commission, in the first instance, would recommend to the General Assembly that it take note of the draft articles and annex the text of the articles to a resolution, similar to the procedure followed by the Assembly with regard to the articles on "Nationality of natural persons in relation to the succession of States" in resolution 55/153 of 12 December 2000. The recommendation would also propose that, given the importance of the topic, in the second and later stage the Assembly consider the adoption of a Convention on this topic, which would raise the question of dispute settlement mentioned above.

At the same session, the Commission also decided to amend the title of the topic to "Responsibility of States for internationally wrongful acts" to distinguish the topic from the responsibility of the State under internal law and from the concept of international "liability" for acts not prohibited by international law (*see section 26 below*).[748]

At the same session, the Commission adopted the entire set of final draft articles on responsibility of States for internationally wrongful acts consisting of 59 articles as well as commentaries thereto.[749] The draft articles are divided into four parts, as follows: Part One. The interna-

[748] See *ibid.*, para. 68.

[749] See *ibid.*, paras. 69, 70, 76 and 77.

tionally wrongful act of a State, including Chapter I. General principles, Chapter II. Attribution of conduct to a State, Chapter III. Breach of an international obligation, Chapter IV. Responsibility of a State in connection with the act of another State and Chapter V. Circumstances precluding wrongfulness; Part Two. Content of the international responsibility of a State, including Chapter I. General principles, Chapter II. Reparation for injury and Chapter III. Serious breaches of obligations under peremptory norms of general international law; Part Three. The implementation of the international responsibility of a State, including Chapter I. Invocation of the responsibility of a State and Chapter II. Countermeasures; and Part Four. General provisions. The text of the draft articles is reproduced in volume II, annex VI, section 10.

The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to concluding a convention on the topic. The Commission was of the view that the question of the settlement of disputes could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.[750]

The General Assembly, in resolution 56/83 of 12 December 2001, as recommended by the Commission, took note of the articles on responsibility of States for internationally wrongful acts, the text of which was annexed to the resolution, commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action, and decided to include in the provisional agenda of its fifty-ninth session, in 2004, an item entitled "Responsibility of States for internationally wrongful acts".

By resolution 59/35 of 2 December 2004, the General Assembly requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles on Responsibility of States for internationally wrongful acts, to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard. It also decided to return to the topic at its sixty-second session, in 2007.

[750] See *ibid.*, paras. 72 and 73.

By resolution 62/61 of 6 December 2007, the General Assembly commended once again the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action; requested the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles; also requested the Secretary-General to update his compilation of decisions of international courts, tribunals and other bodies referring to the articles,[751] to invite Governments to submit information on their practice in this regard, and further requested the Secretary-General to submit this material well in advance of the Assembly's sixty-fifth session. The Assembly also decided to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

By resolution 65/19 of 6 December 2010, the General Assembly commended once again the articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action, and reiterated its requests to the Secretary-General to invite Governments to submit further comments and information and to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles.[752] The Assembly also decided to revert to the topic at its sixty-eight session, in 2013, and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

26. International liability for injurious consequences arising out of acts not prohibited by international law

From the outset of its work on the topic of State responsibility (*see section 25 above*), the Commission agreed that that topic should deal only with the consequences of internationally wrongful acts, and that, in defining the general rule concerning the principle of responsibility for internationally wrongful acts, it was necessary to adopt a formula which did not prejudge the existence of responsibility for lawful acts. That conclusion met with broad acceptance in the discussion of the Sixth Committee of the General Assembly at its twenty-fifth session, in 1970.

[751] See A/62/62 and Corr.1 and Add.1.

[752] *Ibid.*, and A/65/76.

At its twenty-fifth session, in 1973, when the Commission started to work on the first set of draft articles on State responsibility, it referred to the matter in more definite terms: " . . . if it is thought desirable—and views to this effect have already been expressed in the past both in the International Law Commission and in the Sixth Committee of the General Assembly—the International Law Commission can undertake the study of the so-called responsibility for risk after its study on responsibility for wrongful acts has been completed, or it can do so simultaneously but separately."[753]

The General Assembly, in resolution 3071 (XXVIII) of 30 November 1973, again supported the position of the Commission and recommended that the Commission undertake a study of the new topic "at an appropriate time". The Assembly, in resolutions 3315 (XXIX) of 14 December 1974 and 3495 (XXX) of 15 December 1975, repeated its recommendation that the Commission take up the topic "as soon as appropriate", and finally in 1976, in resolution 31/97 of 15 December, it replaced that phrase by the words "at the earliest possible time".

Pursuant to those recommendations of the General Assembly, the Commission agreed, at its twenty-ninth session, in 1977, to undertake the study on the topic at the earliest possible time, having regard, in particular, to the progress made on the draft articles on State responsibility for internationally wrongful acts.

The General Assembly, in resolution 32/151 of 19 December 1977, endorsed the conclusion of the Commission and invited it, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

At its thirtieth session, in 1978, the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. On the basis of the recommendations made by the Working Group,[754] the Commission appointed Robert Q. Quentin-Baxter as Special Rapporteur for the topic and invited him to prepare a preliminary report at an early juncture. It also requested the Secretariat to collect and survey materials on the topic on a continuous basis.

At the Commission's thirty-seventh session, in 1985, Julio Barbosa succeeded Robert Q. Quentin-Baxter as Special Rapporteur for the

[753] See *Yearbook of the International Law Commission, 1973*, vol. II, document A/9010/Rev.1, para. 39.

[754] For the report of the Working Group, see document A/CN.4/L.284 and Corr.1. Section II of the report is reproduced in *ibid., 1978*, vol. II (Part Two), para. 178, annex.

topic. In connection with its work on the topic prior to it being divided into two parts, the Commission had before it the reports of the Special Rapporteurs,[755] information provided by Governments and international organizations[756] as well as documents prepared by the Secretariat.[757]

At its thirty-fifth session, in 1983, the Commission had agreed that the Special Rapporteur should, with the help of the Secretariat, prepare a questionnaire to be addressed to selected international organizations with a view to ascertaining whether obligations which States owed to each other, and discharged, as members of international organizations might, to that extent, fulfil or replace some of the procedures indicated in the Special Rapporteur's schematic outline contained in his third report. In compliance with this decision, a questionnaire was prepared and addressed to sixteen international organizations, selected on the basis of activities which might bear on the subject matter of the inquiry.

At its fortieth session, in 1988, the Commission began the first reading of the draft articles on the topic.

At its forty-fourth session, in 1992, the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. On the basis of the recommendation of the Working Group,[758] the Commission decided, with regard to the scope of the topic, that, pending a final decision, the topic should be understood as comprising both issues of prevention and of remedial measures. Preven-

[755] For the reports of Robert Q. Quentin-Baxter, see *ibid., 1980,* vol. II (Part One), document A/CN.4/334 and Add.1 and 2; *ibid.*, *1981,* vol. II (Part One), document A/CN.4/346 and Add.1 and 2; *ibid.*, *1982,* vol. II (Part One), document A/CN.4/360; *ibid.*, *1983,* vol. II (Part One), document A/CN.4/373; and *ibid.*, *1984,* vol. II (Part One), document A/CN.4/383 and Add.1. For the reports of Julio Barbosa, see *ibid., 1985,* vol. II (Part One), document A/CN.4/394; *ibid.*, *1986,* vol. II (Part One), document A/CN.4/402; *ibid.*, *1987,* vol. II (Part One), document A/CN.4/405; *ibid.*, *1988,* vol. II (Part One), document A/CN.4/413; *ibid.*, *1989,* vol. II (Part One), document A/CN.4/423; *ibid.*, *1990,* vol. II (Part One), document A/CN.4/428 and Add.1; *ibid.*, *1991,* vol. II (Part One), document A/CN.4/437; *ibid.*, *1992,* vol. II (Part One), document A/CN.4/443; *ibid.*, *1993,* vol. II (Part One), document A/CN.4/450; *ibid.*, *1994,* vol. II (Part One), document A/CN.4/459; as well as documents A/CN.4/468 and A/CN.4/475 and Add.1.

[756] See *ibid., 1984,* vol. II (Part One), document A/CN.4/378; as well as document A/CN.4/481 and Add.1.

[757] "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law" (document ST/LEG/15, subsequently reissued in a slightly amended form under the symbol A/CN.4/384, reproduced in *Yearbook of the International Law Commission, 1985*, vol. II (Part One, addendum)); and "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (document A/CN.4/471).

[758] Document A/CN.4/L.470.

tion should, however, be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in that context might include those designed for mitigation of harm, restoration of what had been harmed and compensation for harm caused. Thus, the draft articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and secondly with articles on the remedial measures when such activities had caused transboundary harm. The Commission deferred, however, its decision on the question of the approach to be taken with regard to the nature of the articles or of the instrument to be drafted, until after the completion of the work on the topic. The articles would be considered and adopted on the basis of their merits based on their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development and codification of international law in that area. The Commission also deferred its decision on the title of the topic until after the completion of the draft articles.[759]

At its forty-sixth and forty-seventh sessions, in 1994 and 1995, the Commission provisionally adopted draft articles 1 (Scope of the present articles), 2 (Use of terms), 11 (Prior authorisation), 12 (Risk assessment), 13 (Pre-existing activities), 14 (Measures to prevent or minimize the risk), 14 *bis* (Non-transference of risk), 15 (Notification and information), 16 (Exchange of information), 16 *bis* (Information to the public), 17 (National security and industrial secrets), 18 (Consultations on preventive measures), 19 (Rights of the State likely to be affected), 20 (Factors involved in an equitable balance of interests), A (Freedom of action and the limits thereto), B (Prevention), C (Liability and compensation) and D (Cooperation), with commentaries thereto.

At its forty-seventh session, in 1995, the Commission established a Working Group to identify activities within the scope of the topic. In the light of the Working Group's report,[760] the Commission agreed that it must, in its future work on the topic, have a clear view of the kind of activities to which the draft articles on the topic apply. It took the view that it could work on the basis that the types of activities listed in various conventions dealing with issues of transboundary harm came within the scope of the topic, but that, eventually, more specificity might be required in the draft articles.

At its forty-eighth session, in 1996, the Commission established a Working Group to review the topic in all its aspects in the light of the

[759] See *Yearbook of the International Law Commission, 1992,* vol. II (Part Two), paras. 344–348.

[760] Document A/CN.4/L.510.

reports of the Special Rapporteur and the discussions on the topic held over the years. In its report to the Commission, the Working Group submitted a single consolidated text of draft articles and commentaries thereto which were limited in terms of the scope of the topic and residual in character.[761] The Commission was unable to examine the draft articles at that session. It, however, decided to transmit them to the General Assembly and to Governments for comments.[762]

At its forty-ninth session, in 1997, the Commission, pursuant to General Assembly resolution 51/160 of 16 December 1996, established a Working Group to consider the question of how to proceed with the topic. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to the topic "State responsibility". It further noted that the Commission had dealt with two distinct, though related, issues under the topic: "prevention" and "international liability". The Working Group agreed that those issues henceforth should be dealt with separately. Noting that the work on prevention was already at an advanced stage, the Working Group believed that the Commission should proceed with its work on this aspect of the topic with a possible completion of the first reading in the near future. With respect to the second aspect, liability, the Working Group was of the view that, while retaining it, the Commission should await further comments from Governments before making any decision on the issue.[763]

At the same session, the Commission considered and adopted the Working Group's report.[764] On the basis of the recommendation of the Working Group, the Commission decided, *inter alia*, to proceed with its work on the topic, undertaking prevention first under the subtitle "Prevention of transboundary damage from hazardous activities".

The General Assembly, in resolution 52/156 of 15 December 1997, took note of the Commission's decision.

(a) Prevention of transboundary damage from hazardous activities

At its forty-ninth session, in 1997, the Commission appointed Pemmaraju Sreenivasa Rao as Special Rapporteur for this part of the topic.

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[761] Document A/CN.4/L.533 and Add.1 reproduced in *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), annex I.

[762] See *ibid.*, para. 99.

[763] See *ibid., 1997,* vol. II (Part Two), paras. 165–167.

[764] Document A/CN.4/L.536 reflected in *ibid., 1997,* vol. II (Part Two), paras. 165–167.

The Commission proceeded with its work on this part of the topic, on the basis of the reports of the Special Rapporteur[765] and information provided by Governments,[766] from its fiftieth to its fifty-third session (1998 to 2001)

At its fiftieth session, in 1998, the Commission established a Working Group to ascertain whether the principles of procedure and content of the duty of prevention were appropriately reflected in the draft articles recommended by the Working Group to the Commission at its forty-eighth session, in 1996. On the basis of the Working Group's discussions, the Special Rapporteur proposed at the same session a revised text of the draft articles,[767] which the Commission referred to the Drafting Committee. The Commission considered the report of the Drafting Committee and adopted on first reading a set of seventeen draft articles on prevention of transboundary damage from hazardous activities. In accordance with articles 16 and 21 of the Statute, they were transmitted to Governments for comments and observations.

The General Assembly, in resolution 53/102 of 8 December 1998, expressed its appreciation to the Commission for the completion of the first reading of the draft articles on the prevention part of the topic and invited Governments to submit comments and observations in writing on the draft articles.

At its fifty-second session, in 2000, the Commission established a Working Group to examine the comments and observations made by States on the draft articles. On the basis of the discussion in the Working Group, the Special Rapporteur presented his third report[768] containing a draft preamble and a revised set of draft articles on prevention, along with the recommendation that they be adopted as a framework convention. Furthermore, the third report addressed questions such as the scope of the topic, its relationship with liability, the relationship between an equitable balance of interests among States concerned and the duty of prevention, as well as duality of the regimes of liability and State responsibility. The Commission considered the report and decided to refer the draft preamble and draft articles contained therein to the Drafting Committee.

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[765] See *ibid., 1998,* vol. II (Part One), document A/CN.4/487 and Add.1; *ibid., 2000,* vol. II (Part One), document A/CN.4/501and A/CN.4/510.

[766] See *ibid., 2000,* vol. II (Part One), document A/CN.4/509; and *ibid., 2001,* vol. II (Part One), document A/CN.4/516.

[767] Document A/CN.4/L.556, reproduced in *ibid., 1998,* vol. II (Part Two), footnote 12.

[768] See *Yearbook of the International Law Commission, 2000,* vol. II (Part One), document A/CN.4/510.

At its fifty-third session, in 2001, the Commission adopted and submitted to the General Assembly the final text of draft articles on prevention of transboundary harm from hazardous activities, with commentaries thereto.[769] The draft articles consist of a preamble and nineteen articles: article 1 (Scope), article 2 (Use of terms), article 3 (Prevention), article 4 (Cooperation), article 5 (Implementation), article 6 (Authorization), article 7 (Assessment of risk), article 8 (Notification and information), article 9 (Consultations on preventive measures), article 10 (Factors involved in an equitable balance of interests), article 11 (Procedures in the absence of notification), article 12 (Exchange of information), article 13 (Information to the public), article 14 (National security and industrial secrets), article 15 (Non-discrimination), article 16 (Emergency preparedness), article 17 (Notification of an emergency), article 18 (Relationship to other rules of international law) and article 19 (Settlement of disputes). The text of the draft articles is reproduced in volume II, annex VI, section 11. In transmitting the final draft to the General Assembly, the Commission recommended that the General Assembly elaborate a convention on the basis of the draft articles.[770]

The General Assembly, by resolution 56/82 of 12 December 2001, expressed its appreciation for the valuable work done by the Commission on the issue of prevention on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities).

In resolution 61/36 of 4 December 2006, the General Assembly decided to revert to the topic, together with the issue of allocation of loss in the case of transboundary harm from hazardous activities, at its sixty-second session, in 2007.

In resolution 62/68 of 6 December 2007, the General Assembly welcomed the conclusion of the work of the International Law Commission on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm, and its adoption of the respective draft articles and draft principles and commentaries on the subjects. Concerning the articles on prevention of transboundary harm from hazardous activities, the text of which was annexed to that resolution, the Assembly commended them to the attention of Governments, without prejudice to any future action, as recommended by the Commission regarding the articles. The Assembly also invited Governments to submit comments on any future action, in particular on the form of the articles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a con-

[769] See *ibid., 2001,* vol. II (Part Two), document A/56/10, paras. 91, 92, 97 and 98.

[770] See *ibid.*, para. 94

vention on the basis of the draft articles, as well as on any practice in relation to the application of the articles.

By resolution 65/28 of 6 December 2010, the General Assembly commended once again the articles to the attention of Governments, without prejudice to any future action, as recommended by the Commission; reiterated its invitation to Governments to submit comments on any future action with regard to the articles; requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles (as well as to the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities), and decided to include in the provisional agenda of its sixty-eighth session (2013) the item entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm".

(b) International liability in case of loss from transboundary harm arising out of hazardous activities

The General Assembly, in resolution 53/102 of 8 December 1998, requested the Commission, while continuing its work on prevention, to examine other issues arising out of the topic, taking into account comments made by Governments, either in writing or in the Sixth Committee, and to submit its recommendations on the future work to be done on these issues to the Sixth Committee.

At its fifty-first session, in 1999, the Commission, while examining the first part of the topic (prevention, *see subsection (a) above*), decided to defer the consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities.[771]

The General Assembly, in resolutions 54/111 of 9 December 1999 and 55/152 of 12 December 2000, requested the Commission to resume the consideration of the liability aspects of the topic as soon as the second reading of the draft articles on prevention was finalized. The General Assembly, by resolution 56/82 of 12 December 2001, requested the Commission to resume, during its fifty-fourth session, its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

At its fifty-fourth session, in 2002, the Commission decided to include the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme

[771] See *ibid., 1999,* vol. II (Part Two), para. 608.

of work and to resume its consideration of the second part of the topic.[772] The Commission established a Working Group, chaired by Pemmaraju Sreenivasa Rao, to consider the conceptual outline of the topic. The Working Group recommended continuing to limit the scope of the remainder of the topic concerning liability to the same activities that were covered under the first part of the topic concerning prevention, which would effectively link the work on the two parts of the topic. The Working Group also set out the following initial understandings on the topic: (a) a threshold would have to be determined to trigger the application of the regime on allocation of loss caused; and (b) the loss to be covered should include loss to (i) persons, (ii) property, including elements of State patrimony and national heritage, and (iii) environment within national jurisdiction. The Working Group also considered the approach to be taken regarding the role of the operator and the State in the allocation of loss.[773]

The General Assembly, in resolution 57/21 of 19 November 2002, took note of the Commission's decision to proceed with its work on the topic, as requested by the Assembly in resolution 56/82.

The Commission appointed Pemmaraju Sreenivasa Rao as Special Rapporteur for the topic at its fifty-fourth session, in 2002,[774] and proceeded with its consideration of the topic at its fifty-fifth to fifty-sixth sessions, from 2003 to 2004, and at its fifty-eighth session, in 2006. The Working Group was re-established, under the same chairmanship, at the Commission's fifty-fifth[775] and fifty-sixth sessions[776], in 2003 and 2004, respectively. In connection with its work on the topic, the Commission had before it the reports of the Special Rapporteur,[777] reports of the Working Group,[778] a study undertaken by the Secretariat,[779] as well as comments and observations received from Governments.[780]

The Commission undertook the first reading of a set of draft principles on the allocation of loss in the case of transboundary harm aris-

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[772] See *ibid., 2002,* vol. II (Part Two), document A/57/10, para. 517.

[773] See *ibid*., paras. 441–457.

[774] See *ibid*., para. 519.

[775] See *ibid*., para. 166.

[776] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 170.

[777] See *Yearbook of the International Law Commission, 2003,* vol. II (Part One), documents A/CN.4/531, A/CN.4/540; and A/CN.4/566.

[778] See *ibid*., *2002,* vol. II (Part Two), paras. 442–457; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 170–171, and document A/CN.4/L.661 and Corr.1.

[779] Document A/CN.4/543.

[780] Document A/CN.4/562 and Add.1.

ing out of hazardous activities at its fifty-sixth session, in 2004. At that session, the Working Group examined the proposals for draft principles submitted by the Special Rapporteur in his second report[781] with a view to recommending draft principles ripe for referral to the Drafting Committee. At the same session, the Commission adopted, on first reading, a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries thereto.[782] In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the draft principles, through the Secretary-General, to Governments of Member States for comments and observations.[783]

The Commission undertook and completed the second reading of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities at its fifty-eighth session, in 2006, on the basis of the third report of the Special Rapporteur[784] as well as the comments and observations received from Governments.[785]

The Commission subsequently adopted, on second reading, the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, consisting of the text of a preamble and the following eight draft principles, as well as commentaries thereto: 1 (Scope of application), 2 (Use of terms), 3 (Purposes), 4 (Prompt and adequate compensation), 5 (Response measures), 6 (International and domestic remedies), 7 (Development of specific international regimes), and 8 (Implementation).[786] The text of the draft principles is reproduced in volume II, annex VI, section 12.

The Commission submitted the draft preamble and draft principles to the General Assembly and recommended that, in accordance with article 23 of its Statute, the General Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them.[787]

In resolution 61/36 of 4 December 2006, the General Assembly took note of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the text of which was annexed

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[781] Document A/CN.4/540.

[782] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 175 and 176.

[783] See *ibid.*, para. 173.

[784] Document A/CN.4/566.

[785] Document A/CN.4/562 and Add.1.

[786] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 66 and 67.

[787] See *ibid.*, paras. 62 and 63.

to the resolution, and commended them to the attention of Governments. The Assembly also decided to undertake the consideration of the topic, together with the issue of the prevention of transboundary harm from hazardous activities, at its sixty-second session, in 2007.

By resolution 62/68 of 6 December 2007, the General Assembly commended again the principles to the attention of Governments, without prejudice to any future action, as recommended by the Commission regarding the principles. The Assembly also invited Governments to submit comments on any future action, in particular on the form of the principles as well as on any practice in relation to the application of the principles.

In resolution 65/28 of 6 December 2010, the General Assembly commended once again the principles to the attention of Governments; reiterated its invitation to Governments to submit comments on any future action with regard to the principles; requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the principles (as well as to the articles on prevention of transboundary harm from hazardous activities); and decided to include in the provisional agenda of its sixty-eighth session (2013) an item entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm".

27. Diplomatic protection

At its forty-seventh session, in 1995, the International Law Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, decided to include in the Commission's agenda, subject to the approval of the General Assembly, the topic "Diplomatic Protection". The Commission noted that work on this topic would complement the Commission's work on State responsibility (*see section 25 above*) and should be of interest to all Member States. The Commission could consider, *inter alia*, the content and scope of the rule of exhaustion of local remedies; the rule of nationality of claims as applied to both natural and legal persons, including its relation to so-called "functional" protection; and problems of stateless persons and dual nationals. The Commission could also address the effect of dispute settlement clauses on domestic remedies and on the exercise of diplomatic protection.[788]

The General Assembly, in resolution 50/45 of 11 December 1995, took note of the Commission's suggestion to include the topic in its

[788] See *Yearbook of the International Law Commission, 1995,* vol. II (Part Two), para. 501.

agenda and invited Governments to submit comments on this suggestion for consideration by the Sixth Committee of the General Assembly at its fifty-first session, in 1996.

At its forty-eighth session, in 1996, the Commission adopted a general outline of the main legal issues raised under the topic, including explanatory notes, prepared by the Working Group on the long-term programme of work, to assist Governments in deciding whether to approve further work. The Commission noted that the study could follow the traditional pattern of articles and commentaries, while leaving for future decision the question of its final form. [789]

The General Assembly, in resolution 51/160 of 16 December 1996, invited the Commission to examine further the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments submitted by Governments.

At its forty-ninth session, in 1997, the Commission established a Working Group to examine further the topic and to indicate its scope and content in accordance with General Assembly resolution 51/160. The Working Group attempted to (a) clarify the scope of the topic to the extent possible; and (b) identify the issues that should be studied in the context of the topic. The Commission adopted the report submitted by the Working Group.[790]

The General Assembly, in resolution 52/156 of 15 December 1997, endorsed the Commission's decision to include in its agenda the topic "Diplomatic protection".

The Commission considered the topic at its forty-ninth and fiftieth sessions, in 1997 and 1998 and at its fifty-second to its fifty-eighth sessions, from 2000 to 2006. The Commission appointed Mohammed Bennouna and Christopher John R. Dugard as the successive Special Rapporteurs for the topic at its forty-ninth and fifty-first sessions, in 1997 and 1999, respectively.[791] During its consideration of the topic, the Commission had before it eight reports[792] of the Special Rapporteurs,

[789] See *ibid*., *1996*, vol. II (Part Two), annex II, addendum 1.

[790] See *ibid*., *1997*, vol. II (Part Two), paras. 172–189.

[791] See *ibid*., para. 190 and *ibid*. *1999,* vol. II (Part Two), para. 19.

[792] See *ibid*., *1998,* vol. II (Part One), document A/CN.4/484; *ibid*., *2000,* vol. II (Part One), document A/CN.4/506 and Corr.1 and Add.1; *ibid*., *2001,* vol. II (Part One), document A/CN.4/514 (incorporating Corr.1) and Corr.2 (Spanish only); *ibid*., *2002,* vol. II (Part One), document A/CN.4/523 and Add.1; *ibid*., *2003,* vol. II (Part One), document A/CN.4/530 and Corr.1 (Spanish only) and Add.1; document A/CN.4/538; document A/CN.4/546; and document A/CN.4/567.

three reports[793] of Working Groups established at its forty-ninth, fiftieth and fifty-fifth sessions in 1997, 1998 and 2003, respectively, as well as comments and observations received from Governments.[794]

The first reading of the draft articles on diplomatic protection was undertaken during the fifty-second to fifty-sixth sessions, from 2000 to 2004, on the basis of the first five reports[795] submitted by the Special Rapporteur, Mr. Dugard. The Special Rapporteur submitted proposals for 27 draft articles, on some of which the Commission decided not to take action.[796] With regard to particular draft articles, the Commission established either a working group[797] or an informal consultation[798] to

[793] See *ibid., 1997,* vol. II (Part Two), paras. 172–189; *ibid., 1998,* vol. II (Part Two), paras. 108–109; and *ibid., 2003,* vol. II (Part Two), document A/58/10, paras. 91–92.

[794] Documents A/51/358 and Add.1; A/CN.4/561 and Add.1 and 2 and A/CN.4/575. The General Assembly, in resolution 53/102 of 8 December 1998, invited Governments to submit the most relevant national legislation, decisions of domestic courts and State practice relevant to diplomatic protection in order to assist the Commission in its future work on the topic.

[795] See *Yearbook of the International Law Commission, 2000,* vol. II (Part One), document A/CN.4/506 and Corr.1 and Add.1; *ibid., 2001,* vol. II (Part One), document A/CN.4/514 (incorporating Corr.1) and Corr. 2 (Spanish only); *ibid., 2002,* vol. II (Part One), document A/CN.4/523 and Add.1; *ibid., 2003,* vol. II (Part One), document A/CN.4/530 and Corr.1 (Spanish only) and Add.1; and document A/CN.4/538.

[796] See proposals for draft articles: 2 (The threat or use of force), 4 (The duty to exercise diplomatic protection in cases of injury arising from a grave breach of a *jus cogens* norm), in *ibid., 2000,* vol. II (Part One), document A/CN.4/506 and Corr.1; 12 (The exhaustion of local remedies rule as a procedural precondition with respect to an internationally wrongful act which is a violation of domestic law and international law), 13 (The exhaustion of local remedies rule with respect to a denial of justice regarding a violation of domestic law), in *ibid., 2001,* vol. II (Part One), document A/CN.4/514 and Corr.1 and 2 (Spanish only); 15 (Burden of proof), 16 (The Calvo clause), in *ibid., 2002,* vol. II (Part One), document A/CN.4/523 and Add.1; and 23 to 25 (Protection by an international organization and diplomatic protection), in document A/CN.4/538. At its fifty-sixth session, in 2004, the Commission did not accept proposals to include within the scope of the topic: the protection by an administering State or international organization; the delegation of the right of diplomatic protection and the transfer of claims; and the protection by an international organization and diplomatic protection. See document A/CN.4/538. The Commission, at its fifty-seventh session, in 2005, agreed with the conclusion of the Special Rapporteur, reflected in his sixth report, document A/CN.4/546, that it was not appropriate to include a provision on the "clean hands" doctrine in the draft articles. See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 231.

[797] At its fifty-fifth session, in 2003, the Commission established an open-ended Working Group, chaired by the Special Rapporteur, on draft article 17, paragraph 2. See *Yearbook of the International Law Commission, 2003,* vol. II (Part Two), document A/58/10, paras. 90–92.

[798] An open-ended informal consultation, chaired by the Special Rapporteur, was established at the fifty-third session, in 2001, to consider draft article 9. See *ibid., 2001,* vol. II (Part Two), document A/56/10, para. 166. An open-ended informal consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews

consider particular proposals of the Special Rapporteur, before referring them to the Drafting Committee.

At its fifty-sixth session, in 2004, the Commission completed the first reading of the draft articles on diplomatic protection and adopted a set of 19 draft articles as well as commentaries thereto.[799] In accordance with articles 16 and 21 of its Statute, the Commission transmitted the draft articles adopted on first reading to Governments for comments and observations.[800]

The General Assembly, in resolution 59/41 of 2 December 2004, expressed its appreciation to the Commission for the completion of the first reading of the draft articles on diplomatic protection. It further drew the attention of Governments to the importance for the Commission of having their views on the draft articles and commentary on diplomatic protection.

The Commission undertook and completed the second reading of the draft articles on diplomatic protection at its fifty-eighth session, in 2006, on the basis of the seventh report[801] of the Special Rapporteur and of comments and observations received from Governments[802] on the draft articles adopted on first reading in 2004. The Special Rapporteur's report contained proposals for the consideration of draft articles 1 to 19 on second reading in light of the comments and observations received by Governments. It also contained a proposal for an additional draft article on the right of the injured national to receive compensation.

The Commission subsequently adopted, on second reading, the draft articles on diplomatic protection which were divided into four parts as follows: Part One. General Provisions, including articles 1 and 2; Part Two. Nationality, including Chapter I. General Principles, covering article 3, Chapter II. Natural Persons, covering articles 4 to 8, Chapter III. Legal Persons, covering articles 9 to 13; Part Three. Local Remedies, covering articles 14 to 15; and Part Four. Miscellaneous Provisions covering articles 16 to 19.[803] The text of the draft articles is reproduced in volume II, annex VI, section 13.

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as well as that of corporations and shareholders, was also established at the fifty-fourth session, in 2002. See *ibid., 2002,* vol. II (Part Two), document A/57/10, para. 113.

[799] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 59 and 60.

[800] See *ibid.*, para. 57.

[801] Document A/CN.4/567.

[802] Documents A/CN.4/561 and Add.1 and 2, and A/CN.4/575 (issued after the adoption of the draft articles on second reading).

[803] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 43, 44, 49 and 50.

In accordance with article 23 of its Statute, the Commission recommended to the General Assembly that a convention be elaborated on the basis of the draft articles on diplomatic protection.[804]

In resolution 61/35 of 4 December 2006, the General Assembly took note of the draft articles on diplomatic protection and invited Governments to submit comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles. It further decided to return to the topic at its sixty-second session, in 2007.

In resolution 62/67 of 6 December 2007, the General Assembly commended the articles on diplomatic protection, the text of which was annexed to the resolution, to the attention of Governments, and invited Governments to submit in writing to the Secretary-General any further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles. The Assembly also decided to revert to this item at its sixty-fifth session, in 2010.

In resolution 65/27 of 6 December 2010, the General Assembly commended once again the articles to the attention of Governments and invited Governments to submit any further comments, including on the recommendation by the Commission to elaborate a convention on the basis of the articles. The Assembly also decided to revert to the item at its sixty-eighth session, in 2013, and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second and sixty-fifth sessions of the General Assembly, to further examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles and to also identify any difference of opinion on the articles.

28. Unilateral acts of States

At its forty-eighth session, in 1996, the International Law Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, identified the topic of "Unilateral acts of States" as appropriate for codification and progressive development. The Working Group noted the relationship between this topic and the more general topic "Sources of international law" envisaged as a global topic of codification in the memorandum submitted by the Secretary-General at the first session of the Commission, in 1949.[805] The Working Group concluded that the present topic was appropriate for immediate consid-

[804] See *ibid.*, para. 46.

[805] Document A/CN.4/1 (United Nations publication, Sales No. 48.V.1) reissued under the symbol A/CN.4/1/Rev.1 (United Nations publication, Sales No. 48.V.1(1)).

eration for the following reasons: (1) it was a well delimited topic which had not been studied by any international official body; (2) it had been touched upon in several judgments of the International Court of Justice (ICJ), especially in the *Nuclear Tests* cases,[806] but the *dicta* left room for uncertainties and questions; (3) States had abundant recourse to unilateral acts and their practice could be studied with a view to drawing general legal principles; and (4) the law of treaties provided a point of departure and a scheme of reference for approaching the rules relating to unilateral acts notwithstanding the differences between the two topics. The Working Group prepared a tentative general outline of the topic, including explanatory notes, which contained the following sections: (1) Definition and typology; (2) Legal effects and application; (3) Conditions of validity; and (4) Duration, amendment and termination.[807]

The General Assembly, in resolution 51/160 of 16 December 1996, invited the Commission to examine further the topic "Unilateral acts of States" and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit.

The General Assembly, in resolution 52/156 of 15 December 1997, endorsed the Commission's decision to include in its agenda the topic "Unilateral acts of States".

The Commission appointed Victor Rodríguez Cedeño as Special Rapporteur at its forty-ninth session, in 1997,[808] and proceeded with its work on the topic from its fiftieth session, in 1998 to its fifty-eighth session, in 2006. In connection with its consideration of the topic, the Commission had before it the reports of the Special Rapporteur,[809] Government comments[810] and the reports and conclusions of the open-

[806] *Nuclear Tests (Australia* v. *France, New Zealand* v. *France), Judgment, I.C.J. Reports, 1974*, pp. 253 and 457.

[807] See *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), annex II, addendum 3.

[808] See *ibid., 1997,* vol. II (Part Two), para. 212.

[809] See *ibid., 1998,* vol. II (Part One), document A/CN.4/486; *ibid., 1999,* vol. II (Part One), document A/CN.4/500 and Add.1; *ibid., 2000,* vol. II (Part One), document A/CN.4/505; *ibid., 2001,* vol. II (Part One), document A/CN.4/519; *ibid., 2002,* vol. II (Part One), document A/CN.4/525 and Add.1, Corr.1, Corr.2 (Arabic and English only) and Add.2; *ibid., 2003,* vol. II (Part One), document A/CN.4/534; document A/CN.4/542 and Corr.1 (French only), 2 and 3; as well as document A/CN.4/557; and document A/CN.4/569 and Add.1.

[810] For replies from Governments to the questionnaire submitted to Governments following the Commission's fifty-first session in 1999, see *ibid., 2000*, vol. II (Part One), document A/CN.4/511. The document contains the text of the replies received as at 6 July 2000. For replies from Governments to the questionnaire submitted to Governments

ended Working Group established at its forty-ninth session, in 1997, and re-established each year from its fiftieth session, in 1998, to its fifty-third session, in 2001, and from its fifty-fifth session, in 2003, to its fifty-eighth session, in 2006.[811] The Working Group was chaired by Enrique Candioti at its forty-ninth and fiftieth sessions, in 1997 and 1998 respectively, by the Special Rapporteur, Victor Rodríguez Cedeño, from its fifty-first session in 1999 to its fifty-third session in 2001, and by Alain Pellet from its fifty-third session in 2003 to its fifty-eighth session in 2006.

At its fifty-first session, in 1999, the Working Group reported to the Commission on issues related to the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering the relevant State practice; the setting of general guidelines according to which the practice of States should be gathered,[812] and the direction that the work of the Special Rapporteur should take in the future.[813]

At its fifty-fifth session, in 2003, the Commission adopted the seven recommendations, contained in Parts 1 and 2 of the report of the Working Group, on the scope of the topic and the method of work.[814]

At its fifty-sixth session, in 2004, the Working Group agreed to retain a sample of unilateral acts sufficiently documented to allow for in-depth analysis. It also established a grid which would permit the use of uniform analytical tools.[815] Individual members of the Working Group subsequently took up a number of studies, which were completed in accordance

following the Commission's fifty-third session in 2001, see *ibid., 2002,* vol. II (Part One), document A/CN.4/524.

[811] See *ibid., 1997,* vol. II (Part Two), paras. 195–210; *ibid., 1998,* vol. II (Part Two), paras. 192–200; *ibid., 1999,* vol. II (Part Two), paras. 577–597; *ibid., 2000,* vol. II (Part Two), paras. 620–621; *ibid., 2001,* vol. II (Part Two), document A/56/10, para. 254; *ibid., 2003,* vol. II (Part Two), document A/58/10, paras. 303–308; *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10* (A/59/10), paras. 245–247; *ibid., Sixtieth session, Supplement No. 10* (A/60/10), paras. 327–332; and *ibid., Sixty-first session, Supplement No. 10* (A/61/10), paras. 173–176.

[812] The Working Group developed guidelines for a questionnaire to be sent to States, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic. See *Yearbook of the International Law Commission, 1999,* vol. II (Part Two), paras. 590–595.

[813] See *ibid.*, para. 581.

[814] See *ibid., 2003,* vol. II (Part Two), document A/58/10, paras. 304–308.

[815] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 247. The grid included the following elements: date; author/organ; competence of author/organ; form; content; context and circumstances; aim; addressees; reactions of addressees; reactions of third parties; basis; implementation; modification; termination/revocation; legal scope; decision of a judge or an arbitrator; comments; and literature.

with the established grid, and transmitted to the Special Rapporteur for the preparation of his eighth report. The Commission, at its fifty-seventh session, in 2005, subsequently requested the Working Group to consider the points on which there was general agreement and which might form the basis for preliminary conclusions or proposals on the topic.[816]

At its fifty-eighth session, in 2006, the Commission decided that, after extensive consideration of the topic, it was necessary to come to some conclusions. It was aware that the concept of an unilateral act was not uniform, and that it covered a wide spectrum of conduct. It noted further that differences among legal cultures partly accounted for the misunderstandings to which the topic had given rise as, for some, the concept of a juridical act necessarily implied an express manifestation of a will to be bound on the part of the author State, whereas for others any unilateral conduct by the State producing legal effects on the international plane could be categorized as an unilateral act.[817]

At the same session, the Working Group was requested to prepare conclusions for the Commission on the topic taking into account the various views expressed, the draft Guiding Principles proposed by the Special Rapporteur in his ninth report[818] and its previous work on the topic. The Commission, following consideration of the report of the Working Group, adopted a set of ten Guiding Principles, together with commentaries, applicable to unilateral declarations of States capable of creating legal obligations, [819] and commended them to the attention of the General Assembly.[820] The text of the Guiding Principles is reproduced in volume II, annex VI, section 14.

In resolution 61/34 of 4 December 2006, the General Assembly took note of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations and commended their dissemination.

29. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

At its fifty-second session, in 2000, the Commission decided to include the topic "Risks ensuing from fragmentation of international

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[816] See *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 329.

[817] See *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), paras. 173–175.

[818] Document A/CN.4/569 and Add.1.

[819] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 176–177.

[820] See *ibid.*, para. 170.

law" in its long-term programme of work.[821] The Commission noted that the method and outcome of work on the topic did not fall strictly within the normal form of codification, but was within its competence and in accordance with its Statute.[822] The General Assembly, in resolution 55/152 of 12 December 2000, took note of the Commission's report concerning its long-term programme of work. In resolution 56/82 of 12 December 2001, the Assembly requested the Commission to further consider the topic, having due regard to comments made by Governments.

At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work, and changed the title to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[823] The Commission proceeded with its work on the topic from its fifty-fourth session, in 2002, to its fifty-eighth session, in 2006. The Commission established a Study Group at its fifty-fourth session, in 2002, which was reconstituted at each session and chaired successively, by Bruno Simma, at its fifty-fourth session, in 2002, and by Martti Koskenniemi, at its fifty-fifth to fifty-eighth sessions, from 2003 to 2006.[824] At each session, the Study Group submitted reports for consideration by the Commission.[825]

At its fifty-fourth session, in 2002, the Study Group recommended the preparation of the following series of studies on specific aspects of the topic to assist international judges and practitioners in coping with the consequences of the diversification of international law: (*a*) the function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (*b*) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties (*see volume II, annex V, section 6*), in the context of general developments

[821] See *Yearbook of the International Law Commission, 2000,* vol. II (Part Two), para. 729.

[822] See *ibid.*, para. 731.

[823] See *ibid., 2002,* vol. II (Part Two), document A/57/10, paras. 492–494.

[824] See *ibid.*, para. 493; *ibid., 2003,* vol. II (Part Two) document A/58/10, para. 412; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 298; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 442; and *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 237.

[825] The successive reports of the Study Group have been reproduced each year in the annual reports of the International Law Commission. See *Yearbook of the International Law Commission, 2002,* vol. II (Part Two), document A/57/10, paras. 495–513; *ibid., 2003,* vol. II (Part Two), document A/58/10, paras. 415–435; *ibid. Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10) paras. 300–358; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10) paras. 445–493; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10) paras. 241–251.

in international law and concerns of the international community; (*c*) the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (*d*) the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); and (*e*) hierarchy in international law: *jus cogens,* obligations *erga omnes,* Article 103 of the Charter of the United Nations, as conflict rules.[826] The Study Group noted that the choice of subjects for study was guided by the Commission's previous work relating to the law of treaties and the responsibility of States for internationally wrongful acts and that the Commission's work on the topic would build upon and further develop those earlier texts.[827]

At its fifty-fifth session, in 2003, the Study Group considered the preliminary conceptual questions addressed within the outline relating to the function and the scope of the *lex specialis* rule, prepared by the Study Group's Chairman. The questions focused on the nature of the *lex specialis* rule, its acceptance and rationale, the relational distinction between the "general" and the "special" rule and the application of the *lex specialis* rule in regard to the "same subject matter".[828]

During its fifty-sixth session, in 2004, and fifty-seventh session, in 2005, the Study Group considered a number of outlines and studies on the different topics selected by the Study Group. The Study Group reaffirmed its approach to focus on the substantive aspects of fragmentation in the light of the Vienna Convention on the Law of Treaties while leaving aside institutional considerations pertaining to fragmentation. It reiterated its intention to attain an outcome that would be concrete and of practical value especially for legal experts in foreign offices and international organizations.[829]

At its fifty-eighth session, in 2006, the Commission finalized its work on fragmentation of international law and took note of the set of forty-two conclusions contained in the report of the Study Group,[830] which had to be read in connection with the analytical study, finalized by the Chairman of the Study Group, on which they were based.[831] That study summarized and analysed the phenomenon of fragmentation on the basis of the studies prepared by the various members of the

[826] See *Yearbook of the International Law Commission, 2002,* vol. II (Part Two), document A/57/10, para. 512.

[827] See *ibid*.

[828] See *ibid., 2003,* vol. II (Part Two), document A/58/10, para. 430.

[829] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 447–448.

[830] See *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 251.

[831] Document A/CN.4/L.682 and Add.1 and Corr.1.

Study Group and taking into account the comments made in the Study Group.

The Commission, after taking note of the conclusions of the Study Group commended them to the attention of the General Assembly.[832] The conclusions are reproduced in volume II, annex VI, section 15.

In resolution 61/34 of 4 December 2006, the General Assembly took note of the conclusions of the Commission's Study Group on the topic "Fragmentation of international law: difficulties arising from diversification and expansion of international law," together with the analytical study on which they were based.

30. Shared natural resources

At its fifty-second session, in 2000, the Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, concluded that the topic "Shared natural resources of States" was appropriate for inclusion in its long-term programme of work.[833]

The General Assembly, in resolution 55/152 of 12 December 2000, took note of the Commission's report concerning its long-term programme of work. In resolution 56/82 of 12 December 2001, the Assembly requested the Commission to further consider the topic having due regard to comments made by Governments.

At its fifty-fourth session, in 2002, the Commission decided to include the topic "Shared natural resources" in its programme of work, to appoint Chusei Yamada as Special Rapporteur for the topic, and to establish a Working Group to assist the Special Rapporteur.[834] The General Assembly, in resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic in its programme of work.

At its fifty-fifth session, in 2003, the Commission had before it the first report[835] of the Special Rapporteur which provided the background on the topic and proposed to limit its scope to the study of confined transboundary groundwaters, oil and gas, with work proceeding initially on the study of confined transboundary groundwaters. The Special Rapporteur also submitted an addendum to the report which was technical in nature and sought to provide a better understanding of what constituted

[832] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 239.

[833] See *Yearbook of the International Law Commission, 2000,* vol. II (Part Two), para. 729 (3). For the syllabus on the topic, see *ibid*., annex (3).

[834] See *ibid., 2002,* vol. II (Part Two), document A/57/10, paras. 20, 518 and 519.

[835] See *ibid., 2003,* vol. II (Part One), document A/CN.4/533 and Add.1.

confined transboundary groundwaters. The Special Rapporteur noted that the problem of shared natural resources had first been dealt with by the Commission during its codification of the law of the non-navigational uses of international watercourses (*see pages 197-198*). At the time, the Commission had decided to exclude confined groundwaters unrelated to surface waters from the topic, but nonetheless considered that a separate study was warranted due to the importance of confined groundwaters in many parts of the world. The Special Rapporteur deemed it indispensable to know exactly what such groundwaters were in order to ascertain the extent to which the principles embodied in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (*see volume II, annex V, section 12*) could be applicable. The Special Rapporteur noted that the international efforts to manage groundwaters were taking place in different forums, that the law relating to groundwaters was more akin to that governing the exploitation of oil and gas, and that the Commission's work on the topic of international liability, particularly regarding the prevention aspect, would be relevant.[836]

The General Assembly, in resolution 58/77 of 9 December 2003, invited Governments to provide information to the Commission regarding national legislation, bilateral and other agreements and arrangements with regard to the use and management of transboundary groundwaters, in particular those governing the quality and quantity of such waters, relevant to the topic. At the fifty-sixth session, in 2004, the Commission agreed that a questionnaire, prepared by the Special Rapporteur, be circulated to Governments and relevant intergovernmental organizations asking for their views and information regarding groundwaters.[837] The General Assembly, in resolution 59/41 of 2 December 2004, drew the attention of Governments to the importance for the Commission of having their views on the various aspects involved in the topic, in particular on their practice, bilateral or regional, relating to the allocation of groundwaters from transboundary aquifer systems and the management of non-renewable transboundary aquifer systems relating to the topic.

The Commission undertook the first reading of the draft articles from its fifty-sixth to fifty-eighth sessions, from 2004 to 2006, respectively. During this period, the Commission received and considered a further two (for a total of three) reports from the Special Rapporteur, containing proposals for draft articles.[838] The Commission also had

[836] See *ibid., 2003,* vol. II (Part Two), document A/58/10, paras. 376–381.

[837] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 81.

[838] Documents A/CN.4/539 and Add.1; and A/CN.4/551 and Corr.1 and Add.1.

before it a set of comments and observations received from Governments and relevant intergovernmental organizations, which were circulated at the fifty-seventh session, in 2005.[839] The Commission also established three open-ended working groups, the first, in 2004, chaired by the Special Rapporteur, to assist in furthering the Commission's consideration of the topic; the second, in 2005, chaired by Enrique Candioti, to review and revise the 25 draft articles on the law of transboundary aquifers proposed by the Special Rapporteur, in his third report, taking into account the debate in the Commission; and the third in 2006, also chaired by Enrique Candioti, to complete the review and revision of the draft articles submitted by the Special Rapporteur.[840]

At its fifty-eighth session, in 2006, the Commission adopted, on first reading, 19 draft articles[841] on the law of transboundary aquifers and commentaries thereto. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles through the Secretary General for comments and observations, with the request that such comments and observations be submitted to the Secretary General.[842]

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[839] Document A/CN.4/555 and Add.1.

[840] The Commission also received informal briefings by experts on groundwaters from the Economic Commission for Europe (ECE), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO) and the International Association of Hydrogeologists (IAH), at its fifty-fifth and fifty-sixth sessions, in 2003 and 2004, respectively; as well as an informal technical presentation on the Guarani Aquifer System project, at its fifty-seventh session, in 2005. See *Yearbook of the International Law Commission, 2003,* vol. II (Part Two), document A/58/10, para. 373; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10,* A/59/10, para. 80; and *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 32.

[841] Draft articles 1 (Scope), 2 (Use of terms), 3 (Sovereignty of aquifer States), 4 (Equitable and reasonable utilization), 5 (Factors relevant to equitable and reasonable utilization), 6 (Obligation not to cause significant harm to other aquifer States), 7 (General obligation to cooperate), 8 (Regular exchange of data and information), 9 (Protection and preservation of ecosystems), 10 (Recharge and discharge zones), 11 (Prevention, reduction and control of pollution), 12 (Monitoring), 13 (Management), 14 (Planned activities), 15 (Scientific and technical cooperation with developing States), 16 (Emergency situations) 17 (Protection in time of armed conflict), 18 (Data and information concerning national defence or security), and 19 (Bilateral and regional agreements and arrangements). The draft articles are divided into the following five parts: Part I (Introduction) including articles 1 and 2; Part II (General principles) including articles 3 to 8; Part III (Protection, preservation, and management) including articles 9 to 13; Part IV (Activities affecting other States) including article 14; and Part V (Miscellaneous provisions) including articles 15 to 19. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 75 and 76.

[842] See *ibid.*, para. 73.

At its fifty-ninth session, in 2007, the Commission considered the fourth report of the Special Rapporteur,[843] which focused on the relationship between the work on transboundary aquifers and any future work on oil and gas, and recommended that the Commission proceed with the second reading of the draft articles on the law of transboundary aquifers independently of any future consideration of oil and gas. The Commission also established a Working Group on Shared natural resources which addressed (*a*) the substance of the draft articles on the law of transboundary aquifers adopted on first reading; (*b*) the final form that the draft articles should take; and (*c*) issues involved in the consideration of oil and gas, and in particular prepared a questionnaire on State practice concerning oil and gas for circulation to Governments.[844]

At the sixtieth session, in 2008, the Commission had before it the fifth report of the Special Rapporteur comprising a set of 20 draft articles on the law of transboundary aquifers for the consideration of the Commission on second reading.[845] The Commission also had before it the comments and observations received from Governments on the draft articles adopted on first reading.[846] The Commission subsequently adopted, on second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers, with commentaries thereto. The draft articles were divided into four parts, as follows: Part I entitled "Introduction" (articles 1 and 2 on scope and use of terms, respectively), Part II entitled "General Principles" (articles 3 to 9 on sovereignty of aquifer States, equitable and reasonable utilization, factors relevant to equitable and reasonable utilization, obligation not to cause significant harm to other aquifer States, general obligation to cooperate, regular exchange of data and information, and bilateral and regional agreements and arrangements, respectively), Part III entitled "Protection, Preservation and Management" (articles 10 to 15 on protection and preservation of ecosystems, recharge and discharge zones, prevention, reduction and control of pollution, monitoring, management and planned activities, respectively) and Part IV entitled "Miscellaneous Provisions" (articles 16 to 19 on technical cooperation with developing States, emergency situations, protection in time of armed conflict, and data and information vital to national defense or security, respectively) The text of the draft articles is reproduced in volume II, annex VI, section 16.[847]

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[843] Document A/CN.4/580.

[844] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 14.

[845] Document A/CN.4/591.

[846] Document A/CN.4/595 and Add. 1.

[847] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 53 and 54.

The Commission also decided, in accordance with article 23 of its Statute, to recommend to the General Assembly: (*a*) to take note of the draft articles on the law of transboundary aquifers in a resolution and to annex the articles to the resolution; (*b*) to recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (*c)* to also consider, at a later stage, the elaboration of a convention on the basis of the draft articles.[848]

The General Assembly, in resolution 63/124 of 11 December 2008, took note of the draft articles on the law of transboundary aquifers presented by the Commission, the text of which was annexed to the resolution; commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action; encouraged the States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles; and decided to revert to the item at its sixty-sixth session, in 2011, with a view to examining, *inter alia*, the question of the form that might be given to the draft articles.

In resolution 66/104 of 9 December 2011, the General Assembly recommended that the draft articles be considered by Member States when negotiating future agreements or arrangements for the management of their transboundary aquifers, as appropriate; encouraged the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization, whose contribution had been noted in resolution 63/124, to offer further scientific and technical assistance to the States concerned; and decided to revert to this item at its sixty-eight session, in 2013, and, in the light of written comments of Governments, as well as views expressed in the debates held at its sixty-third and sixty-sixth sessions, to further examine, *inter alia*, the question of the form that might be given to the draft articles.

Oil and gas

In 2009 and 2010, the work in the Commission on the topic "Shared Natural Resources" continued with regard to the aspect relating to oil and gas. At its sixty-second session, in 2010, the Commission decided not to take up the consideration of the transboundary oil and gas aspects of the topic.[849]

[848] See *ibid.*, para. 49.

[849] See *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 377 and 384.

31. Reservations to treaties[850]

At its forty-fifth session, in 1993, the International Law Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, decided to include in the Commission's agenda, subject to the approval of the General Assembly, the topic "The law and practice relating to reservations to treaties". The Commission noted that the 1969 Vienna Convention on the Law of Treaties (*see volume II, annex V, section 6*), the 1978 Vienna Convention on Succession of States in Respect of Treaties (*see volume II, annex V, section 9*) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (*see volume II, annex V, section 11*) set out some principles concerning reservations to treaties, but they did so in terms that were too general to act as a guide for State practice and left a number of important matters in the dark. These conventions provide ambiguous answers to the questions of differentiating between reservations and interpretative declarations, the scope of interpretative declarations, the validity of reservations (the conditions for the lawfulness of reservations and their applicability to another State) and the regime of objections to reservations (in particular, the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose). These conventions are also silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties (in particular the constituent instruments of international organizations and human rights treaties), reservations to codification treaties and problems resulting from particular treaty techniques (elaboration of additional protocols, bilateralization techniques). The Commission recognized the need not to challenge the regime established in articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties, but nonetheless considered that these provisions could be clarified and developed in draft protocols to existing conventions or a guide to practice.[851]

The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the above decision of the International Law Commission on the understanding that the final form to be given to the work on the topic would be decided after a preliminary study was presented to the Assembly.

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[850] At its forty-seventh session, in 1995, the Commission concluded that the title of the topic should be amended to read as above rather than "The law and practice relating to reservations to treaties".

[851] See *Yearbook of the International Law Commission, 1993,* vol. II (Part Two), paras. 427–430 and 440.

At its forty-sixth session, in 1994, the Commission appointed Alain Pellet as Special Rapporteur for the topic.[852]

The General Assembly, in resolution 49/51 of 9 December 1994, again endorsed the decision of the Commission on the understanding reflected above.

At its forty-seventh session, in 1995, the Commission had before it the first report[853] of the Special Rapporteur. This preliminary report provided a detailed study of the Commission's previous work on reservations and its outcome. It also provided an inventory of the problematic aspects of the topic, including those relating to the ambiguities and gaps in the provisions concerning reservations contained in the Vienna Conventions on the Law of Treaties, as well as those connected with the specific object of certain treaties or provisions or arising from certain specific treaty approaches. Finally, it outlined the scope and form of the Commission's future work, guided by the preservation of what had been achieved, and proposed the form that the results of the Commission's work might take. Following the Commission's consideration of the report, the Special Rapporteur summarized the conclusions he had drawn with respect to: (1) the title of the topic, which should now read "Reservations to treaties"; (2) the form of the results of the study, which should be a guide to practice in respect of reservations; (3) the flexible way in which the Commission's work on the topic should be carried out; and (4) the consensus in the Commission that there should be no change in the relevant provisions of the Vienna Conventions. The Guide to Practice in the form of draft articles with commentaries would provide guidelines for the practice of States and international organizations in respect of reservations; these guidelines would, if necessary, be accompanied by model clauses.[854] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994.[855] The Commission authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties to ascertain the practice of, and the problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions.[856]

The General Assembly, in resolution 50/45 of 11 December 1995, took note of the Commission's conclusions, invited the Commission

[852] See *ibid., 1994,* vol. II (Part Two), para. 381.

[853] See *ibid., 1995,* vol. II (Part One), document A/CN.4/470.

[854] See *ibid.,* (Part Two), para. 487.

[855] See *ibid.*, para. 488.

[856] See *ibid.*, para. 489.

to continue its work along the lines indicated in its report and invited States and international organizations, particularly those which are depositaries, to answer the questionnaire.[857]

At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report[858] as well as a bibliography.[859] The report dealt with the issue of the unity or diversity of the legal regime of reservations to treaties, especially reservations to human rights treaties. The Special Rapporteur concluded that despite the diversity of treaties, the Vienna regime on reservations is generally applicable. Moreover, the coexistence of monitoring mechanisms does not preclude monitoring bodies from making determinations of the permissibility of reservations, even if States still can draw any consequences they wish from such determinations and react accordingly. The Special Rapporteur also proposed a draft resolution of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter. The Commission did not have time to consider the report and the draft resolution. The Commission therefore deferred the debate on the topic to its next session.[860]

At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic concerning the question of the unity or diversity of the legal regime of reservations. Wishing to contribute to discussions taking place in other forums on the subject of reservations to normative multilateral treaties, particularly human rights treaties, the Commission adopted a number of preliminary conclusions on the subject.[861] The Commission welcomed comments by Governments on these preliminary conclusions and invited monitoring bodies set up by the relevant human rights treaties to submit their comments as well.[862]

The General Assembly, in resolution 52/156 of 15 December 1997, took note of the Commission's preliminary conclusions and its invita-

[857] Thirty-three States and 26 international organizations responded to the questionnaire. See also the comments and observations submitted at a later time by States on the Guide to Practice on Reservations to Treaties as provisionally adopted by the Commission in 2010 (A/CN.4/639 and Add.1).

[858] See *Yearbook of the International Law Commission, 1996*, vol. II (Part One), document A/CN.4/477 and Add.1.

[859] See *ibid.*, document A/CN.4/478. A revised version was issued at the fifty-first session, in 1999. See *ibid.*, document A/CN.4/478/Rev.1.

[860] See *ibid.*, (Part Two), para. 137.

[861] See *ibid.*, *1997*, vol. II (Part Two), para. 157.

[862] See *ibid.*, para. 28.

tion to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

From its fiftieth session, in 1998, to its sixty-second session, in 2010, the Commission considered an additional 14 reports[863] and a note[864] by the Special Rapporteur, along with a memorandum by the Secretariat on reservations to treaties in the context of succession of States,[865] and provisionally adopted 199 draft guidelines and commentaries thereto.[866]

The Commission also held informal meetings with the Human Rights Bodies at the fifty-fifth to fifty-seventh sessions, from 2003 to 2005, during which there was an exchange of views aiming at a deeper understanding of the position of those bodies, in particular with regard to the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[867] Furthermore, at its fifty-ninth session, in 2007, the Commission held a meeting with United Nations and other experts in the field of human rights, including representatatives from human rights treaty bodies. During the meeting, to

[863] See *ibid., 1998*, vol. II (Part One), documents A/CN.4/491 and Corr.1 (English only), and Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (Arabic, French, Russian only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1; *ibid.*, *1999,* vol. II (Part One), document A/CN.4/499; *ibid.*, *2000,* vol. II (Part One), document A/CN.4/508 and Add.1–4; *ibid.*, *2001,* vol. II (Part One), document A/CN.4/518 and Add.1–3; *ibid.*, *2002,* vol. II (Part One), document A/CN.4/526 and Add.1–3; *ibid.*, *2003,* vol. II (Part One), document A/CN.4/535 and Add.1; as well as documents A/CN.4/544 and A/CN.4/558 and Corr.1, Add.1 and Corr.1 and 2 (Fench and Arabic only), and Add.2; A/CN.4/574; A/CN.4/584 and Corr.1; A/CN.4/600; A/CN.4/614 and Corr.1 (English) and Add. 1 and 2; A/CN.4/624 and Add. 1 and 2; and A/CN.4/626 and Add.1.

[864] A/CN.4/586.

[865] A/CN.4/616.

[866] For the respective texts of, and commentaries to, the draft guidelines adopted by the Commission between 1998 and 2010, see: *Yearbook of the International Law Commission, 1998,* vol. II (Part Two), para. 540; *ibid., 1999,* vol. II (Part Two), para. 470; *ibid., 2000,* vol. II (Part Two), para. 663; *ibid., 2001,* vol. II (Part Two), document A/56/10, para. 157; *ibid., 2002,* vol. II (Part Two), document A/57/10, para. 103; *ibid., 2003,* vol. II (Part Two), document A/58/10, para. 368; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para.295; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 438; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 159; *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 154; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 124; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 84; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 106.

[867] See *Yearbook of the International Law Commission, 2003*, vol. II (Part Two), A/58/10, para. 334; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para.375; and *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), paras. 370 and 509.

which experts from regional human rights bodies were also invited, an exchange of views took place on various issues relating to reservations to human rights treaties, in particular on the causes of invalidity of reservations to human rights treaties and on the assessment of the validity of reservations to human rights treaties.[868]

At its sixty-second session, in 2010, the Commission was able to complete the provisional adoption of the entire set of draft guidelines of the Guide to Practice on Reservations to Treaties, with commentaries thereto.[869] At the same session, the Commission indicated that it intended to adopt the final version of the Guide to Practice during its sixty-third session in 2011, taking into consideration the observations of States and international organizations as well as the organs with which the Commission cooperates, made since the beginning of the examination of the topic, together with further observations received by the Secretariat of the Commission before 31 January 2011.[870]

At the sixty-third session, in 2011, the Commission had before it the seventeenth report of the Special Rapporteur,[871] as well as comments and observations received from Governments[872] on the provisional version of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-second session in 2010. The Commission established a Working Group, chaired by Marcelo Vázquez-Bermúdez, in order to proceed with the finalization of the text of the guidelines constituting the Guide to Practice,[873] as had been envisaged during the sixty-second session.[874] The Working Group reviewed the version of the Guide to Practice as provisionally adopted in 2010 on the basis of the changes proposed by the Special Rapporteur in the light of the oral and written observations made by States on the topic since 1995.[875] The Commission also referred to the Working Group a draft recommendation or conclusions on the reservations dialogue, and a draft recommendation on technical assistance and assistance in the settlement of disputes

[868] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 398.

[869] See *ibid., Sixty-fifth session, Supplement No. 10* (A/65/10), para.45.

[870] *Ibid.*

[871] Document A/CN.4/647 and Add.1.

[872] Document A/CN.4/639 and Add.1.

[873] *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), para. 57.

[874] See *ibid., Sixty-fifth session, Supplement No. 10* (A/65/10 and Add.1), para. 45.

[875] See *ibid., Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), para. 57.

concerning reservations,[876] contained, respectively, in the seventeenth report of the Special Rapporteur and in the addendum to that report.[877]

On the basis of the recommendations of the Working Group, the Commission adopted, also at its sixty-third session, in 2011, the Guide to Practice on Reservations to Treaties, which comprises an introduction, the text of the guidelines with commentaries thereto, an annex on the reservations dialogue and a bibliography.[878] The text of the guidelines and annex thereto is reproduced in volume II, annex VI, section 17.

In accordance with article 23 of its Statute, the Commission recommended to the General Assembly to take note of the Guide to Practice on Reservations to Treaties and ensure its widest possible dissemination.[879] The Commission also adopted a recommendation to the General Assembly on mechanisms of assistance in relation to reservations to treaties.[880]

In resolution 66/98 of 9 December 2011, the General Assembly commended the International Law Commission for the completion of its work on the Guide to Practice on Reservations to Treaties and decided that the consideration of chapter IV of the report of the Commission on the work of its sixty-third session,[881] dealing with the topic "Reservations to treaties", shall be continued at the sixty-seventh session of the General Assembly, in 2012, during the time of the consideration of the report of the International Law Commission on the work of its sixty-fourth session.

32. Responsibility of international organizations

At its fifty-second session, in 2000, the Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, concluded that the topic "Responsibility of international organizations" was appropriate for inclusion in its long-term programme of work.[882] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that years report of the commission.[883]

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[876] See *ibid*., para. 59.

[877] Document A/CN.4/647 and Add.1.

[878] See *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10), paras. 61, 75 and 76, and A/66/10/Add.1.

[879] *Ibid*., para. 72.

[880] *Ibid*., para. 73.

[881] *Ibid*., paras. 51 to 76, and A/6610/Add.1.

[882] See *Yearbook of the International Law Commission, 2000,* vol. II (Part Two), paras. 726–728 and 729 (1).

[883] See *ibid.,* annex (1).

The General Assembly, in resolution 55/152 of 12 December 2000, took note of the Commission's report concerning its long-term programme of work. In resolution 56/82 of 12 December 2001, the Assembly requested the Commission to begin its work on the topic.

At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work, to appoint Giorgio Gaja as Special Rapporteur for the topic, and to establish a Working Group on the topic.[884] The Working Group considered the following issues: (a) the scope of the topic, including the concepts of responsibility and international organizations; (b) relations between the topic of responsibility of international organizations and the articles on State responsibility; (c) questions of attribution; (d) questions of responsibility of Member States for conduct that is attributed to an international organization; (e) other questions concerning the arising of responsibility for an international organization; (f) questions of content and implementation of international responsibility; (g) settlement of disputes; and (h) the practice to be taken into consideration. The Working Group recommended that the Secretariat approach international organizations with a view to collecting relevant materials, especially on questions of attribution and the responsibility of Member States for conduct that is attributed to an international organization.[885]

The General Assembly, in resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic in its programme of work.

From its fifty-fifth to sixty-first sessions, held from 2003 to 2009, the Commission had received and considered seven reports from the Special Rapporteur,[886] as well as comments and observations received from Governments and international organizations,[887] and provision-

[884] See *ibid., 2002,* vol. II (Part Two), document A/57/10, paras. 18, 461–463, 517 and 519.

[885] See *ibid*., paras. 465–488. The Commission requested the Secretariat to circulate, on an annual basis, the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. See *ibid.,* A/57/10 and Corr.1, para. 488 and *ibid., 2003*, vol. II (Part Two), document A/58/10, para. 52. The General Assembly, in resolution 58/77 adopted on 9 December 2003, requested the Secretary-General to invite States and international organizations to submit information concerning their practice relevant to the topic, including cases in which States members of an international organization may be regarded as responsible for acts of the organization.

[886] See *ibid., 2003,* vol. II (Part One), document A/CN.4/532; document A/CN.4/541; as well as document A/CN.4/553; document A/CN.4/564 and Add.1 and 2; A/CN.4/583; A/CN.4/597; and A/CN.4/610.

[887] Document A/CN.4/545; document A/CN.4/547; document A/CN.4/556; document A/CN.4/568 and Add.1; A/CN.4/582; A/CN.4/593 and Add.1; and A/CN.4/609.

ally adopted draft articles 1 to 66, with commentaries thereto.[888] Working Groups were also established at the fifty-fifth session, in 2003, to consider the Special Rapporteur's proposal for draft article 2, as well as to provide guidance to the Special Rapporteur on his next report;[889] and at the fifty-seventh session, in 2005, to consider draft articles 8 and 16, as proposed by the Special Rapporteur.[890]

At its sixty-first session, in 2009, the Commission adopted a set of 66 draft articles on the responsibility of international organizations on first reading, together with commentaries.[891] The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2011.[892]

At the sixty-third session, in 2011, the Commission adopted, on second reading, a set of 67 draft articles, together with commentaries thereto, on the responsibility of international organizations.[893] In so doing, the Commission had before it the eighth report of the Special Rapporteur,[894] surveying the comments made by Governments[895] and international organizations[896] on the draft articles adopted on first reading in 2009, and making recommendations for consideration by the

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[888] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90. For the commentaries to: draft articles 1 to 3, see *Yearbook of the International Law Commission, 2003,* vol. II (Part Two), document A/58/10 para. 54; draft articles 4 to 7, see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 72; draft articles 8 to 16 [15], see *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 206; draft articles 17 to 30, see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 91; draft articles 31 to 45, see *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 344; draft articles 46 to 53, see *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 165; and draft articles 2, 4, 8, 15, 15 *bis*, 18, 19, 54 to 60, 3, 3 *bis*, 28, paragraph 1, and 61 to 64, see *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 51 (reproducing all the draft articles and commentaries as adopted on first reading in 2009).

[889] See *Yearbook of the International Law Commission, 2003,* vol. II (Part Two), documentA/58/10, paras. 47–48 and 51.

[890] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 201.

[891] See *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 46–47 and 50–51.

[892] See *ibid.*, para. 48.

[893] See *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), paras. 82–83 and 87–88.

[894] Document A/CN.4/640.

[895] Document A/CN.4/636 and Add.1.

[896] Document A/CN.4/637 and Add.1.

Commission during the second reading. The draft articles were divided into six parts, as follows: Part I entitled "Introduction" (articles 1 and 2 on scope and use of terms, respectively); Part II entitled "The internationally wrongful act of an international organization" (articles 3 to 27 on general principles, attribution of conduct to an international organization, breach of an international obligation, responsibility of an international organization in connection with the act of a State or another international organization, and circumstances precluding wrongfulness); Part III entitled "Content of the international responsiblity of an international organization" (articles 28 to 42 on general principles, reparation for injury, and serious breaches of obligation under preemptory norms of general international law); Part Four entitled "The implementation of the international responsibility of an international organization" (articles 43 to 57 on invocation of the responsibility of an international organization and countermeasures);Part V entitled "Responsibility of a State in connection with the conduct of an international organization"(article 58 to 63); and Part VI entitled "General provisions" (articles 64 to 67). The text of the draft articles is reproduced in volume II, annex VI, section 18.

In accordance with article 23 of its Statute, the Commission recommended to the General Assembly (*a*) to take note of the draft articles in a resolution, and to annex them to the resolution, and (*b*) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.[897]

In resolution 66/100 of 9 December 2011, the General Assembly took note of the articles on the responsibility of international organizations, the text of which was annexed to the resolution, and commended them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action. It further decided to return to the topic at its sixty-ninth session, in 2014, with a view to examining, *inter alia*, the question of the form that might be given to the draft articles.

33. Effects of armed conflicts on treaties

At its fifty-second session, in 2000, the International Law Commission identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work.[898] A brief syllabus describing

[897] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), para. 85.

[898] See *Yearbook of the International Law Commission, 2000,* vol. II (Part Two), paras. 726–728 and 729 (2).

the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[899] The syllabus noted that the topic had been set aside by the Commission in its work on the law of treaties and formed part of the saving clause in the Vienna Convention on the Law of Treaties[900] (*see volume II, annex V, section 6*). The syllabus further recognized that the subject was ideal for codification and/or progressive development as, on the one hand, there was considerable practice and experience and, on the other hand, there were elements of uncertainty. It further noted that the topic received a wide range of support in the Working Group on the long-term programme of work and that it was generally recognized that there was a continuing need for clarification of the law in the area.

At its fifty-sixth session, in 2004, the Commission decided to include the topic "Effects of armed conflicts on treaties" in its programme of work and to appoint Ian Brownlie as Special Rapporteur for the topic.[901]

The General Assembly, in resolution 55/152 of 12 December 2000, took note of the topic's inclusion in the long-term programme of work and, by resolution 59/41 of 2 December 2004, endorsed the Commission's decision to include the topic in its programme of work.

At its fifty-seventh and fifty-eighth sessions, in 2005 and 2006, respectively, the Commission received and considered the first two reports of the Special Rapporteur[902], as well as a memorandum prepared by the Secretariat.[903] At the fifty-seventh session, in 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat circulate a note to Governments requesting information about their practice with regard to the topic, in particular the more contemporary practice.[904]

The first reading of the draft articles continued at the fifty-ninth and sixtieth sessions, in 2007 and 2008, on the basis of the third[905] and fourth[906] reports of the Special Rapporteur, and of a working group under the chairmanship of Lucius Caflisch.

At its sixtieth session, in 2008, the Commission adopted, on first reading, a set of 18 draft articles on the effects of armed conflicts on trea-

[899] See *ibid.*, annex (2).

[900] Article 73.

[901] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

[902] Documents A/CN.4/552 and A/CN.4/570 and Corr.1.

[903] Document A/CN.4/550 and Corr.1 and 2.

[904] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 112.

[905] Document A/CN.4/578 and Corr.1.

[906] Document A/CN.4/589 and Corr.1

ties, together with an annex and a set of commentaries.[907] In accordance with articles 16 to 21 of its Statute, the Commission transmitted the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2010.[908]

In resolution 63/123 of 11 December 2008, the General Assembly expressed its appreciation to the Commission for the completion of the first reading of the draft articles on the topic "Effects of armed conflicts on treaties" and drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles and commentaries thereto by the requested date.

Following the resignation from the Commission of Ian Brownlie, the Commission appointed Lucius Caflisch as Special Rapporteur for the topic at its sixty-first session, in 2009.[909]

At its sixty-second session, in 2010, the Commission had before it the first report of the Special Rapporteur,[910] containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments. The Commission also had before it a compilation of written comments and observations received from Governments.[911] The Commission referred draft articles 1 to 17 to the Drafting Committee.[912]

At the sixty-third session, in 2011, the Commission continued and completed the second reading (commenced at its sixty-second session in 2010) of the draft articles on the effects of armed conflicts on treaties. The Commission was thus able to adopt, on second reading, a set of 18 draft articles and an annex (containing a list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), together with commentaries thereto, on the topic.[913] The draft articles were divided into three parts, as follows: Part I entitled "Scope and definitions" (articles 1 and 2); Part II entitled "Principles" (articles 3 to 13); and Part III entitled "Miscellaneous" (articles 14 to 18). The text of the draft articles and annex thereto is reproduced in volume II, annex VI, section 19.

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[907] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 61.

[908] See *ibid.*, para. 63.

[909] See *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 229.

[910] Document A/CN.4/627 and Add.1.

[911] Document A/CN.4/622 and Add.1.

[912] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 190.

[913] See *ibid., Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), paras. 100 and 101.

In accordance with article 23 of its Statute, the Commission recommended to the General Assembly to take note of the draft articles in a resolution and to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.[914]

In resolution 66/99 of 9 December 2011, the General Assembly took note of the articles on the effects of armed conflicts on treaties, the text of which was annexed to the resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. It further decided to return to the topic at its sixty-ninth session, in 2014, with a view to examining, *inter alia*, the question of the form that might be given to the draft articles.

B. TOPICS AND SUB-TOPICS CURRENTLY UNDER CONSIDERATION BY THE COMMISSION

A brief account of the work of the International Law Commission on the topics and sub-topics currently under consideration is set out below.

1. Expulsion of aliens

At its fiftieth session, in 1998, the Commission took note of the report of the Planning Group identifying, *inter alia*, the topic of expulsion of aliens for possible inclusion in the Commission's long-term programme of work.[915] The topic was subsequently included in the long-term programme at the fifty-second session, in 2000,[916] and a syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[917]

At its fifty-sixth session, in 2004, the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Maurice Kamto as Special Rapporteur for the topic.[918]

The General Assembly, in resolution 55/152 of 12 December 2000, took note of the topic's inclusion in the long-term programme of work

[914] *Ibid*., para. 97.

[915] See *Yearbook of the International Law Commission, 1998,* vol. II (Part Two), para. 554.

[916] See *ibid*., *2000,* vol. II (Part Two), paras. 726–728 and 729(4).

[917] See *ibid*., annex (4).

[918] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

and, in resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

At its fifty-seventh session, in 2005, the Commission had before it the preliminary report of the Special Rapporteur,[919] providing an overall view of the subject while highlighting the legal problems which it raised and the methodological difficulties related to its consideration. The report also proposed a draft work plan and outline.

At its fifty-eighth session, in 2006, the Commission had before it the second report of the Special Rapporteur[920] and a study prepared by the Secretariat.[921] The Commission considered the second report, dealing with the scope of the topic and definitions (two draft articles), at its next session, in 2007,[922] together with the third[923] report of the Special Rapporteur, which addressed certain general provisions limiting the right of States to expel aliens (five draft articles).[924]

In its resolution 62/66 of 6 December 2007, the General Assembly invited Governments to provide information to the International Law Commission on the topic.

At its sixtieth session, in 2008, the Commission considered the fourth report of the Special Rapporteur,[925] the first part of which dealt with the issues raised by the expulsion of persons having dual or multiple nationalities, and the second part of which addressed the question of loss of nationality and denationalizarion in relation to expulsion. Following the debate on the fourth report, the Commission established a Working Group under the chairmanship of Donald M. McRae to consider these two issues.[926] At the same session, the Commission approved the Working Group's conclusions[927] and requested the Drafting Committee to take them into consideration.

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[919] Document A/CN.4/554.

[920] Document A/CN.4/573 and Corr.1.

[921] Document A/CN.4/565 and Corr.1.

[922] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 252.

[923] Document A/CN.4/581.

[924] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 15.

[925] Document A/CN.4/594.

[926] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 170 and 171.

[927] The conclusions were as follows: (1) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities; and (2) the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals; *ibid*., para. 171.

At the sixty-first session, in 2009, the Commission considered the fifth report of the Special Rapporteur,[928] dealing with the protection of human rights of aliens expelled or being expelled. Later during the session, the Special Rapporteur presented to the Commission a new version of the draft articles on this question, revised and restructured in the light of the debate in the Commission,[929] as well as a new draft work plan with a view to restructuring the whole set of draft articles on the topic.[930]

In its resolution 64/114 of 16 December 2009, the General Assembly invited once again Governments to provide information regarding practice in respect of the topic "Expulsion of aliens".[931]

At the sixty-second session, in 2010, the Commission considered the revised draft articles on the protection of human rights,[932] as well as the sixth report and addendum thereto presented by the Special Rapporteur,[933] which addressed a number of issues such as collective expulsion, disguised expulsion, extradition disguised as expulsion, the grounds for expulsion, detention conditions for aliens subject to expulsion, and expulsion proceedings.

At the sixty-third session, in 2011, the Commission considered a second addendum to the Special Rapporteur's sixth report,[934] which completed the consideration of the expulsion proceedings and addressed the legal consequences of expulsion, as well as the Special Rapporteur's seventh report,[935] providing an account of recent developments in relation to the topic and proposing a restructured summary of the draft articles.

Also at its sixty-third session, the Commission took note of an interim report by the Chairman of the Drafting Committee, informing the Commission of the progress of the work on the set of draft articles on the expulsion of aliens which had been referred to the Drafting Committee since 2007, and which were being finalized with a view to being

[928] Document A/CN.4/611 and Corr.1.

[929] Document A/CN.4/617.

[930] Document A/CN.4/618.

[931] Comments and information received from Governments in relation to this topic were compiled by the Secretariat into documents A/CN.4/604, and A/CN.4/628 and Add.1.

[932] Document A/CN.4/617.

[933] Document A/CN.4/625 and Add.1.

[934] Document A/CN.4/625/Add.2.

[935] Document A/CN.4/642.

submitted to the Commission at its sixty-fourth session, in 2012, for adoption on first reading.[936]

The work of the Commission on the topic as described above has been proceeding in accordance with the successive resolutions adopted by the General Assembly under the item relating to the report of the International Law Commission.[937]

2. The obligation to extradite or prosecute (*aut dedere aut judicare*)

At its fifty-sixth session, in 2004, the Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work.[938] A brief syllabus describing the overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[939]

The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission's report concerning its long-term programme of work.

At its fifty-seventh session, in 2005, the Commission decided to include the topic in its programme of work and to appoint Zdzislaw Galicki as Special Rapporteur for the topic.[940]

At its fifty-eighth session, in 2006, the Commission considered the preliminary report of the Special Rapporteur,[941] dealing with universality of suppression and universality of jurisdiction, universal jurisdiction and the obligation to extradite or prosecute, the sources of the obligation to extradite or prosecute, and the scope of the obligation to extradite or prosecute.

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[936] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), paras. 214.

[937] General Assembly resolutions 55/152 of 12 December 2000, 56/82 of 12 December 2001; 59/41 of 2 December 2004; 60/22 of 23 November 2005; 62/66 of 6 December 2007; 63/123 of 11 December 2008; 64/114 of 16 December 2009; and 65/26 of 6 December 2010. The work on the topic will continue at the sixty-fourth session of the Commission, in 2012, in accordance with General Assembly resolution 66/98 of 9 December 2011.

[938] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362–363.

[939] See *ibid*., annex.

[940] See *ibid*., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

[941] Document A/CN.4/571. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 215–232.

The General Assembly, in resolution 61/34 of 4 December 2006, invited Governments to provide to the Commission information on legislation and practice regarding the topic.

At its fifty-ninth session, in 2007, the Commission considered the second report of the Special Rapporteur,[942] containing one draft article on the scope of application of the draft articles as well as a proposed plan for further development.[943] At that session, the Commission also had before it comments and information received from Governments in relation to this topic.[944]

The General Assembly, in resolution 62/66 of 6 December 2007, invited once again Governments to provide to the Commission information on practice regarding this topic.

At the sixtieth session, in 2008, the Commission had before it the third report of the Special Rapporteur,[945] as well as comments and information received from Governments.[946] The third report was aimed at continuing the process of formulation of questions addressed both to States and to members of the Commission on the most essential aspects of the topic. The questions were intended to enable the Special Rapporteur to draw final conclusions regarding the main issue of whether the obligation *aut dedere aut judicare* existed as a matter of customary international law. The Commission held a debate on the basis of the Special Rapporteur's third report which covered, *inter alia*, substantive questions related to the customary nature of the obligation, its relation to universal jurisdiction and to the surrender of individuals to international courts, as well as procedural aspects to be dealt with in the future.[947] The Commission further decided to establish a Working Group on the topic under the chairmanship of Alain Pellet.[948]

At the sixty-first session, in 2009, the Commission had before it comments and information received from Governments.[949] The Commission re-established an open-ended Working Group on this topic under the Chairmanship of Alain Pellet, and subsequently took note of the oral report presented by the Chairman of the Working Group. The Working Group proposed the following general framework for the

[942] Document A/CN.4/585 and Corr. 1.

[943] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 348–368.

[944] Document A/CN.4/579 and Add. 1–4.

[945] Document A/CN.4/603.

[946] Document A/CN.4/599.

[947] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 316–332.

[948] See *ibid.*, para. 315.

[949] Document A/CN.4/612.

Commission's consideration of the topic: the legal bases of the obligation to extradite or prosecute; the material scope of the obligation to extradite or prosecute; the content of the obligation to extradite or prosecute; the relationship between the obligation to extradite or prosecute and other principles; the conditions for the triggering of the obligation to extradite or prosecute; the implementation of the obligation to extradite or prosecute; and the relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal.[950]

At its sixty-second session, in 2010, the Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*). The Working Group continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur.[951] It had before it a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat,[952] together with the general framework prepared by the Working Group in 2009.[953] The Working Group also had before it a working paper prepared by the Special Rapporteur, entitled "Bases for discussion in the Working Group on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'",[954] containing observations and suggestions, based on the general framework prepared in 2009, and further drawing upon the Survey by the Secretariat. The Working Group reaffirmed, taking into account the practice of the Commission in the progressive development of international law and its codification, that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed in 2009.[955] The Commission took note of the oral report presented by the temporary Chairman of the Working Group.[956]

In resolution 65/26 of 6 December 2010, the General Assembly invited the Commission to give priority, *inter alia*, to its consideration of this topic.

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[950] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 200–204.

[951] See *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 337–340.

[952] Document A/CN.4/630.

[953] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[954] Document A/CN.4/L.774.

[955] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 340.

[956] See *ibid.*, para. 336.

At the sixty-third session, in 2011, the Commission considered the fourth report of the Special Rapporteur,[957] addressing the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom, and concerning which three draft articles were proposed.[958]

In resolution 66/98 of 9 December 2011, the General Assembly invited the Commission to continue to give priority to, and work towards the conclusion of, *inter alia*, this topic.

The work of the Commission on the topic as described above has been proceeding in accordance with the successive resolutions adopted by the General Assembly under the item relating to the report of the International Law Commission.[959]

3. Immunity of State officials from foreign criminal jurisdiction

At its fifty-eighth session, in 2006, the Commission, on the basis of a recommendation of the Working Group on the long-term programme of work, identified the topic "Immunity of State officials from foreign criminal jurisdiction" for inclusion in its long-term programme of work.[960] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[961]

The General Assembly, in resolution 61/34 of 12 December 2006, took note of the Commission's decision to include the topic in its long-term programme of work.

At its fifty-ninth session, in 2007, the Commission decided to include the topic in its programme of work and appointed Roman A. Kolodkin as Special Rapporteur for the topic.[962]

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[957] Document A/CN.4/648.

[958] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), paras. 293–332.

[959] General Assembly resolutions 60/22 of 23 November 2005; 61/34 of 4 December 2006; 62/66 of 6 December 2007; 63/123 of 11 December 2008; 64/114 of 16 December 2009; and 65/26 of 6 December 2010. The work on the topic will continue at the sixty-fourth session of the Commission, in 2012, in accordance with General Assembly resolution 66/98 of 9 December 2011 (see, in particular, paragraph 8 of the resolution).

[960] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257.

[961] See *ibid.*, annex A.

[962] See *ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

The General Assembly, in resolution 62/66 of 6 December 2007, took note of the Commission's decision to include the topic in its programme of work.

At the sixtieth session, in 2008, the Commission had before it a preliminary report by the Special Rapporteur[963] as well as a memorandum by the Secretariat on the topic.[964] The preliminary report briefly outlined the breadth of prior consideration, by the Commission and by the Institute of International Law, of the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the Commission. On the basis of this report, the Commission held a debate which addressed key legal questions such as the sources of immunity, the notions of jurisdiction and of immunity, the rationales for immunity, the types of immunity, the persons covered by immunity and the question of possible exceptions to immunity.[965]

The Commission did not consider the topic at the sixty-first and sixty-second sessions, in 2009 and 2010.

In resolution 65/26 of 6 December 2010, the General Assembly invited the Commission to give priority, *inter alia*, to its consideration of this topic.

At its sixty-third session, in 2011, the Commission considered the second[966] and third reports[967] of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of State officials from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular, on questions relating to the timing of consideration of immunity, as well as its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.[968]

In resolution 66/98 of 9 December 2011, the General Assembly invited the Commission to continue to give priority to, and work towards the conclusion of, *inter alia*, this topic.

The work of the Commission on the topic as described above has been proceeding in accordance with the resolutions adopted by the Gen-

[963] Document A/CN.4/601.

[964] Document A/CN.4/596 and Corr.1.

[965] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 267–311.

[966] Document A/CN.4/631.

[967] Document A/CN.4/646.

[968] See *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), paras. 104–203.

eral Assembly under the item relating to the report of the International Law Commission.[969]

4. Protection of persons in the event of disasters

At its fifty-eighth session, in 2006, the Commission, on the basis of a recommendation of the Working Group on the long-term programme of work, identified the topic "Protection of persons in the event of disasters" for inclusion in its long-term programme of work.[970] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[971]

The General Assembly, in resolution 61/34 of 4 December 2006, took note of the Commission's decision to include the topic in its long-term programme of work.

At its fifty-ninth session, in 2007, the Commission decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Eduardo Valencia-Ospina as Special Rapporteur for the topic.[972]

The General Assembly, in resolution 62/66 of 6 December 2007, took note of the Commission's decision to include the topic in its programme of work.

From its sixtieth to sixty-third sessions, held from 2008 to 2011, the Commission received and considered four reports of the Special Rapporteur;[973] a memorandum by the Secretariat[974] focusing primarily on natural disasters and providing an overview of existing legal instruments and texts applicable to various aspects of disaster prevention and relief assistance; and written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of the Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

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[969] General Assembly resolution 62/66 of 6 December 2007; 63/123 of 11 December 2008; 64/114 of 16 December 2009; and 65/26 of 6 December 2010. The work on the topic will continue at the sixty-fourth session of the Commission, in 2012, in accordance with General Assembly resolution 66/98 of 9 December 2011 (see, in particular, paragraph 8 of the resolution).

[970] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257.

[971] See *ibid*., annex C.

[972] See *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

[973] See documents A/CN.4/598; A/CN.4/615 and Corr.1; A/CN.4/629; and A/CN.4/643 and Corr.1.

[974] Document A/CN.4/590 and Add.1–3.

The Special Rapporteur's preliminary report[975] traced the evolution of the protection of persons in the event of disasters and identified the sources of law on the topic as well as previous codification efforts and developments of the law in the area. His second report[976] analysed the scope *ratione materiae*, *ratione personae* and *ratione temporis* of the topic and issues relating to the definition of "disaster" for purposes of the topic; undertook a consideration of the basic duty to cooperate; and contained proposals for three draft articles addressing, respectively, the scope of the draft articles, the definition of disasters and the duty to cooperate. The third report[977] of the Special Rapporteur provided a summary of the views of States on the work undertaken by the Commissionup until then; a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection; a consideration of the question of the responsibility of the affected State; and contained proposals for three further draft articles dealing, respectively, with humanitarian principles in disaster response, human dignity and the primary responsibility of the affected State. The fourth report[978] of the Special Rapporteur dealt with, and proposed three additional draft articles on, the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance; and the right to offer assistance.

During the same period, the Commission provisionally adopted eleven draft articles with commentaries thereto.[979]

The work of the Commission on the topic as described above has been proceeding in accordance with the successive resolutions adopted by the General Assembly under the item relating to the report of the International Law Commission.[980]

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[975] Document A/CN.4/598.

[976] Document A/CN.4/615 and Corr.1.

[977] Document A/CN.4/629.

[978] Document A/CN.4/643 and Corr.1.

[979] See, concerning draft articles 1 to 5, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 298–299 and 331; and, concerning articles 6 to 11, *ibid., Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), paras. 273–274 and 289.

[980] General Assembly resolutions 62/66 of 6 December 2007; 63/123 of 11 December 2008; 64/114 of 16 December 2009; and 65/26 of 6 December 2010. The work on the topic will continue at the sixty-fourth session of the Commission, in 2012, in accordance with General Assembly resolution 66/98 of 9 December 2011.

5. The Most-favoured-nation clause

The International Law Commission had first considered the topic of the most-favoured-nation clause from 1967 to 1978. *(See Part III, A, section 19 above.)*

At its fifty-eighth session, in 2006, the Commission considered a proposal to include again the topic of the Most-favoured-nation clause in its long-term programme of work. It recalled the outcome of its previous consideration of the topic, and noted that some of its members believed that the topic should not be reopened since the basic policy differences that caused the General Assembly to take no action on the Commission's draft articles had not been resolved, and should first be dealt with in international forums with the necessary technical expertise and policy mandate. Other members considered that, given the changes in the international situation and the continued importance of the most-favoured-nation clause in contemporary treaties, in particular in the fields of trade law and international investment law, the time had come to undertake further work on the question. The Commission decided to seek the views of Governments as to the utility of further work by the Commission on the topic.[981]

At its fifty-ninth session, in 2007, the Commission established an open-ended Working Group on the Most-Favoured-Nation clause under the chairmanship of Donald McRae, to examine the possibility of including again the topic of the Most-Favoured-Nation clause in its long-term programme of work.[982]

At its sixtieth session, in 2008, the Commission, on the basis of a recommendation of the Working Group on the long-term programme of work, identified the topic "The Most-Favoured-Nation clause" for inclusion in its long-term programme of work.[983] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[984] At the same session, the Commission decided to include the topic in its current programme of work and to establish a Study Group for the topic at its sixty-first session, in 2009.[985]

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[981] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 259 and 32–33.

[982] See *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 377. The report of the Working Group is contained in document A/CN.4/L.719.

[983] See *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), paras. 351–352.

[984] See *ibid.*, annex B.

[985] See *ibid.*, paras. 354.

The General Assembly, in resolution 63/123 of 11 December 2008, took note of the inclusion of the topic in the Commission's programme of work.

At its sixty-first session, in 2009, the Commission established a Study Group on The Most-Favoured-Nation clause, co-chaired by Donald M. McRae and A. Rohan Perera. The Study Group considered a framework that would serve as a road map for future work, in the light of issues highlighted in the syllabus on the topic, and made a preliminary assessment of the Commission's 1978 draft articles[986] with a view to reviewing the developments that had taken place since then.[987]

At its sixty-second session, in 2010, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, co-chaired by Donald M. McRae and A. Rohan Perera. The Study Group considered and reviewed the various papers prepared on the basis of the framework which had been agreed upon in 2009,[988] including a catalogue of MFN provisions and papers on the 1978 draft articles, the practice of GATT and WTO, the work of OECD and UNCTAD on MFN, and the "*Maffezini*" issue,[989] and set out a programme of work for the sixty-third session.[990] The Commission took note of the oral report of the Co-Chairmen of the Study Group.[991]

At the sixty-third session, in 2011, the Commission reconstituted once again the Study Group on the Most-Favoured-Nation clause. The Study Group held a wide-ranging discussion, on the basis of a working paper on the Interpretation and Application of MFN Clauses in Investment Agreements and a framework of questions prepared to provide an overview of issues that may need to be considered in the context of the overall work of the Study Group, while also taking into account other developments, including recent arbitral decisions, and set out a programme of work for the future.[992]

The work of the Commission on the topic as described above has been proceeding in accordance with the resolutions adopted by the Gen-

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[986] See *Yearbook of the International Law Commission*, 1978, vol. II (Part Two), paras. 45 and 74. The final text of the draft articles is reproduced in volume II, annex V, section 6.

[987] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 211–216.

[988] See *ibid*., paras. 215–216.

[989] See *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 359–368.

[990] See *ibid*., paras. 369–373.

[991] See *ibid*., para. 358.

[992] See *ibid., Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), paras. 347–362.

eral Assembly under the item relating to the report of the International Law Commission.[993]

6. Treaties over time

At its sixtieth session, in 2008, the Commission, on the basis of a recommendation of the Working Group on the long-term programme of work, identified the topic "Treaties over time" for inclusion in its long-term programme of work.[994] A syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission.[995] At the same session, the Commission decided to include the topic in its current programme of work and to establish a Study Group on the topic at its sixty-first session, in 2009.[996] The General Assembly, in resolution 63/123 of 11 December 2008, took note of the inclusion of the topic in the Commission's programme of work.

At its sixty-first session, in 2009, the Commission established a Study Group on Treaties over Time, chaired by Georg Nolte.[997] At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[998] The Study Group agreed on the following:[999] (*a*) work should start on subsequent agreement and practice on the basis of successive reports to be prepared by the Chairman for the consideration of the Study Group, while the possibility of approaching the topic from a broader perspective should be further explored; (*b*) the Chairman would prepare for the following year a report on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice, and other international courts and tribunals of general or *ad hoc* jurisdiction; (*c*) contributions on the issue of subsequent agreement and practice by other interested members of the Study Group were encouraged, in particular on the question of subsequent agreement and practice at the regional level or in relation to special treaty regimes or specific areas

[993] General Assembly resolution 63/123 of 11 December 2008; 64/114 of 16 December 2009; and 65/26 of 6 December 2010. The work on the topic will continue at the sixty-fourth session of the Commission, in 2012, in accordance with General Assembly resolution 66/98 of 9 December 2011.

[994] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 351–352.

[995] See *ibid.*, Annex A.

[996] See *ibid.*, para. 353.

[997] See *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 218.

[998] See *ibid.*, paras. 220–226.

[999] See *ibid.*, para. 226.

of international law; (*d*) moreover, interested members were invited to provide contributions on other issues falling within the broader scope of the topic as previously outlined. The Commission took note of the oral report of the Chairman of the Study Group.[1000]

At its sixty-second session, in 2010, the Study Group on Treaties over time was reconstituted under the chairmanship of Georg Nolte.[1001] The Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction.[1002] Also, the Study Group recommended that a request for information be included in Chapter III of the Commission's report and be also brought to the attention of States by the Secretariat.[1003] The Commission took note of the oral report of the Chairman of the Study Group and approved the recommendation concerning the request for information from States.[1004]

At the sixty-third session, in 2011, the Commission reconstituted once again the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice.[1005] The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction, by addressing the question of possible modifications of a treaty by subsequent agreements and practice, and the relation of subsequent agreements and practice to formal amendment procedures, and also considered a working paper by Mr. Musase on evolutionary interpretation. The Study Group then began its consideration of the second report by its Chairman, dealing with the jurisprudence under special regimes relating to subsequent agreements and practice, by focusing on certain conclusions contained in the report. In the light of the discussions, the Chairman of the Study Group reformulated the text of nine preliminary conclusions on a number of issues including reliance by adjudicatory bodies on the general rule of treaty interpretation, different approaches to treaty interpretation, and various aspects concerning subsequent agreements and practice as a means of treaty interpretation.[1006]

[1000] See *ibid.*, para. 219.

[1001] See *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 345.

[1002] See *ibid.*, paras. 347–352.

[1003] See *ibid.*, para. 354.

[1004] See *ibid.*, para. 346.

[1005] See *ibid., Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1), paras. 334–343.

[1006] See *ibid.*, para. 344.

The Commission took note of the oral report of the Chairman of the Study Group and approved the recommendation that States be invited again to provide information in relation to the topic.[1007]

The work of the Commission on the topic as described above has been proceeding in accordance with the resolutions adopted by the General Assembly under the item relating to the report of the International Law Commission.[1008]

[1007] See *ibid*., para. 335.

[1008] General Assembly resolutions 63/123 of 11 December 2008; 64/114 of 16 December 2009; and 65/26 of 6 December 2010. The work on the topic will continue at the sixty-fourth session of the Commission, in 2012, in accordance with General Assembly resolution 66/98 of 9 December 2011.

ANNEX I

STATUTE OF THE INTERNATIONAL LAW COMMISSION*

Article 1

1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.

2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.

Chapter I. Organization of the International Law Commission

Article 2[a]

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 3

The members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations.

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* General Assembly resolution 174 (II) of 21 November 1947. The text of the Statute that was reproduced in previous editions of this publication contained the following textual differences: the term "curricula vitae" was replaced by the term "statements of qualifications" in article 6; the term "vacancy" was replaced by the term "casual vacancy" in article 11; the phrase "necessary and desirable" was replaced by the phrase "necessary or desirable" in article 18, paragraph 2; and the phrase "Conclusions defining" was replaced by the phrase "Conclusions relevant to" in article 20, subparagraph (b). The present edition of this publication reproduces the text of the Statute as adopted by the General Assembly in resolution 174 (II) which did not contain these changes.

[a] Text amended by General Assembly resolution 36/39 of 18 November 1981.

Article 4

Each Member may nominate for election not more than four candidates, of whom two may be nationals of the nominating State and two nationals of other States.

Article 5

The names of the candidates shall be submitted in writing by the Governments to the Secretary-General by 1 June of the year in which an election is held, provided that a Government may in exceptional circumstances substitute for a candidate whom it has nominated before 1 June another candidate whom it shall name not later than thirty days before the opening of the General Assembly.

Article 6

The Secretary-General shall as soon as possible communicate to the Governments of States Members the names submitted, as well as any curricula vitae of candidates that may have been submitted by the nominating Governments.

Article 7

The Secretary-General shall prepare the list referred to in article 3 above, comprising in alphabetical order the names of all the candidates duly nominated, and shall submit this list to the General Assembly for the purposes of the election.

Article 8

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 9[b]

1. Those candidates, up to the maximum number prescribed for each regional group, who obtain the greatest number of votes and not less than a majority of the votes of the Members present and voting shall be elected.

[b] Text amended by General Assembly resolution 36/39 of 18 November 1981.

2. In the event of more than one national of the same State obtaining a sufficient number of votes for election, the one who obtains the greatest number of votes shall be elected, and, if the votes are equally divided, the elder or eldest candidate shall be elected.

Article 10[c]

The members of the Commission shall be elected for five years. They shall be eligible for re-election.

Article 11

In the case of a vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 above.

Article 12[d]

The Commission shall sit at the European Office of the United Nations at Geneva. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General.

Article 13[e]

Members of the Commission shall be paid travel expenses, and shall also receive a special allowance, the amount of which shall be determined by the General Assembly.

Article 14

The Secretary-General shall, so far as he is able, make available staff and facilities required by the Commission to fulfil its task.

Chapter II. Functions of the International Law Commission

Article 15

In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression

[c] Text amended by General Assembly resolution 985 (X) of 3 December 1955.
[d] Text amended by General Assembly resolution 984 (X) of 3 December 1955.
[e] Text amended by General Assembly resolution 485 (V) of 12 December 1950.

"codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

A. Progressive development of international law

Article 16

When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow in general a procedure on the following lines:

(*a*) It shall appoint one of its members to be Rapporteur;

(*b*) It shall formulate a plan of work;

(*c*) It shall circulate a questionnaire to the Governments, and shall invite them to supply, within a fixed period of time, data and information relevant to items included in the plan of work;

(*d*) It may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;

(*e*) It may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;

(*f*) It shall consider the drafts proposed by the Rapporteur;

(*g*) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in subparagraph (*c*) above;

(*h*) The Commission shall invite the Governments to submit their comments on this document within a reasonable time;

(*i*) The Rapporteur and the members appointed for that purpose shall reconsider the draft, taking into consideration these comments, and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;

(*j*) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17

1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General.

2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow in general a procedure on the following lines:

(*a*) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subjects;

(*b*) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

(*c*) The Commission shall submit a report and its recommendations to the General Assembly. Before doing so, it may also, if it deems it desirable, make an interim report to the organ or agency which has submitted the proposal or draft;

(*d*) If the General Assembly should invite the Commission to proceed with its work in accordance with a suggested plan, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (*c*) of that article may not, however, be necessary.

B. Codification of international law

Article 18

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary and desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question.

Article 19

1. The Commission shall adopt a plan of work appropriate to each case.

2. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

(*b*) Conclusions defining:

(i) The extent of agreement on each point in the practice of States and in doctrine;

(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

Article 21

1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document, including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by Governments in accordance with article 19. The Commission shall decide whether the opinions of any scientific institution or individual experts consulted by the Commission shall be included in the publication.

2. The Commission shall request Governments to submit comments on this document within a reasonable time.

Article 22

Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report, which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23

1. The Commission may recommend to the General Assembly:

(*a*) To take no action, the report having already been published;

(*b*) To take note of or adopt the report by resolution;

(*c*) To recommend the draft to Members with a view to the conclusion of a convention;

(*d*) To convoke a conference to conclude a convention.

2. Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Article 24

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

Chapter III. Cooperation with other bodies

Article 25

1. The Commission may consult, if it considers it necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

2. All documents of the Commission which are circulated to Governments by the Secretary-General shall also be circulated to such organs of the United Nations as are concerned. Such organs may furnish any information or make any suggestions to the Commission.

Article 26

1. The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.

2. For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. The Secretary-General shall endeavour to include on this list at least one national organization of each Member of the United Nations.

3. In the application of the provisions of this article, the Commission and the Secretary-General shall comply with the resolutions of the General Assembly and the other principal organs of the United Nations concerning relations with Franco Spain and shall exclude both from consultations and from the list, organizations which have collaborated with the nazis and fascists.

4. The advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized.

ANNEX II

PRESENT AND FORMER MEMBERS OF THE INTERNATIONAL LAW COMMISSION

Names marked with an asterisk are those of members elected in 2011 by the General Assembly for the term 1 January 2012 to 31 December 2016.[a]

Name	*Nationality*[b]	*Period of service*[c]
Emmanuel Akwei Addo	Ghana	1997-2006
*Mohammed Bello Adoke	Nigeria	2011-
Roberto Ago	Italy	1957-1978
Bola Adesumbo Ajibola	Nigeria	1987-1991
Richard Osuolale A. Akinjide	Nigeria	1982-1986
Husain M. Al-Baharna	Bahrain	1987-2006
Fernando Albonico	Chile	1967-1971
Gonzalo Alcivar	Ecuador	1970-1972
George H. Aldrich	United States of America	1981
Ricardo J. Alfaro	Panama	1949-1953 1958-1959
Awn S. Al-Khasawneh	Jordan	1987-1999
*Ali Mohsen Fetais Al-Marri	Qatar	2002-
Riyadh Mahmoud Sami Al-Qaysi	Iraq	1982-1991
Gilberto Amado	Brazil	1949-1969
Gaetano Arangio-Ruiz	Italy	1985-1996
João Clemente Baena Soares	Brazil	1997-2006
Mikuin Leliel Balanda	Zaire[d]	1982-1986
Julio Barboza	Argentina	1979-1996
Yuri G. Barsegov	Union of Soviet Socialist Republics[e]	1987-1991

[a] General Assembly decision 66/413 of 17 November 2011.

[b] As designated during the term of office of the respective member.

[c] Years included in the period of service correspond to the years when a member is listed as such in the Yearbooks of the International Law Commission.

[d] As from 17 May 1997, the designation "Zaire"was changed to the "Democratic Republic of the Congo".

[e] As at 24 December 1991, the name "Russian Federation" is used in the United Nations in place of the name the "Union of Soviet Socialist Republics".

Name	*Nationality*[b]	*Period of service*[c]
Milan Bartoš	Yugoslavia	1957-1973
Mohammed Bedjaoui	Algeria	1965-1981
John Alan Beesley	Canada	1987-1991
Mohamed Bennouna	Morocco	1987-1998
Ali Suat Bilge	Turkey	1972-1976
Boutros Boutros-Ghali	Egypt	1979-1991
Derek William Bowett	United Kingdom of Great Britain and Northern Ireland	1992-1996
James Leslie Brierly	United Kingdom of Great Britain and Northern Ireland	1949-1951
Herbert W. Briggs	United States of America	1962-1966
Sir Ian Brownlie	United Kingdom of Great Britain and Northern Ireland	1997-2008
Marcel Cadieux	Canada	1962-1966
*Lucius C. Caflisch	Switzerland	2007-
Carlos Calero-Rodrigues	Brazil	1982-1996
Juan José Calle y Calle	Peru	1973-1981
*Enrique J. A. Candioti	Argentina	1997-
Jorge Castañeda	Mexico	1967-1986
Erik Castrén	Finland	1962-1971
Choung Il Chee	Republic of Korea	2002-2006
*Pedro Comissário Afonso	Mozambique	2002-
Roberto Córdova	Mexico	1949-1954
James Richard Crawford	Australia	1992-2001
Emmanuel Kodjoe Dadzie	Ghana	1977-1981
Riad Daoudi	Syrian Arab Republic	2002-2006
John de Saram	Sri Lanka	1992-1996
Leonardo Díaz-González	Venezuela	1977-1991
Christopher John Robert Dugard	South Africa	1997-2011
Constantin P. Economides	Greece	1997-2001 2003-2006
Douglas L. Edmonds	United States of America	1954-1961
Gudmundur Eiriksson	Iceland	1987-1996

Name	*Nationality*[b]	*Period of service*[c]
Abdullah El-Erian	Egypt, United Arab Republic and Arab Republic of Egypt[f]	1957-1958 1962-1978
Nabil Elaraby	Egypt	1994-2001
Taslim Olawale Elias	Nigeria	1962-1975
Faris El-Khouri	Syria, United Arab Republic and Syrian Arab Republic[g]	1949-1961
*Abdelrazeg El-Murtadi Suleiman Gouider	Libya	2012-
Khalafalla El Rasheed Mohamed Ahmed	Sudan	1982-1986
Nihat Erim	Turkey	1959-1961
Paula Escarameia	Portugal	2002-2010
*Concepción Escobar Hernández	Spain	2011-
Constantin Th. Eustathiades	Greece	1967-1971
Jens Evensen	Norway	1979-1984
Luigi Ferrari Bravo	Italy	1997-1998
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland	1955-1960
Constantin Flitan	Romania	1982-1986
Salifou Fomba	Mali	1992-1996 2002-2011
*Mathias Forteau	France	2012-
Laurel B. Francis	Jamaica	1977-1991
J. P. A. François	Netherlands	1949-1961
Giorgio Gaja	Italy	1999-2011
Zdzislaw Galicki	Poland	1997-2011
Francisco V. García Amador	Cuba	1954-1961

[f] By a communication, dated 24 February 1958, the Secretary-General was informed of the establishment by Egypt and Syria of a single State, the United Arab Republic. By a communication, dated 2 September 1971, the designation "United Arab Republic" was changed to "Arab Republic of Egypt" (Egypt).

[g] By a communication, dated 24 February 1958, the Secretary-General was informed of the establishment by Egypt and Syria of a single State, the United Arab Republic. By a communication, dated 13 September 1971, the Secretary-General was informed of the official name of Syria as the "Syrian Arab Republic".

Name	*Nationality*[b]	*Period of service*[c]
*Kirill Gevorgian	Russian Federation	2012-
Raul I. Goco	Philippines	1997-2001
*Juan Manuel Gómez-Robledo	Mexico	2012-
Bernhard Graefrath	German Democratic Republic, Germany[h]	1987-1991
André Gros	France	1961-1963
Mehmet Güney	Turkey	1992-1996
Gerhard Hafner	Austria	1997-2001
Edvard Hambro	Norway	1972-1976
*Hussein A. Hassouna	Egypt	2007-
Francis Mahon Hayes	Ireland	1987-1991
Qizhi He	China	1994-2001
Mauricio Herdocia Sacasa	Nicaragua	1997-2001
*Mahmoud D. Hmoud	Jordan	2007-
Shuhsi Hsu	China	1949-1961
Jiahua Huang	China	1985-1986
*Huikang Huang	China	2010-
Manley O. Hudson	United States of America	1949-1953
Kamil E. Idris	Sudan	1992-1996 2000-2001
Adegoke Ajibola Ige[i]	Nigeria	
Luis Ignacio-Pinto	Dahomey[j]	1967-1969
Jorge E. Illueca	Panama	1982-1991 1997-2001
*Marie G. Jacobsson	Sweden	2007-
Andreas J. Jacovides	Cyprus	1982-1996
S. P. Jagota	India	1977-1986
Eduardo Jimenez de Arechaga	Uruguay	1960-1969
Peter C. R. Kabatsi	Uganda	1992-2001 2002-2006
*Maurice Kamto	Cameroon	1999-

[h] Through the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State. As from 3 October 1990, the Federal Republic of Germany acts in the United Nations under the designation "Germany".

[i] Mr. Ige died shortly after his election.

[j] The designation "Dahomey" was changed to "Benin" on 1 December 1975.

Name	*Nationality*[b]	*Period of service*[c]
Victor Kanga	Cameroon	1962-1964
James Lutabanzibwa Kateka	United Republic of Tanzania	1997-2006
Richard D. Kearney	United States of America	1967-1976
Fathi Kemicha	Tunisia	2002-2011
Thanat Khoman	Thailand	1957-1959
*Kriangsak Kittichaisaree	Thailand	2012-
Roman Anatolyevitch Kolodkin	Russian Federation	2003-2011
Vladimir M. Koretsky	Union of Soviet Socialist Republics[e]	1949-1951
Abdul G. Koroma	Sierra Leone	1982-1993
Martti Koskenniemi	Finland	2002-2006
Feodor I. Kozhevnikov	Union of Soviet Socialist Republics[e]	1952-1953
Sergei B. Krylov	Union of Soviet Socialist Republics[e]	1954-1956
Mochtar Kusuma-Atmadja	Indonesia	1992-2001
Valery I. Kuznetsov	Russian Federation	2002
Manfred Lachs	Poland	1962-1966
José M. Lacleta Muñoz	Spain	1982-1986
*Ahmed Laraba	Algeria	2012-
Sir Hersch Lauterpacht	United Kingdom of Great Britain and Northern Ireland	1952-1954
Chieh Liu	China	1962-1966
Igor Ivanovich Lukashuk	Russian Federation	1995-2001
Antonio de Luna Garcia	Spain	1962-1966
Ahmed Mahiou	Algeria	1982-1996
Chafic Malek	Lebanon	1982-1986
William Mansfield	New Zealand	2002-2006
Alfredo Martínez Moreno	El Salvador	1973-1976
Michael J. Matheson	United States of America	2003-2006
Ahmed Matine-Daftary	Iran[k]	1957-1961
Stephen C. McCaffrey	United States of America	1982-1991
*Donald M. McRae	Canada	2007-

[k] By a communication received on 14 November 1982, the Secretary-General was notified that the designation "Iran (Islamic Republic of)" should be henceforth used.

Name	*Nationality*[b]	*Period of service*[c]
Teodor Viorel Melescanu	Romania	1997-2001 2003-2011
Václav Mikulka	Czechoslovakia, Czech Republic[l]	1992-1998
Djamchid Momtaz	Iran (Islamic Republic of)	2000-2006
*Shinya Murase	Japan	2009-
*Sean D. Murphy	United States of America	2012-
Zhengyu Ni	China	1982-1984
*Bernd H. Niehaus	Costa Rica	2002-
Frank X. J. C. Njenga	Kenya	1976-1991
*Georg Nolte	Germany	2007-
Motoo Ogiso	Japan	1982-1991
Bayo Ojo	Nigeria	2007-2011
Didier Opertti Badan	Uruguay	1997- 2006
Luis Padilla Nervo	Mexico	1955-1963
Radhabinod Pal	India	1952-1966
Guillaume Pambou-Tchivounda	Gabon	1992-2006
Angel Modesto Paredes	Ecuador	1962-1966
*Ki Gab Park	Republic of Korea	2012-
John J. Parker	United States of America	1954
Stanislaw M. Pawlak	Poland	1987-1991
Alain Pellet	France	1990-2011
A. Rohan Perera	Sri Lanka	2007-2011
Obed Pessou	Dahomey[j], Senegal	1962-1966
*Chris M. Peter	United Republic of Tanzania	2012-
*Ernest Petrič	Slovenia	2007-
Christopher Walter Pinto	Sri Lanka	1973-1981
Syed Sharifuddin Pirzada	Pakistan	1982-1986
Robert Q. Quentin-Baxter	New Zealand	1972-1984
Alfred Ramangasoavina	Madagascar	1967-1976
Pemmaraju Sreenivasa Rao	India	1987-2006
Sir Benegal N. Rau	India	1949-1951
Edilbert Razafindralambo	Madagascar	1982-1996

[1] Following the dissolution of Czechoslovakia, the member continued to serve as a national of the Czech Republic, as of 1 January 1993.

Name	*Nationality*[b]	*Period of service*[c]
Paul Reuter	France	1964-1989
Willem Riphagen	Netherlands	1977-1986
Patrick Lipton Robinson	Jamaica	1992-1996
Víctor Rodrígues Cedeño	Venezuela	1997-2006
Shabtai Rosenne	Israel	1962-1971
Robert Rosenstock	United States of America	1992-2003
Zenon Rossides	Cyprus	1972-1976
Emmanuel J. Roucounas	Greece	1985-1991
José María Ruda	Argentina	1964-1972
*Gilberto V. Saboia	Brazil	2007-
Milan Šahović	Yugoslavia	1974-1981
Carlos Salamanca Figueroa	Bolivia	1954-1956
A. E. F. Sandström	Sweden	1949-1961
Georges Scelle	France	1949-1960
Stephen M. Schwebel	United States of America	1977-1980
Bernardo Sepúlveda	Mexico	1997-2005
César Sepúlveda Gutiérrez	Mexico	1987-1991
José Sette Câmara	Brazil	1970-1978
Jiuyong Shi	China	1987-1993
Bruno Simma	Germany	1997-2002
Sir Ian Sinclair	United Kingdom of Great Britain and Northern Ireland	1982-1986
Nagendra Singh	India	1967-1972
*Narinder Singh	India	2007-
Luis Solari Tudela	Peru	1987-1991
Jean Spiropoulos	Greece	1949-1957
Constantin A. Stavropoulos	Greece	1982-1984
*Pavel Šturma	Czech Republic	2012-
Sompong Sucharitkul	Thailand	1977-1986
Alberto Szekely	Mexico	1992-1996
Abdul Hakim Tabibi	Afghanistan	1962-1981
Arnold J. P. Tammes	Netherlands	1967-1976
Doudou Thiam	Senegal	1970-1999
*Dire D. Tladi	South Africa	2012-
Peter Tomka	Slovakia	1999-2002

Name	*Nationality*[b]	*Period of service*[c]
Christian Tomuschat	Federal Republic of Germany, Germany[h]	1985-1996
Senjin Tsuruoka	Japan	1961-1981
Grigory I. Tunkin	Union of Soviet Socialist Republics[e]	1957-1966
Nikolai A. Ushakov	Union of Soviet Socialist Republics[e]	1967-1986
Endre Ustor	Hungary	1967-1976
*Eduardo Valencia-Ospina	Colombia	2006-
Sir Francis Vallat	United Kingdom of Great Britain and Northern Ireland	1973-1981
Edmundo Vargas Carreño	Chile	1992-1996 2007-2011
*Stephen C. Vasciannie	Jamaica	2007-
Marcelo Vázquez-Bermudez	Ecuador	2007-2011
Alfred Verdross	Austria	1957-1966
Vladlen Vereshchetin	Russian Federation	1992-1994
Stephen Verosta	Austria	1977-1981
Francisco Villagrán Kramer	Guatemala	1992-1996
*S. Amos Wako	Kenya	2007-
Sir Humphrey Waldock	United Kingdom of Great Britain and Northern Ireland	1961-1972
*Nugroho Wisnumurti	Indonesia	2007-
*Sir Michael Wood	United Kingdom of Great Britain and Northern Ireland	2008-
Hanqin Xue	China	2002-2010
Chusei Yamada	Japan	1992-2008
Alexander Yankov	Bulgaria	1977-1996
Mustafa Kamil Yasseen	Iraq	1960-1976
Jesús María Yepes	Colombia	1949-1953
Kisaburo Yokota	Japan	1957-1960
Jaroslav Zourek	Czechoslovakia[l]	1949-1961

ANNEX III

JURIDICAL STATUS OF THE MEMBERS OF THE INTERNATIONAL LAW COMMISSION AT THE PLACE OF ITS PERMANENT SEAT*

The Government of Switzerland, in a communiqué addressed to the Secretary-General of the United Nations, transmitted the text of the decision taken by the Swiss Federal Council regarding the juridical status of the members of the International Law Commission at Geneva, the place of its permanent seat. The text of the decision reads as follows:

> "On the proposal of the Federal Political Department, the Federal Council decided on 9 May 1979 to accord, by analogy, to the members of the International Law Commission, for the duration of the Commission's sessions at Geneva, the privileges and immunities to which the Judges of the International Court of Justice are entitled while present in Switzerland. These are the privileges and immunities enjoyed by the heads of mission accredited to the international organizations at Geneva. The members of the International Law Commission will be entitled to a special red identity card."

* See *Yearbook of the International Law Commission, 1979*, vol. II (Part Two), document A/34/10, paras. 11-13.

ANNEX IV

PERIODS OF CONSIDERATION OF TOPICS ON THE WORK PROGRAMME OF THE INTERNATIONAL LAW COMMISSION

Draft Declaration on Rights and Duties of States	1949
Ways and means for making the evidence of customary international law more readily available	1949–1950
Formulation of the Nürnberg principles	1949–1950
Question of international criminal jurisdiction[a]	1949–1950
Law of treaties	1949–1966
Draft Code of Crimes against the Peace and Security of Mankind[b]	1949–1954, 1982–1996
Law of the sea[c]	1949–1956
Arbitral procedure	1949–1958
Nationality, including statelessness[d]	1950–1954
Question of defining aggression[e]	1951
Reservations to multilateral conventions	1951
State responsibility[f]	1954–2001
Diplomatic intercourse and immunities	1954–1958
Consular intercourse and immunities	1955–1961
Special missions	1958–1967

[a] The draft statute for an international criminal court was subsequently prepared (1992–1994) in the context of the work on the draft code of crimes against the peace and security of mankind.

[b] This topic was originally entitled "Draft code of offences against the peace and security of mankind", but was amended, in 1987, to read as above in order to achieve greater uniformity and equivalence between different language versions.

[c] Including the regime of the high seas (1950–1951, 1953, 1955–1956) and the regime of the territorial sea (1952, 1954–1956).

[d] Including nationality of married persons (1952), future statelessness (1952–1954), present statelessness (1953–1954) and multiple nationality (1954).

[e] Incorporated into the draft code of offences against peace and security of mankind (1948-1954).

[f] The Commission decided the title of the topic to be "Responsibility of States for internationally wrongful acts", in 2001.

Relations between States and international organizations[g]	1959–1971, 1976–1992
Succession of States and Governments[h]	1962–1963, 1967–1981
Extended participation in general multilateral treaties concluded under the auspices of the League of Nations	1963
The most-favoured-nation clause	1967–1978, 2008–
Question of treaties concluded between States and international organizations or between two or more international organizations	1970–1982
The law of the non-navigational uses of international watercourses	1971–1994
Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law	1972
International liability for injurious consequences arising out of acts not prohibited by international law[i]	1974–2006
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	1977–1989
Jurisdictional immunities of States and their property	1978–1991, 1999
Nationality in relation to the succession of States[j]	1993–1999
Reservations to treaties	1993–2011
Diplomatic protection	1997–2006
Unilateral acts of States	1997–2006

[g] Sub–divided into status, privileges and immunities of representatives of States to international organizations (1968–1971) and status, privileges and immunities of international organizations (1976–1992).

[h] Sub–divided into succession of States with respect to treaties (1968–1974) and succession of States in respect of matters other than treaties (1967–1981).

[i] Sub–divided into prevention of transboundary damage from hazardous activities (1997–2001) and international liability in case of loss from transboundary harm arising out of hazardous activities (2002–2006).

[j] Sub-divided into nationality of natural persons in relation to the succession of States (1997–1999) and nationality of legal persons in relation to succession of States (1998–1999).

Fragmentation of international law: difficulties arising from the diversification and expansion of international law	2002–2006
Responsibility of international organizations	2002–2011
Shared natural resources[k]	2002–2010
Effects of armed conflicts on treaties	2004–2011
Expulsion of aliens	2004–
The obligation to extradite or prosecute (*aut dedere aut judicare*)	2005–
Immunity of State officials from foreign criminal jurisdiction	2007–
Protection of persons in the event of disasters	2007–
Treaties over time	2008–

[k] Sub-divided into the law of transboundary aquifers (2002-2008) and oil and gas (2007-2010).

SELECTED BIBLIOGRAPHY

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1949[a]	Summary records and documents of the first session	A/CN.4/SER.A/1949	1957.V.1
1950, vol. I	Summary records of the second session	A/CN.4/SER.A/1950	1957.V.3, vol. I
1950, vol. II	Documents of the second session	A/CN.4/SER.A/1950/Add.1	1957.V.3, vol. II
1951, vol. I	Summary records of the third session	A/CN.4/SER.A/1951	1957.V.6, vol. I
1951, vol. II	Documents of the third session	A/CN.4/SER.A/1951/Add.1	1957.V.6, vol. II
1952, vol. I	Summary records of the fourth session	A/CN.4/SER.A/1952	58.V.5, vol. I
1952, vol. II	Documents of the fourth session	A/CN.4/SER.A/1952/Add.1	58.V.5, vol. II
1953, vol. I	Summary records of the fifth session	A/CN.4/SER.A/1953	59.V.4, vol. I
1953, vol. II	Documents of the fifth session	A/CN.4/SER.A/1953/Add.1	59.V.4, vol. II
1954, vol. I	Summary records of the sixth session	A/CN.4/SER.A/1954	59.V.7, vol. I
1954, vol. II	Documents of the sixth session	A/CN.4/SER.A/1954/Add.1	59.V.7, vol. II
1955, vol. I	Summary records of the seventh session	A/CN.4/SER.A/1955	60.V.3, vol. I
1955, vol. II	Documents of the seventh session	A/CN.4/SER.A/1955/Add.1	60.V.3, vol. II
1956, vol. I	Summary records of the eighth session	A/CN.4/SER.A/1956	1956.V.3, vol. I

[a] The Yearbooks have been issued in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish) unless otherwise indicated.

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1956, vol. II	Documents of the eighth session	A/CN.4/SER.A/1956/Add.1	1956.V.3, vol. II
1957, vol. I	Summary records of the ninth session	A/CN.4/SER.A/1957	1957.V.5, vol. I
1957, vol. II	Documents of the ninth session	A/CN.4/SER.A/1957/Add.1	1957.V.5, vol. II
1958, vol. I	Summary records of the tenth session	A/CN.4/SER.A/1958	58.V.1, vol. I
1958, vol. II	Documents of the tenth session	A/CN.4/SER.A/1958/Add.1	58.V.1, vol. II
1959, vol. I	Summary records of the eleventh session	A/CN.4/SER.A/1959	59.V.1, vol. I
1959, vol. II	Documents of the eleventh session	A/CN.4/SER.A/1959/Add.1	59.V.1, vol. II
1960, vol. I	Summary records of the twelfth session	A/CN.4/SER.A/1960	60.V.1, vol. I
1960, vol. II	Documents of the twelfth session	A/CN.4/SER.A/1960/Add.1	60.V.1, vol. II
1961, vol. I	Summary records of the thirteenth session	A/CN.4/SER.A/1961	61.V.1, vol. I
1961, vol. II	Documents of the thirteenth session	A/CN.4/SER.A/1961/Add.1	61.V.1, vol. II
1962, vol. I	Summary records of the fourteenth session	A/CN.4/SER.A/1962	62.V.4
1962, vol. II	Documents of the fourteenth session	A/CN.4/SER.A/1962/Add.1	62.V.5
1963, vol. I	Summary records of the fifteenth session	A/CN.4/SER.A/1963	63.V.1
1963, vol. II	Documents of the fifteenth session	A/CN.4/SER.A/1963/Add.1	63.V.2
1964, vol. I	Summary records of the sixteenth session	A/CN.4/SER.A/1964	65.V.1
1964, vol. II	Documents of the sixteenth session	A/CN.4/SER.A/1964/Add.1	65.V.2

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1965, vol. I	Summary records of the first part of the seventeenth session	A/CN.4/SER.A/1965	66.V.1
1965, vol. II	Documents of the first part of the seventeenth session	A/CN.4/SER.A/1965/Add.1	66.V.2
1966, vol. I (Part I)	Summary records of the second part of the seventeenth session	A/CN.4/SER.A/1966	67.V.1 (Part I)
1966, vol. I (Part II)	Summary records of the eighteenth session	A/CN.4/SER.A/1966	67.V.5
1966, vol. II	Documents of the second part of the seventeenth session and of the eighteenth session	A/CN.4/SER.A/1966/Add.1	67.V.2
1967, vol. I	Summary records of the nineteenth session	A/CN.4/SER.A/1967	68.V.1
1967, vol. II	Documents of the nineteenth session	A/CN.4/SER.A/1967/Add.1	68.V.2
1968, vol. I	Summary records of the twentieth session	A/CN.4/SER.A/1968	69.V.3
1968, vol. II	Documents of the twentieth session	A/CN.4/SER.A/1968/Add.1	69.V.4
1969, vol. I	Summary records of the twenty-first session	A/CN.4/SER.A/1969	70.V.7
1969, vol. II	Documents of the twenty-first session	A/CN.4/SER.A/1969/Add.1	70.V.8
1970, vol. I	Summary records of the twenty-second session	A/CN.4/SER.A/1970	71.V.6
1970, vol. II	Documents of the twenty-second session	A/CN.4/SER.A/1970/Add.1	71.V.7
1971, vol. I	Summary records of the twenty-third session	A/CN.4/SER.A/1971	72.V.5

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1971, vol. II (Part One)	Documents of the twenty-third session	A/CN.4/SER.A/1971/Add.1 (Part 1)	72.V.6 (Part I)
1971, vol. II (Part Two)	Documents of the twenty-third session	A/CN.4/SER.A/1971/Add.1 (Part 2)	72.V.6 (Part II)
1972, vol. I	Summary records of the twenty-fourth session	A/CN.4/SER.A/1972	73.V.4
1972, vol. II	Documents of the twenty-fourth session	A/CN.4/SER.A/1972/Add.1	73.V.5
1973, vol. I	Summary records of the twenty-fifth session	A/CN.4/SER.A/1973	74.V.4
1973, vol. II	Documents of the twenty-fifth session	A/CN.4/SER.A/1973/Add.1	74.V.5
1974, vol. I	Summary records of the twenty-sixth session	A/CN.4/SER.A/1974	75.V.6
1974, vol. II (Part One)	Documents of the twenty-sixth session	A/CN.4/SER.A/1974/Add.1 (Part 1)	75.V.7 (Part I)
1974, vol. II (Part Two)	Report of the Secretary-General on the legal problems relating to the utilization and use of international rivers and documents of the twenty-sixth session	A/CN.4/SER.A/1974/Add.1 (Part 2)	75.V.7 (Part II)
1975, vol. I	Summary records of the twenty-seventh session	A/CN.4/SER.A/1975	76.V.3
1975, vol. II	Documents of the twenty-seventh session	A/CN.4/SER.A/1975/Add.1	76.V.4
1976, vol. I	Summary records of the twenty-eighth session	A/CN.4/SER.A/1976	77.V.4

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1976, vol. II (Part One)	Documents of the twenty-eighth session	A/CN.4/SER.A/1976/Add.1 (Part 1)	77.V.5 (Part I)
1976, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its twenty-eighth session	A/CN.4/SER.A/1976/Add.1 (Part 2)	77.V.5 (Part II)
1977, vol. I	Summary records of the twenty-ninth session	A/CN.4/SER.A/1977	78.V.1
1977, vol. II (Part One)	Documents of the twenty-ninth session	A/CN.4/SER.A/1977/Add.1 (Part 1)	78.V.2 (Part I)
1977, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its twenty-ninth session	A/CN.4/SER.A/1977/Add.1 (Part 2)	78.V.2 (Part II)
1978, vol. I	Summary records of the thirtieth session	A/CN.4/SER.A/1978	79.V.5
1978, vol. II (Part One)	Documents of the thirtieth session	A/CN.4/SER.A/1978/Add.1 (Part 1)	79.V.6 (Part I)
1978, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirtieth session	A/CN.4/SER.A/1978/Add.1 (Part 2)	79.V.6 (Part II)
1979, vol. I	Summary records of the meetings of the thirty-first session	A/CN.4/SER.A/1979	80.V.4
1979, vol. II (Part One)	Documents of the thirty-first session	A/CN.4/SER.A/1979/Add.1 (Part 1)	80.V.5 (Part I)

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Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1979, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-first session	A/CN.4/SER.A/1979/Add.1 (Part 2)	80.V.5 (Part II)
1980, vol. I	Summary records of the meetings of the thirty-second session	A/CN.4/SER.A/1980	81.V.3
1980, vol. II (Part One)	Documents of the thirty-second session	A/CN.4/SER.A/1980/Add.1 (Part 1)	81.V.4 (Part I)
1980, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-second session	A/CN.4/SER.A/1980/Add.1 (Part 2)	81.V.4 (Part II)
1981, vol. I	Summary records of the meetings of the thirty-third session	A/CN.4/SER.A/1981	82.V.3
1981, vol. II (Part One)	Documents of the thirty-third session	A/CN.4/SER.A/1981/Add.1 (Part 1)	82.V.4 (Part I)
1981, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-third session	A/CN.4/SER.A/1981/Add.1 (Part 2)	82.V.4 (Part II)
1982, vol. I	Summary records of the meetings of the thirty-fourth session	A/CN.4/SER.A/1982	83.V.2
1982, vol. II (Part One)	Documents of the thirty-fourth session	A/CN.4/SER.A/1982/Add.1 (Part 1)	83.V.3 (Part I)
1982, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-fourth session	A/CN.4/SER.A/1982/Add.1 (Part 2)	83.V.3 (Part II)

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Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1983, vol. I	Summary records of the meetings of the thirty-fifth session	A/CN.4/SER.A/1983	84.V.6
1983, vol. II (Part One)	Documents of the thirty-fifth session	A/CN.4/SER.A/1983/Add.1 (Part 1)	84.V.7 (Part I)
1983, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-fifth session	A/CN.4/SER.A/1983/Add.1 (Part 2)	84.V.7 (Part II)
1984, vol. I	Summary records of the meetings of the thirty-sixth session	A/CN.4/SER.A/1984	85.V.6
1984, vol. II (Part One)	Documents of the thirty-sixth session	A/CN.4/SER.A/1984/Add.1 (Part 1)	85.V.7 (Part I)
1984, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-sixth session	A/CN.4/SER.A/1984/Add.1 (Part 2)	85.V.7 (Part II)
1985, vol. I	Summary records of the meetings of the thirty-seventh session	A/CN.4/SER.A/1985	86.V.4
1985, vol. II (Part One)	Documents of the thirty-seventh session	A/CN.4/SER.A/1985/Add.1 (Part 1)	86.V.5 (Part I)
1985, vol. II (Part One)	Documents of the thirty-seventh session (Addendum)	A/CN.4/SER.A/1985/Add.1 (Part 1/Add.1)	86.V.9 (Part I/Add.1)
1985, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-seventh session	A/CN.4/SER.A/1985/Add.1 (Part 2)	86.V.5 (Part II)

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Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1986, vol. I	Summary records of the meetings of the thirty-eighth session	A/CN.4/SER.A/1986	87.V.7
1986, vol. II (Part One)	Documents of the thirty-eighth session	A/CN.4/SER.A/1986/Add.1 (Part 1)	87.V.8 (Part I)
1986, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-eighth session	A/CN.4/SER.A/1986/Add.1 (Part 2)	87.V.8 (Part II)
1987, vol. I	Summary records of the meetings of the thirty-ninth session	A/CN.4/SER.A/1987	88.V.6
1987, vol. II (Part One)	Documents of the thirty-ninth session	A/CN.4/SER.A/1987/Add.1 (Part 1)	88.V.7 (Part I)
1987, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its thirty-ninth session	A/CN.4/SER.A/1987/Add.1 (Part 2)	88.V.7 (Part II)
1988, vol. I	Summary records of the meetings of the fortieth session	A/CN.4/SER.A/1988	90.V.4
1988, vol. II (Part One)	Documents of the fortieth session	A/CN.4/SER.A/1988/Add.1 (Part 1)	90.V.5 (Vol. II/Part I)
1988, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its fortieth session	A/CN.4/SER.A/1988/Add.1 (Part 2)	90.V.5 (Part II)
1989, vol. I	Summary records of the meetings of the forty-first session	A/CN.4/SER.A/1989	91.V.4

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Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1989, vol. II (Part One)	Documents of the forty-first session	A/CN.4/SER.A/1989/Add.1 (Part 1)	91.V.5 (Part 1)
1989, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-first session	A/CN.4/SER.A/1989/Add.1 (Part 2)	91.V.5 (Part 2)
1990, vol. I	Summary records of the meetings of the forty-second session	A/CN.4/SER.A/1990	92.V.9
1990, vol. II (Part One)	Documents of the forty-second session	A/CN.4/SER.A/1990/Add.1 (Part 1)	92.V.10 (Part 1)
1990, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-second session	A/CN.4/SER.A/1990/Add.1 (Part 2)	92.V.10 (Part 2)
1991, vol. I	Summary records of the meetings of the forty-third session	A/CN.4/SER.A/1991	93.V.8
1991, vol. II (Part One)	Documents of the forty-third session	A/CN.4/SER.A/1991/Add.1 (Part 1)	93.V.9 (Part 1)
1991, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-third session	A/CN.4/SER.A/1991/Add.1 (Part 2)	93.V.9 (Part 2)
1992, vol. I	Summary records of the meetings of the forty-fourth session	A/CN.4/SER.A/1992	94.V.3
1992, vol. II (Part One)	Documents of the forty-fourth session	A/CN.4/SER.A/1992/Add.1 (Part 1)	94.V.4 (Part 1)

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Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1992, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-fourth session	A/CN.4/SER.A/1992/Add.1 (Part 2)	94.V.4 (Part 2)
1993, vol. I	Summary records of the meetings of the forty-fifth session	A/CN.4/SER.A/1993	95.V.3
1993, vol. II (Part One)	Documents of the forty-fifth session	A/CN.4/SER.A/1993/Add.1 (Part 1)	95.V.4 (Part 1)
1993, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-fifth session	A/CN.4/SER.A/1993/Add.1 (Part 2)	95.V.4 (Part 2)
1994, vol. I	Summary records of the meetings of the forty-sixth session	A/CN.4/SER.A/1994	96.V.1
1994, vol. II (Part One)	Documents of the forty-sixth session	A/CN.4/SER.A/1994/Add.1 (Part 1)	96.V.2 (Part 1)
1994, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-sixth session	A/CN.4/SER.A/1994/Add.1 (Part 2)	96.V.2 (Part 2)
1995, vol. I	Summary records of the meetings of the forty-seventh session	A/CN.4/SER.A/1995	97.V.1
1995, vol. II (Part One)	Documents of the forty-seventh session	A/CN.4/SER.A/1995/Add.1 (Part 1)	97.V.2 (Part 1)
1995, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-seventh session	A/CN.4/SER.A/1995/Add.1 (Part 2)	97.V.2 (Part 2)

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Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1996, vol. I[b]	Summary records of the meetings of the forty-eighth session	A/CN.4/SER.A/1996	98.V.8
1996, vol. II (Part One)[b]	Documents of the forty-eighth session	A/CN.4/SER.A/1996/Add.1 (Part 1)	98.V.9 (Part 1)
1996, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-eighth session	A/CN.4/SER.A/1996/Add.1 (Part 2)	98.V.9 (Part 2)
1997, vol. I[c]	Summary records of the meetings of the forty-ninth session	A/CN.4/SER.A/1997	99.V.7
1997, vol. II (Part One)	Documents of the forty-ninth session	A/CN.4/SER.A/1997/Add.1 (Part 1)	99.V.8 (Part 1)
1997, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its forty-ninth session	A/CN.4/SER.A/1997/Add.1 (Part 2)	99.V.8 (Part 2)
1998, vol. I	Summary records of the meetings of the fiftieth session	A/CN.4/SER.A/1998	00.V.10
1998, vol. II (Part One)	Documents of the fiftieth session	A/CN.4/SER.A/1998/Add.1 (Part 1)	00.V.11 (Part 1)
1998, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its fiftieth session	A/CN.4/SER.A/1998/Add.1 (Part 2)	00.V.11 (Part 2)

[b] Not available in Chinese as of 31 December 2011.

[c] The 1997 and subsequent Yearbooks in Chinese have not been published as of 31 December 2011.

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
1999, vol. I	Summary records of the meetings of the fifty-first session	A/CN.4/SER.A/1999	02.V.9
1999, vol. II (Part One)	Documents of the fifty-first session	A/CN.4/SER.A/1999/Add.1 (Part 1)	02.V.10 (Part 1)
1999, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its fifty-first session	A/CN.4/SER.A/1999/Add.1 (Part 2)	02.V.10 (Part 2)
2000, vol. I	Summary records of the meetings of the fifty-second session	A/CN.4/SER.A/2000	03.V.6
2000, vol. II (Part One)[d]	Documents of the fifty-second session	A/CN.4/SER.A/2000/Add.1 (Part 1)	03.V.7 (Part 1)
2000, vol. II (Part two)	Report of the Commission to the General Assembly on the work of its fifty-second session	A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1	03.V.7 (Part 2)/Rev.1
2001, vol. I	Summary records of the meetings of the fifty-third session	A/CN.4/SER.A/2001/	04.V.16
2001, vol. II (Part One)[d]	Documents of the fifty-third session	A/CN.4/SER.A/2001/Add.1 (Part 1)	04.V.17 (Part 1)
2001, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its fifty-third session	A/CN.4/SER.A/2001/Add.1 (Part 2)	04.V.17 (Part 2)

[d] Also not available in Arabic as of 31 December 2011.

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
2002, vol. I	Summary records of the meetings of the fifty-fourth session	A/CN.4/SER.A/2002	08.V.7
2002, vol. II (Part One)[e]	Documents of the fifty-fourth session	A/CN.4/SER.A/2002/Add.1 (Part 1)	08.V.11 (Part 1)
2002, vol. II (Part Two)	Report of the Commission to the General Assembly on the work of its fifty-fourth session	A/CN.4/SER.A/2002/Add.1 (Part 2)	08.V.11 (Part 2)
2003, vol. I	Summary records of the meetings of the fifty-fifth session	A/CN.4/SER.A/2003	09.V.2
2003, vol. II (Part One)[e]	Documents of the fifty-fifth session	A/CN.4/SER.A/2003/Add.1 (Part 1)	09.V.7 (Part 1)
2003, vol. II (Part Two)[f]	Report of the Commission to the General Assembly on the work of the fifty-fifth session	A/CN.4/SER.A/2003/Add.1 (Part 2)	09.V.7 (Part 2)
2004, vol. I[e]	Summary records of the meetings of the fifty-sixth session	A/CN.4/SER.A/2004	10.V.2
2004, vol. II (Part One)[g]	Documents of the fifty-sixth session	A/CN.4/SER.A/2004/Add.1 (Part 1)	10.V.9 (Part 1)

[e] Also not available in Arabic and Russian as of 31 December 2011.

[f] Also not available in Russian as of 31 December 2011.

[g] Available only in English as of 31 December 2011.

Yearbooks of the International Law Commission

Yearbook	*Title*	*Document*	*United Nations publication Sales No.*
2005, vol. I[h]	Summary records of the meetings of the fifty-seventh session	A/CN.4/SER.A/2005/	F.11.V.3

Studies undertaken by the Secretariat[i]

Title	*Document*	*Yearbook*
Fundamental rights and duties of States		
Preparatory Study concerning a draft Declaration on the Rights and Duties of States (1949)	A/CN.4/2 and Add.1[j]	
Ways and means for making the evidence of Customary International Law more readily available		
Preparatory work within the purview of article 24 of the Statute of the International Law Commission—memorandum submitted by the Secretary-General (1949)	A/CN.4/6 and Corr.1[k]	
Formulation of the Nürnberg Principles		
The Charter and the Judgment of the Nürnberg Tribunal: History and Analysis (1949)	A/CN.4/5[l]	

[h] Available only in French as of 31 December 2011.

[i] Studies of a substantive nature undertaken by the Secretariat for the International Law Commission. For a complete list of all documents, including notes, proposals, bibliographies, memoranda and studies submitted by the Secretariat (organized by topic), see the online Analytical Guide to the Work of the International Law Commission (accessible at http://www.un.org/law/ilc/). Studies undertaken by the Codification Division, including in its capacity as Secretariat of the International Law Commission, published as part of the United Nations Legislative Series, are also listed below.

[j] See United Nations publication, Sales No. 1949.V.4.

[k] See United Nations publication, Sales No. 1949.V.6.

[l] See United Nations publication, Sales No. 1949.V.7.

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Question of International Criminal Jurisdiction		
Historical survey of the question of international criminal jurisdiction (1949)	A/CN.4/7/Rev.1[m]	
Draft Code of Offences/Crimes against the Peace and Security of Mankind		
Memorandum presented by the Secretariat (1950)	A/CN.4/39	1950, vol. II
Analytical paper pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its 34th session (1983)	A/CN.4/365 (mimeograph)	
Nationality including Statelessness		
The problem of Statelessness—report by the Secretary-General (1952)	A/CN.4/56 and Add.1 (mimeograph)	
Survey of the problem of multiple nationality prepared by the Secretariat (1954)	A/CN.4/84	1954, vol. II
Law of the Sea (Régime of the High Seas)		
Memorandum presented by the Secretariat (1950)	A/CN.4/32	1950, vol. II
Juridical Regime of Historic Waters, including Historic Bays		
Study prepared by the Secretariat (1962)	A/CN.4/143	1962, vol. II
Arbitral Procedure		
Memorandum prepared by the Secretariat (1950)	A/CN.4/35	1950, vol. II
Memorandum on the Soviet Doctrine and Practice with Respect to Arbitral Procedure prepared by the Secretariat (1950)	A/CN.4/36 (mimeograph)	
Arbitral Procedure: commentary on Draft on Arbitral Procedure prepared by the Secretariat (1953)	A/CN.4/L.40 (mimeograph), revised edition issued as A/CN.4/92[n]	

[m] See United Nations publication, Sales No. 1949.V.8.

[n] See United Nations publication, Sales No. 1955.V.1.

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Diplomatic Intercourse and Immunities		
Memorandum prepared by the Secretariat (1956)	A/CN.4/98	1956, vol. II
Law of treaties		
Practice of the United Nations Secretariat in relation to certain questions raised in connection with the articles on the law of treaties: note by the Secretariat (1959)	A/CN.4/121	1959, vol. II
Resolutions of the General Assembly concerning the law of treaties: memorandum prepared by the Secretariat (1963)	A/CN.4/154	1963, vol. II
Depositary practice in relation to reservations: Report by the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV) (1965)	A/5687	1965, vol. II
Preparation of Multilingual Treaties: memorandum by the Secretariat (1966)	A/CN.4/187	1966, vol. II
Representation of States in their relations with international organizations		
The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat (1967)	A/CN.4/L.118 and Add.1 and 2	1967, vol. II
Status, privileges and immunities of international organizations, their officials, experts, etc.		
The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat (1985)	A/CN.4/L.383 and Add.1–3	1985, vol. II (Part One, Addendum)

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Succession of States and Governments		
The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat (1962)	A/CN.4/149 and Add.1	1962, vol. II
Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary: memorandum prepared by the Secretariat (1962)	A/CN.4/150	1962, vol. II
Digest of the decisions of international tribunals relating to State succession: study prepared by the Secretariat (1962)	A/CN.4/151	1962, vol. II
Digest of decisions of national courts relating to succession of States and Governments: study prepared by the Secretariat (1963)	A/CN.4/157	1963, vol. II
Succession of States in respect of Treaties		
Succession of States to multilateral treaties: studies prepared by the Secretariat (1968)	A/CN.4/200 and Corr.1 and Add.1 and 2	1968, vol. II
Succession of States to multilateral treaties: sixth study prepared by the Secretariat (1969)	A/CN.4/210	1969, vol. II
Succession of States to multilateral treaties: seventh study prepared by the Secretariat (1970)	A/CN.4/225	1970, vol. II
Succession of States in respect of bilateral treaties: study prepared by the Secretariat (1970)	A/CN.4/229	1970, vol. II
Supplement to the "Digest of the Decisions of international tribunals relating to State succession" (1970)	A/CN.4/232	1970, vol. II

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Succession of States in respect of bilateral treaties: Second and third studies prepared by the Secretariat [Air transport agreements and Trade agreements] (1971)	A/CN.4/243 and Add.1	1971, vol. II (Part Two)
Supplement to Materials on succession of States, prepared by the Secretariat (1972)	A/CN.4/263 (mimeograph)[o]	
Succession of States in respect of Matters other than Treaties		
Supplement to the "Digest of the decisions of international tribunals relating to State Succession," prepared by the Secretariat (1970)	A/CN.4/232	1970, vol. II
Supplement to Materials on succession of States, prepared by the Secretariat (1972)	A/CN.4/263 (mimeograph)[o]	
Most-Favoured-Nation Clause		
Decisions of national courts relating to the most-favoured-nation clause: digest prepared by the Secretariat (1973)	A/CN.4/269	1973, vol. II
Question of treaties concluded between States and international organizations or between two or more international organizations		
Question of treaties concluded between States and international organizations or between two or more international organizations: working paper submitted by the Secretary-General, (1971)	A/CN.4/L.161 and Add.1–2 (mimeograph)	
Possibilities of participation by the United Nations in international agreements on behalf of a territory: study prepared by the Secretariat (1974)	A/CN.4/281	1974, vol. II (Part Two)

[o] See United Nations publication, Sales No. E/F.68.V.5..

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Law of Non-Navigational Uses of International Watercourses		
Legal Problems relating to the utilization and use of international rivers: report by the Secretary-General (1974)	A/5409	1974, vol. II (Part Two)
Legal problems relating to the non-navigational uses of international watercourses: supplementary report by the Secretary-General (1974)	A/CN.4/274	1974, vol. II (Part Two)
Nationality in relation to the Succession of States		
Memorandum prepared by the Secretariat (1999)	A/CN.4/497	1999, vol. II (Part One)
State Responsibility[p]		
Digest of the decisions of international tribunals relating to State responsibility, prepared by the Secretariat (1964)	A/CN.4/169	1964, vol. II
Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State responsibility" (1969)	A/CN.4/208	1969, vol. II
"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine: study prepared by the Secretariat (1978)	A/CN.4/315	1978, vol. II (Part One)
International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law		

[p] See too: Compilation of decisions of international courts, tribunals and other bodies, Report of the Secretary-General, documents A/62/62 and Corr.1 and Add.1 (2007) and A/65/76 (2010), submitted to the Sixth Committee of the General Assembly in accordance with General Assembly resolutions 59/35 of 2 December 2004 and 62/61 of 6 December 2007.

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Survey of State Practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, prepared by the Secretariat (1985)	A/CN.4/384	1985, vol. II (Part One, Addendum)
Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law: study prepared by the Secretariat (1995)	A/CN.4/471	1995, vol. II (Part One)
Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), prepared by the Secretariat (2004)	A/CN.4/543	2004, vol. II (Part One)
Effects of armed conflicts on treaties		
The effect of armed conflict on treaties: an examination of practice and doctrine: memorandum prepared by the Secretariat (2005)	A/CN.4/550 and Corr.1	
Expulsion of aliens		
Memorandum prepared by the Secretariat (2006)	A/CN.4/565	
Protection of persons in the event of disasters		
Memorandum prepared by the Secretariat (2007)	A/CN.4/590 and Add.1-3	
Immunity of State officials from foreign criminal jurisdiction		
Memorandum prepared by the Secretariat (2008)	A/CN.4/596	

Studies undertaken by the Secretariat

Title	*Document*	*Yearbook*
Reservations to treaties		
Reservations to treaties in the context of succession of States: memorandum prepared by the Secretariat (2009)	A/CN.4/616	
Obligation to extradite or prosecute (*aut dedere aut judicare*)		
Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", prepared by the Secretariat (2010)	A/CN.4/630	
Programme of work		
Survey of International Law in relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission: memorandum submitted by the Secretary-General (1949)	A/CN.4/1/Rev.1[q]	
Future work in the field of the codification and progressive development of international law: working paper prepared by the Secretariat (1962)	A/CN.4/145	1962, vol. II
Review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme: working paper prepared by the Secretariat (1970)	A/CN.4/230 and Corr.1	1970, vol. II
Survey of international law: working paper prepared by the Secretary-General (1971)	A/CN.4/245	1972. vol. II (Part Two)

[q] See United Nations publication, Sales No. 1948.V.I(1).

United Nations Legislative Series

Title	*Document*	*United Nations publication Sales No.*
Laws and regulation on the régime of the high seas:		
vol. I (1951)	ST/LEG/SER.B/1	1951.V.2
vol. II (1952)	ST/LEG/SER.B/2	1952.V.1
Supplements to vols. I and II (1959)	ST/LEG/SER.B/8	59.V.2
Laws and practices concerning the conclusion of treaties (1952)	ST/LEG/SER.B/3	1952.V.4
Laws concerning nationality (1954)	ST/LEG/SER.B/4	1954.V.1
Supplement (1959)	ST/LEG/SER.B/9	59.V.3
Laws concerning the nationality of ships (1956)	ST/LEG/SER.B/5 and Add.1	56.V.1
Supplement (1959)	ST/LEG/SER.B/8	59.V.2
Laws and regulations on the régime of the territorial sea (1957)	ST/LEG/SER.B/6	1957.V.2
Laws and regulations regarding diplomatic and consular privileges and immunities (1958)	ST/LEG/SER.B/7	58.V.3
Supplement (1963)	ST/LEG/SER.B/13	63.V.5
Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations (1960)	ST/LEG/SER.B/10	60.V.2
vol. II (1961)	ST/LEG/SER.B/11	61.V.3
Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation (1963)	ST/LEG/SER.B/12	63.V.4
Materials on succession of States (1968)	ST/LEG/SER.B/14	68.V.5

United Nations Legislative Series

Title	*Document*	*United Nations publication Sales No.*
National legislation and treaties relating to the territorial sea, the contiguous zone, the continental shelf, the high seas and to fishing and conservation of the living resources of the sea (1970)	ST/LEG/SER.B/15	70.V.9
National legislation and treaties relating to the law of the sea (1974)	ST/LEG/SER.B/16	74.V.2
National legislation and treaties relating to the law of the sea (1976)	ST/LEG/SER.B/18	76.V.2
Materials on succession of States in respect of matters other than treaties (1977)	ST/LEG/SER.B/17	77.V.9
National legislation and treaties relating to the law of the sea (1980)	ST/LEG/SER.B/19	80.V.3
Materials on jurisdictional immunities of States and their property (1981)	ST/LEG/SER.B/20	81.V.10
Review of the multilateral treaty-making process (1983)	ST/LEG/SER.B/21	83.V.8
National laws and regulations on the prevention and suppression of international terrorism (Part I) (2002)	ST/LEG/SER.B/22	02.V.7
National laws and regulations on the prevention and suppression of international terrorism (Part II (A-L)) (2005)	ST/LEG/SER.B/23	05.V.7
National laws and regulations on the prevention and suppression of international terrorism (Part II (M-Z)) (2005)	ST/LEG/SER.B/24	05.V.7

Official Records of the General Assembly

Sixth Committee (summary records of the meetings of the Sixth (Legal) Committee of the General Assembly, issued for each of the Assembly's sessions).

Annexes (containing the report of the Sixth Committee and other relevant documents covering its work at each Assembly session).

Supplements (issued for each Assembly session, containing the report of the International Law Commission to the General Assembly covering the work of each of the Commission's sessions. The Commission's reports to the Assembly also appear in the *Yearbook of the International Law Commission, 1949,* and in volume II of each succeeding *Yearbook*).

Resolutions (the resolutions adopted at each session of the General Assembly, issued as a supplement to the *Official Records* of each session).

Official Records of Conferences[r]

Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February-27 April 1958, vol. I, Preparatory Documents; vol. II, Plenary Meetings; vol. III, First Committee (Territorial Sea and Contiguous Zone); vol. IV, Second Committee (High Seas: General Régime); vol. V, Third Committee (High Seas: Fishing, Conservation of Living Resources); vol. VI, Fourth Committee (Continental Shelf); vol. VII, Fifth Committee (Question of Free Access to the Sea of Land-Locked Countries) (A/CONF.13/37–43, United Nations publication, Sales No. 58.V.4).

Official Records of the Second United Nations Conference on the Law of the Sea, Geneva, 17 March-26 April 1960. Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole. Annexes and Final Act (A/CONF.19/8, United Nations publication, Sales No. 60.V.6). Verbatim Records of the General Debate. Committee of the Whole (A/CONF.19/9, United Nations publication, Sales No. 62.V.3).

Official Records of the Third United Nations Conference on the Law of the Sea, vols. I-XVII, covering eleven sessions from 1973 to 1982. For the Final Act of the Conference, see vol. XVII, Summary and verbatim records of the plenary meetings and Documents of the Eleventh Session and Conclusion of the Conference (United Nations publication, Sales No. 84.V.3).

Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961. Vol. I, Summary records of plenary meetings and of meetings of the Committee of the Whole (A/CONF.20/14, United Nations publication, Sales No. 61.X.2); vol. II, Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, resolutions (A/CONF.20/14/Add.1, United Nations publication, Sales No. 62.X.1).

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[r] Also available online (http://untreaty.un.org/cod/diplomaticconferences/index.html).

Official Records of the United Nations Conference on Consular Relations, Vienna, 4 March-22 April 1963. Vol. I, Summary records of plenary meetings and of the meetings of the First and Second Committees (A/CONF.25/16, United Nations publication, Sales No. 63.X.2); vol. II, Annexes, Vienna Convention on Consular Relations, Final Act, Optional Protocols, resolutions (A/CONF.25/16/Add.1, United Nations publication, Sales No. 64.X.1).

Official Records of the United Nations Conference on the Law of Treaties, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969. Summary records of the plenary meetings and of the meetings of the Committee of the Whole of the First Session (A/CONF.39/11, United Nations publication, Sales No. 68.V.7); Summary records of the plenary meetings and of the meetings of the Committee of the Whole of the Second Session (A/CONF.39/11/Add.1, United Nations publication, Sales No. 70.V.6); Documents of the Conference, First and Second Sessions (A/CONF.39/11/Add.2, United Nations publication, Sales No. 70.V.5).

Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February-14 March 1975. Vol. I, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.67/18, United Nations publication, Sales No. 75.V.11); vol. II, Documents of the Conference (A/CONF.67/18/Add.1, United Nations publication, Sales No. 75.V.12).

Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978. Vol. I, Summary records of the plenary meetings and of the meetings of the Committee of the Whole of the First Session (A/CONF.80/16, United Nations publication, Sales No. 78.V.8); vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole of the Resumed Session (A/CONF.80/16/Add.1, United Nations publication, Sales No. E.79.V.9); vol. III, Documents of the Conference, First and Resumed Sessions (A/CONF.80/16/Add.2, United Nations publication, Sales No. 79.V.10).

Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Vienna, 1 March-8 April 1983. Vol. I, Summary records of the plenary meetings and of the meetings of the Committee of the Whole; vol. II, Documents of the Conference (A/CONF.117/16 and Add.1, United Nations publication, Sales No. 94.V.6).

Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986. Vol. I, Summary records of the plenary meetings and of the meetings of the Committee of the Whole; vol. II, Documents of the Conference (A/CONF.129/16 and Add.1, United Nations publication, Sales No. 94.V.5).

Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Vol. I, Final documents; vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole; vol. III, Reports and other documents (A/CONF.183/13, United Nations publication, Sales No. 02.I.5).

Treaties and Related Publications

United Nations, *Treaty Series,* vols. 1–2538, and Cumulative Index, forty-four volumes of which have been issued, covering vols. 1–2400 (as of 31 December 2011).[s]

Multilateral Treaties deposited with the Secretary-General—Status as at 1 April 2009, volumes I and II (ST/LEG/SER.E/26) (United Nations publication, Sales No. 09.V.3).[s] Discontinued.

Statement of Treaties and International Agreements,[t] current as of October 2011 (ST/LEG/SER.A/776).

Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/8) (United Nations publication, Sales No. 94.V.15).

Treaty Handbook (2006) (United Nations publication, Sales No. 02.V.2).[u]

Handbook of Final Clauses (2004) (United Nations publication, Sales No. 04.V.3).[v]

Judicial Decisions, Arbitral Awards and Related Publications

Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1947–2011.[w]

Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 1948-1991[x] (ST/LEG/SER.F/1) (United Nations publication, Sales No. 92.V.5).

Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 1992-1996[x] (ST/LEG/SER.F/1/Add.1) (United Nations publication, Sales No. 97.V.7).

Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 1997-2002[x] (ST/LEG/SER.F/1/Add.2) (United Nations publication, Sales No. 03.V.12).

Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 2003-2007[x] (ST/LEG/SER.F/1/Add.3) (United Nations publication, Sales No. 08.V.6).

Reports of International Arbitral Awards, issued in twenty-nine volumes, covering selected awards handed down since 1798.[y]

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[s] Also available online (http://untreaty.un.org/) and on CD-ROM.

[t] Issued monthly pursuant to the *Regulations to give effect to article 102 of the Charter of the United Nations,* adopted by the General Assembly in resolution 97 (I) of 14 December 1946, and as modified by resolutions 364 B (IV) of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 A of 18 December 1978. See too resolution 52/153 of 15 December 1997. Also available online at (http://treaties.un.org/).

[u] Also available in Spanish, Chinese, Russian and Arabic.

[v] Also available in French, Chinese and Arabic.

[w] Also available online (http://www.icj-cij.org/).

[x] Also available online (http://untreaty.un.org/cod/ICJsummaries/index.html).

[y] Also available online (http://untreaty.un.org/cod/riaa/index.html).

Yearbooks and Guides to the Practice of the United Nations

United Nations Yearbook, covering the period from the United Nations' inception until 2007.

Yearbook of the International Court of Justice, covering the period from 1946–1947 until 2007–2008.

United Nations Juridical Yearbook containing the documentary materials concerning the United Nations and the intergovernmental organizations in relation with it, 1962–2010,[z] and Cumulative Index (Parts I-III, covering volumes up to 1990).

Repertory of Practice of United Nations Organs, and its *Supplements* (1946-2009).[aa]

Repertoire of the Practice of the Security Council, and its *Supplements* (1946-2009).[bb]

Publications relating to the Work of the International Law Commission

International Law Commission—A Guide to the Documents 1949–1969 (ST/GENEVA/LIB/SER.B/Ref.2).

Analytical Guide to the Work of the International Law Commission, 1949–1997 (ST/LEG/GUIDE/1) (United Nations publication, Sales No. 98.V.10).[cc]

The International Law Commission Fifty Years After: An Evaluation (United Nations publication, Sales No. 00.V.3).[dd]

Making Better International Law: the International Law Commission at 50 (United Nations publication, Sales No. 98.V.5).[dd]

International Law on the Eve of the Twenty-first Century: Views from the International Law Commission (United Nations publication, Sales No. 97.V.4).[dd]

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[z] The *United Nations Juridical Yearbook* has been published in all languages as of 2004 (except for the 2002 *United Nations Juridical Yearbook* in Chinese and English). In addition, the 2005 *United Nations Juridical Yearbook* has been published in Chinese, English and Russian, and the 2006 *United Nations Juridical Yearbook* in English and French only. The *United Nations Juridical Yearbooks* for 2007-2010 are only available in English. The English versions are also available online (http://www.un.org/law/UNJuridicalYearbook/index.htm).

[aa] Also available online (http://www.un.org/law/repertory/).

[bb] Also available online (http://www.un.org/en/sc/repertoire/).

[cc] The *Analytical Guide to the Work of the International Law Commission* is updated electronically on the website of the International Law Commission, see http://www.un.org/law/ilc/.

[dd] Also available online (http://www.un.org/law//lindex.htm).

Relevant Web Sites

http://www.un.org/law/ilc	Official web site of the International Law Commission maintained by the Codification Division of the Office of Legal Affairs of the United Nations Secretariat.
http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm	Yearbooks of the International Law Commission
http://www.un.org/law/lindex.htm	Official web site of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat.
http://www.un.org/en/ga/sixth	Official web site of the Sixth Committee of the United Nations General Assembly maintained by the Codification Division of the Office of Legal Affairs of the United Nations Secretariat.
http://treaties.un.org/	United Nations Treaty Collection maintained by the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat.
http://www.un.org/Depts/los	Official web site of the Oceans and Law of the Sea maintained by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations Secretariat.
http://www.icj-cij.org	Official web site of the International Court of Justice.
http://www.un.org/law/ICJsummaries/	Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice.
http://www.icc.int	Official web site of the International Criminal Court.
http://untreaty.un.org/cod/diplomaticconferences/index.html	Official Records of Diplomatic Conferences, convoked by the United Nations.
http://untreaty.un.org/cod/riaa/index.html	Reports of International Arbitral Awards
http://www.un.org/law/UNJuridicalYearbook/index.htm	United Nations Juridical Yearbook

http://untreaty.un.org/cod/repertory/index.html	Repertory of Practice of United Nations Organs
http://www.un.org/en/sc/repertoire/	Repertoire of the Practice of the Security Council