was submitted as a document to this second part of the Conference which was attended by delegations from 24 member countries as well as observers from various international organizations. At its final plenary meeting on 14 November 1974, the Conference approved a report, a Final Act and adopted the text of an Agreement for Joint Financing of North Atlantic Ocean Stations. The Agreement entered into force on 1 December 1976 (see paragraph 2) upon the ratification of or accession to the Agreement by a sufficient number of member countries as required under the provisions of the Agreement.

11. The major decisions taken by the Conference which have a corresponding effect on the draft of the Agreement as submitted to the Conference, related to: (*a*) the number and location of the ocean stations forming the NAOS network which were considered as the minimum for meteorological purposes and at the same time the maximum that could be financed and operated by those Member countries of WMO likely to participate in a new NAOS Agreement initially; (*b*) the cost-sharing arrangements among the countries participating in the joint financing Agreement; (*c*) duration of the Agreement including the circumstances and conditions under which a Contracting Party may denounce the Agreement; (*d*) reimbursement of costs to Contracting Parties operating the vessels; (*e*) responsibilities of WMO; (*f*) conditions for entry into force of the Agreement and (*g*) interim arrangements to ensure the continuity in the operation of a NAOS network in the period between the termination of the previous Agreement on 30 June 1975 and the entry into force of the new Agreement.

NOTE

[1] An Informal Planning Meeting (IPM) is a meeting convened by the Secretary-General to assist him in planning some aspect of a WMO programme. Participants are usually nominated by members. The conclusions or proposals made by an IPM have no status within the organization. Any follow-up action rests with the Secretary-General.

III. OTHER INTERNATIONAL ORGANIZATIONS

A. COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY

1. The Commission of the European Economic Community (hereafter named the Community) welcomes the invitation contained in General Assembly resolution 36/112 to forward observations on the reports which the Secretary-General submitted to the 35th and the 36th General Assembly on the question "Review of the multilateral treaty-making process".

2. The reports from the Secretary-General contain observations from a number of international organizations which explain the role they have in the context of the multilateral treaty-making process. The Commission considers it necessary to draw attention to certain aspects of the Community's functions which represent an important development in the field of international law and international institutions, these developments which must be taken into account when considering the process of the elaboration of multilateral treaties

as an element of the progressive development of international law and its codification.

3. Member States of the Community are under the obligation to enter into negotiations with each other, as far as is necessary, with a view to securing certain benefits for their nationals on matters enumerated in Article 220 of the founding treaty. The Community, therefore, can, in a limited number of cases, serve as the forum for concluding a multilateral treaty, but this is an exception from its main functions and calls for no particular comments in this context.

4. It must be taken into consideration that the Community has international legal personality and is capable under international law of concluding treaties with States and other entities on matters for which its Member States have transferred their competence to the Community. The Community's ability to act as a contracting party to an international convention does not however represent a unique case. A number of intergovernmental organizations have been acquiring such capacities; this trend is reflected in the work which over a number of years has been carried out within the International Law Commission in its elaboration of a set of draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations.[1]

5. The Community has the exclusive competence, in particular, to negotiate and conclude agreements on its own behalf with third States in the field of commercial policy. Moreover, the exclusive competence of the Community covers areas where the Community has adopted uniform rules for the application of its common policies, such as the common agricultural policy.

6. In the absence of Community rules, external competence for the Community exists where the Community has internal powers to take action in the sphere in question and the Community's participation in an international agreement is necessary in order to achieve one of its objectives.

7. In the areas referred to above, the Community has concluded a number of multilateral treaties among which mention will be made only of the following, which are the most interesting in the present context:

(*a*) The EEC is a contracting party to the International Olive Oil Agreement and to the Convention on Multilateral Co-operation in the Northwest Atlantic Fisheries;

(*b*) The Community together with its member States has concluded several commodity agreements: The International Wheat Agreement, 1971; The Interuational Cocoa Agreement, 1975; The International Tin Agreement, 1975; and The International Coffee Agreement, 1976. The EEC is a contracting party alongside some of its member States to the Barcelona Convention of 16 February 1976 for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft which were elaborated under the auspices of the United Nations Environment Programme (UNEP). It is also a signatory alongside all its member States to the Convention on Long-Range Transboundary Air Pollution 1979, and it is intended to ratify this Convention on 15 July 1982;

(*c*) A particularly interesting series of Conventions, which have associated a series of developing countries (more than 50 States) in Africa, the

Caribbean and the Pacific with the Community has been concluded over the years (Yaoundé I and II, Lomé I). The Second Lomé Convention was concluded on 31 October 1979. These Conventions have set up a special relationship between the ACP States and the Community, which gives these countries privileges in the field of trade as well as aid to development.

8. Under the present practice, rules of procedure for UN conferences provide for Community participation as an observer even in cases where such conferences have been convened for the elaboration of a treaty on matters of Community competence. This was for example the case at the Third United Nations Conference on the Law of the Sea which covered a number of subject matters falling within the Community's competence. Experience has shown that the status of observer does not accommodate the interests of the Community in the case where an international conference has been convened for the purpose of concluding a multilateral treaty in respect of which competence rests either exclusively with the Community or is shared between the Community and its member States.

9. The capacity of an international organization to participate in the elaboration and adoption of a multilateral treaty is taken into consideration in the draft emanating from the International Law Commission on the subject of treaties concluded between States and international organizations or between two or more international organizations. Reference is in particular made to the text contained in:

—*draft article 7*: full powers and powers for representatives of organizations to negotiate and conclude a treaty;

—*draft article 9*: adoption of the text of a multilateral treaty;

—*draft article 77*: functions of a depositary for a multilateral treaty;

—*draft article 80*: registration of a treaty for which an international organization has the depositary functions.

10. The Community submits that the above reservations should be taken into consideration at the further work at the United Nations on the subject of reviewing the multilateral treaty-making process. In this context we should like to draw attention to the close relationship that exists between the review of the multilateral treaty-making process and the effort to elaborate standard rules of procedure for UN conferences. We welcome the ongoing work in these matters in view of the importance of achieving a coherent approach.

NOTE

[1] Report of the International Law Commission on its 32nd and 33rd sessions, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10,* Chapter IV, Sect. B, and *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 10,* Chapter III, Sect. B.

B. CONSEIL DE L'EUROPE

1. *Introduction*

1. La présente note contient la contribution du Conseil de l'Europe à la préparation du rapport du Secrétaire général des Nations Unies demandé par

l'Assemblée générale dans sa résolution 32/48 du 8 décembre 1977, intitulée "Réexamen du processus d'établissement des traités multilatéraux".

2. En annexe ont été joints les trois documents suivants :

— Modèles de clauses finales d'accords ou de conventions. Ces modèles ont été adoptés par le Comité des ministres du Conseil de l'Europe en 1962. Ils font à l'heure actuelle l'objet d'un réexamen. Le Secrétariat du Conseil de l'Europe transmettra le nouveau texte dès qu'il aura été adopté (annexe 1).

— Méthodes et instruments de coopération au Conseil de l'Europe.

— Etat des signatures et des ratifications des conventions et accords du Conseil de l'Europe, au 11 avril 1979 (n'est pas reproduit ici).

3. A l'heure actuelle, une centaine de conventions et accords[1] ont été adoptés au sein du Conseil de l'Europe. La procédure régissant leur élaboration n'est pas prévue par des dispositions du Statut de l'Organisation (5 mai 1949). Elle a été établie et s'est développée peu à peu depuis la création du Conseil. Mais, sur la base de cette pratique, il est possible de dégager certaines règles concernant les différentes étapes de l'élaboration d'un traité européen.

2. *L'initiative*

4. L'initiative d'entreprendre l'élaboration d'une convention ou d'un accord peut provenir de sources très diverses : Assemblée consultative[2], comités d'experts, conférences de ministres spécialisés, gouvernements, comité des ministres[3] ou secrétariat.

5. Les comités d'experts sont des organes subsidiaires institués par le Comité des ministres en vertu de l'article 17 du Statut[4]. Ce sont des comités auxiliairres du Comité des ministres, qui, en règle générale, leur donne un mandat très précis. Toutefois, à côté de comités spécialisés chargés d'une tâche assez restreinte et qui cessent de fonctionner lorsque cette tâche est accomplie, il existe des comités dont la compétence est beaucoup plus étendue puisqu'ils sont responsables d'une tranche importante du plan à moyen terme de l'Organisation. Parmi tous les comités, ce sont ces derniers qui font au Comité des ministres des propositions relatives à l'élaboration de traités européens.

6. Tous les Etats membres ont la possibilité de désigner des participants. Toutefois, malgré ce mode de désignation, les membres des comités ne sont pas considérés comme représentants des gouvernements mais comme des experts spécialisés dans la matière dont l'étude est assignée au comité; ils agissent sous leur propre responsabilité et n'engagent pas celle de leur gouvernement.

7. Des observateurs peuvent être invités à participer aux réunions des comités d'experts. Ils représentent des Etats non membres, des organisations intergouvernementales ou des organisations non gouvernementales.

8. A côté de ces comités d'experts institués en vertu de l'article 17 du Statut, il convient de signaler l'existence de comités prévus par certaines conventions et qui sont chargés en particulier de faire des propositions tendant à améliorer les conditions d'application de la convention concernée. Ces comités (dits "conventionnels") peuvent ainsi être amenés à proposer l'élaboration d'un protocole d'amendement ou d'une nouvelle convention. Leur composition est différente de celle des comités de l'article 17 car ils réunissent des représentants des parties contractantes.

9. Les conférences de ministres spécialisés réunissent, à intervalles plus ou moins réguliers, les membres des gouvernements qui sont chargés d'un secteur déterminé de l'action gouvernementale (éducation, justice, environnement, etc.). Le Statut du Conseil de l'Europe ne contient pas de dispositions concernant expressément ces conférences. Toutefois, elles ont établi des rapports particuliers de travail avec l'Organisation, en particulier pour ce qui concerne la préparation, l'ordre du jour ou le secrétariat (qui est assuré par le Secrétariat du Conseil de l'Europe). Le Secrétaire général du Conseil de l'Europe présente au Comité des ministres un rapport sur chacune de ces conférences et porte à sa connaissance toutes les résolutions, décisions et autres textes qui en émanent.

10. L'Assemblée consultative et les comités d'experts de l'article 17 sont à l'origine du plus grand nombre des traités européens.[5] Mais, dans la pratique, il n'est pas toujours possible de savoir qui a vraiment pris l'initiative. Même si formellement cela n'apparaît pas, ce peut être, par exemple, un gouvernement ou une organisation non gouvernementale. En outre, plusieurs conventions ou accords s'inspirent d'une idée de l'Assemblée consultative qui a été reprise formellement plus tard par un autre organe.

3. *La décision d'élaborer une convention ou un accord*

11. Cette décision est toujours prise par le Comité des ministres, généralement après avoir reçu l'avis d'un comité d'experts sur l'opportunité et la faisabilité d'entreprendre une telle activité. La décision, qui est prise en principe dans le cadre de l'adoption du programme de travail de l'organisation, requiert, conformément à l'article 20, *d*, du Statut, la majorité des deux tiers des voix exprimées et la majorité des représentants ayant le droit de siéger.

4. *La négociation proprement dite*

12. Le projet de traité est préparé par un comité d'experts, déjà existant ou créé à cet effet[6]. Comme il a déjà été indiqué, les membres des comités ne sont pas considérés comme des représentants des gouvernements[7].

13. Généralement, un comité d'experts chargé d'élaborer une convention ou un accord reçoit un mandat de durée limitée (un an ou deux renouvelables par décision du Comité des ministres) et se réunit en moyenne deux fois par an. A l'issue de chaque réunion, il adresse un rapport au Comité des ministres pour l'informer en particulier de l'avancement des travaux et demander, le cas échéant, une prolongation de son mandat. Si un comité d'experts se heurte à des difficultés de caractère politique, il peut soumettre la question au Comité des ministres.

14. A l'occasion de l'examen des rapports des comités d'experts, des délégations, au sein du Comité des ministres, peuvent faire des observations écrites ou orales. Mais, avant l'établissement du projet définitif, il est rare que ces remarques portent sur le fond du texte en préparation.

15. Lorsque le Comité d'experts a rempli son mandat, le projet de traité est soumis au Comité des ministres, qui peut, avant de se prononcer définitivement, le transmettre pour avis à l'Assemblée consultative.

16. Généralement, surtout lorsque le contenu du projet est très technique, le texte est adopté par le Comité des ministres sans changement. Parfois, cependant, les négociations peuvent se poursuivre. Ainsi un projet de convention n'a été adopté qu'après plusieurs réunions du Comité des ministres, pour lesquelles les représentants des Etats pouvaient se faire accompagner d'experts.

5. *Adoption du texte*

17. La décision d'adopter le texte est prise par le Comité des ministres; l'adoption exige la majorité des deux tiers des voix exprimées et la majorité des représentants ayant le droit de siéger.

18. Cette majorité acquise, le traité est ouvert à la signature si on constate qu'il n'y a pas d'opposition explicite d'un représentant.

19. Depuis quelques années, les projets de convention ou d'accord sont accompagnés de rapports explicatifs, préparés par les comités d'experts ou par le Secrétariat. Le Comité des ministres doit décider s'ils peuvent être rendus publics, ce qui, jusqu'à présent, a toujours été le cas.

6. *Durée de l'élaboration*

20. La durée d'élaboration des traités européens est très variable. Elle peut aller de quelques mois à près de quinze ans. Toutefois, la grande majorité des accords ou conventions sont élaborés dans une période de trois à quatre ans.

ANNEX I

Model Final Clauses for Conventions and Agreements concluded within the Council of Europe[8]

INTRODUCTION

At the 113th meeting of the Deputies in September 1962, the Committee of Ministers of the Council of Europe approved two texts of final clauses to be used for international treaties concluded within the Council of Europe. One of these texts was designed for agreements that can be signed without reservation as to ratification and acceptance, and the other for conventions requiring ratification or acceptance. These texts were to serve as models for committees of experts charged with drawing up Council of Europe agreements or conventions. It was agreed that the texts could subsequently be amended in special cases or in the light of the results of the work of the International Law Commission of the United Nations.

Since 1962, these model final clauses have been used in a great many European conventions and agreements. This very use has, however, revealed the need for certain changes to the texts. Moreover, the work of the International Law Commission resulted in the adoption in 1969 of the Vienna Convention on the Law of Treaties, which takes account of the most recent developments in international practice.

So as to take these different factors into account, the Committee of Ministers has approved a single new set of model final clauses, at the 315th meeting of the Deputies in February 1980. This model applies to conventions or agreements concluded between States. The Committee of Ministers points out that when considering the draft European Convention for the Protection of International Watercourses against Pollution, and in

order to enable the European Economic Community as such to become a Party to that convention, it adopted final clauses providing for that possibility. Similar clauses are found in the European Convention of 10 March 1976 for the Protection of Animals kept for Farming Purposes, the European Convention of 10 May 1979 on the Protection of Animals for Slaughter and the Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats.

The model final clauses appearing hereafter apply to both conventions and agreements. With the exception of Article (*a*) for which two alternatives are proposed, the texts of all the articles are the same for conventions and agreements: it suffices to maintain or to delete, as appropriate, the words between brackets.

Finally, it should be noted that these model final clauses are intended only to facilitate the task of committees of experts and avoid textual divergencies which would not have any real justification. The model is in no way binding and different clauses may be adopted to fit particular cases.

Article (a)

Alternative 1 (agreements)

1. This Agreement shall be open for signature by the member States of the Council of Europe which may express their consent to be bound by:

(*a*) signature without reservation as to ratification, acceptance or approval, or

(*b*) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Alternative 2 (conventions)

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article (b)

1. (This Agreement) (This Convention) shall enter into force on the first day of the month following the expiration of a period of . . . months after the date on which . . . member States of the Council of Europe have expressed their consent to be bound by (the Agreement) (the Convention) in accordance with the provisions of Article (*a*).

2. In respect of any member State which subsequently expresses its consent to be bound by it, (the Agreement) (the Convention) shall enter into force on the first day of the month following the expiration of a period of . . . months after the date (of signature or)[9] of the deposit of the instrument of ratification, acceptance or approval.

Article (c)

1. After the entry into force of (this Agreement) (this Convention), the Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to (this Agreement) (this Convention), by a decision taken by the majority provided for in Article 20 (*d*) of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.[10]

2. In respect of any acceding State, (the Agreement) (the Convention) shall enter into force on the first day of the month following the expiration of a period of...

months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article (d)

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which (this Agreement) (this Convention) shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of (this Agreement) (this Convention) to any other territory specified in the declaration. In respect of such territory (the Agreement) (the Convention) shall enter into force on the first day of the month following the expiration of a period of...months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of...months after the date of receipt of such notification by the Secretary General.

Article (e)[11]

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in the annex[12] to (this Agreement) (this Convention).[13] No other reservation may be made.[14]

2. Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

3. A Party which has made a reservation in respect of a provision of (this Agreement) (this Convention) may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

Article (f)

1. Any Party may at any time denounce (this Agreement) (this Convention) by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of...months after the date of receipt of the notification by the Secretary General.

Article (g)

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to (this Agreement) (this Convention) of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of (this Agreement) (this Convention) in accordance with Articles (*b*), (*c*) and (*d*);

d. any other act, notification or communication relating to (this Agreement) (this Convention).

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed (this Agreement) (this Convention).

DONE AT ....., the ....., in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to (this Agreement) (this Convention).

ANNEX II

Methods and instruments of co-operation in the Council of Europe

Decision of the Committee of Ministers of the Council of Europe

1. The Committee of Ministers, at the 249th meeting at Deputy level in October 1975, took note of a report prepared at its request by the Permanent Representative of Sweden in co-operation with the Secretariat, concerning the advisability of replacing, in certain cases, the elaboration of conventions by more efficient machinery and of the desirability of a selective policy regarding the detailed follow-up to resolutions. The report is reproduced in this publication.

2. In taking note of the report, the Committee of Ministers approved for its own future guidance the criteria set out in paragraph 26 of the report.

3. For its part, the Secretariat was instructed to take these criteria into account when formulating proposals in connection with the medium-term plan or annual programme of activities of the Committee of Ministers, as well as to distribute the report to the committees of experts set up under Article 17 of the Statute of the Council of Europe.

4. In addition, the Committee of Ministers drew the attention of these committees to the criteria set out in paragraph 26 of the report, asking them to take them into account when examining the form which might be envisaged for the results of work undertaken in the annual programme of activities.

5. Finally, the Committee of Ministers asked the Secretary General to make the report available to the President and Committees of the Consultative Assembly.

Report on the advisability of replacing in certain cases the elaboration of conventions by more efficient machinery and of the desirability of a selective policy regarding the detailed follow-up to resolutions

INTRODUCTION

1. In Resolution (74)4 (Section 1, paragraph (1)) on the future role of the Council of Europe, which was adopted on 24 January 1974 at its 53rd session, the Committee of Ministers instructed the Ministers' Deputies:

—to study the advisability of replacing in certain cases the elaboration of conventions by a more efficient machinery;

—to study the desirability of a selective policy regarding the detailed follow-up to resolutions.

2. Previously, in 1970, the Nordic delegations to the 6th Conference of European Ministers of Justice at The Hague had presented a memorandum on working methods for European inter-governmental co-operation in which it was suggested that the traditional approach to European co-operation through internationally binding instruments such as conventions should be replaced to some extent by a more flexible system of co-operation which would place more emphasis on the techniques of *ad hoc* meetings and exchanges of views.

3. The need to reconsider the methods used in the furtherance of co-operation has arisen from the ever-quickening pace of change in modern European society, which must be matched by correspondingly rapid legal developments. On the one hand, the sheer volume of legislative instruments must necessarily increase and, on the other hand, they must be produced more quickly and amended more easily to cope with changing circumstances.

4. It would not be surprising if the intensification of co-operation within the Council of Europe, which has occurred in recent years, has upset the balance which existed between the various methods of co-operation used and some adjustment may be necessary in the weight which is attached to each form of co-operation. In this context, it is important to recall the legal characteristics of the various methods available, their advantages and disadvantages in achieving progress in intergovernmental co-operation, and the role which each of them can usefully play in this respect. The principal methods which merit close consideration are:

i. conventions;
ii. recommendations to Governments; and the less formal process of
iii. exchanges of views.

WORKING METHODS

Conventions

5. According to Article 15(*a*) of the Statute of the Council of Europe:

> "On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters."

The conclusion of conventions and agreements among member States is thus one of the principal working methods envisaged by the Statute of the Council of Europe, and in the practice of the Organization also these instruments have often been the foundation of common action designed to achieve a greater unity between the member States. At the same time, however, it must be pointed out that conventions concluded within the Council of Europe are not strictly speaking legal acts of the Organization itself but owe their existence to the independently expressed consent of member States. Thus, conventions are not automatically binding upon member States, nor are States under a legal obligation to express their consent to be bound by such an instrument.

6. The strength of the convention as an instrument of co-operation lies in its formality and its legally binding nature with regard to those States which have accepted the treaty. States which proceed to ratification of a convention incur obligations in international law which can be enforced *inter se*, and in the absence of international legislative machinery conventions are a particularly important source of legally binding obligations in the fullest sense. Where it is felt necessary that concrete legal obligations should be undertaken by States it is only through securing their acceptance of a convention that this can be done.

7. In view of their formal and binding nature it is possible to follow up the conclusion of conventions with some kind of specific control machinery to assist in the enforcement of the legal obligations undertaken. Practice shows that the control machinery may vary according to the substantive obligations which are involved.

The leading example of control machinery in a Council of Europe convention is that set up under the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 19 of which provides:

> "To ensure the observance of the engagements undertaken by the High Contracting Parties in the present convention, there shall be set up:
>
> "(*a*) A European Commission of Human Rights . . .

"(*b*) A European Court of Human Rights . . .".

A detailed control machinery is also set up under Part IV of the European Social Charter, according to Article 21 of which:

> "The Contracting Parties shall send to the Secretary General of the Council of Europe a report at two-yearly intervals, in a form to be determined by the Committee of Ministers, concerning the application of such provisions of Part II of the Charter as they have accepted."

Reports shall also be submitted relating to provisions of Part II which have not been accepted. Both sets of reports are examined by a committee of experts and a subcommittee of the Governmental Social Committee, following which recommendations may be made by the Committee of Ministers.

A broadly similar system of control operates under Part XIII of the European Code on Social Security.

Article 24 (I) of the European Convention on Establishment provides:

> "A standing committee shall be set up within a year of the entry into force of this convention. This committee may formulate proposals designed to improve the practical implementation of the convention and, if necessary, to amend or to supplement its provisions."

Some other Council of Europe conventions contain a simple reporting provision. For example, the European Convention on the Equivalence of Diplomas leading to Admission to Universities provides in Article 2 that:

> "Each Contracting Party shall, within a year of the coming into force of this convention, provide the Secretary General of the Council of Europe with a written statement of the measures taken to implement the previous Article."

The European Convention on the Equivalence of Periods of University Study contains a similar provision in Article 7.

8. Conventions are an important means by which the scope of the Organization's work can be extended beyond its usual regional limits, for conventions concluded within the Council of Europe can provide for possible accession by non-member (including non-European) States and in practice this is often done. There are exceptions in the case of certain conventions which are intimately associated with the aims of the Council of Europe and are "closed" conventions in the sense that they are open to signature only by member States. To take but one example of an "open" convention, the European Convention relating to the Formalities required for Patent Applications provides in Article 9 that:

> "After it has come into force, this convention shall be open to accession by all States which are members of the International Union for the Protection of Industrial Property".

In accordance with this Article, South Africa, Israel, Spain and Finland have acceded to the convention. Greece remained a Party during the period of her withdrawal from the Council of Europe.

9. Because they are not legal acts of the Council of Europe as such, conventions are not subject to the statutory voting procedures applicable to the Committee of Ministers, but instead questions concerning conventions are governed by a more flexible procedure which has evolved through practice. The adoption of a text by the Committee of Ministers requires a two-thirds majority of the representatives entitled to sit on the Committee, in accordance with Article 20 (*d*) of the Statute. After that, however, there is presumed to be unanimous agreement to open the convention for signature failing any explicit statement of objection by a representative. Opening for signature is thus based on a "reversed" unanimity. This flexible procedure is important in encouraging the opening of conventions for signature, as at no time is unanimity in the usual sense required and there is strong pressure to open a convention for signature unless good reasons exist for not so doing and are put forward by a member State.

10. On the other hand, the binding and formal quality of conventions, which makes them such important international instruments, also gives rise to corresponding difficulties in their conclusion and implementation. The preparation of a convention is generally a lengthy task which may involve difficulties of substance and of drafting technique. While on no account must thoroughness and accuracy in preparation be sacrificed for speed, the preparation of conventions should be as efficient as possible, for otherwise the danger is that the solution found in a convention will be out of date before it has been introduced in practice.

11. Even after it has been prepared and after it has been opened for signature, a convention still lacks legal significance until it has entered into force, having received the requisite number of ratifications. This number varies from convention to convention. While some conventions have required only two ratifications for their entry into force, there are others which have laid down a more stringent requirement. What is important in this respect is to remember the usefulness of the Council of Europe in offering a framework for the conclusion of a convention even if only a limited number of member States are interested in the subject matter, provided that this is in accord with the political objectives of the Organization. Thus the drafting of a convention should not in principle be ruled out in these circumstances, as there are numerous examples of conventions which have generated little interest at first but have later been more widely supported. These include the European Convention on Establishment and the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories.

12. Practice shows, however, that ratification of conventions by member States tends to be slow. There is no obligation to ratify, even after having voted in favour of the text of a convention, because such a vote does not involve any commitment to proceed to ratify. Ultimately the decision whether or not to ratify lies with the State itself and there is no way of guaranteeing that all member States will ratify a convention or even that enough States will ratify it for it to enter into force. It can only be hoped that a convention having been carefully prepared and the Committee of Ministers having agreed to open it for signature, it will prove acceptable to a majority of States. But this problem is not confined to Council of Europe conventions. It exists with regard to all international organizations and it could even be said that the record of ratifications of Council of Europe treaties is more favourable than that of many other interuational organizations on a European or world scale.

13. The slowness of the process of ratification is often due to the fact that Goverum-ents do not find the subject-matter involved or the solutions envisaged sufficiently interesting from the political point of view. That is why it is undesirable to engage in work on a new convention while the subject is not considered by at least some Governments to be a matter of interest or concern to them. There may of course also be delays in ratification which result from reasons of a practical character. The need for translation into the language or languages of a country may in some cases account for a certain slowness. A more important cause of delay is the need to secure formal approval by national parliaments. In this respect it might be helpful to seek the opinion of the Consultative Assembly in selected cases before opeuing the convention for signature, thus assuring the support of parliamentarians. Furthermore, explanatory reports are often useful in assisting national authorities in the ratification process. In fact, such reports have been prepared within the Council of Europe in respect of many conventions concluded since 1965, but a number of conventions are still elaborated without an appropriate explanatory report. These reports do not constitute instruments providing an authoritative interpretation of the text of conventions, but they might be prepared in future in respect of each convention in order to facilitate the application of the provisions therein contained. In addition, it would be useful to hold regular exchanges of views on the state of ratification of conventions such as take place regularly within the European Committee on Legal Co-operation (CCJ). This practice might be developed and might even take place on a political level.

14. Experience within the Council of Europe suggests that no general conclusion can be drawn as to the speed of preparation and entry into force of conventions and agreements. The periods involved depend on the nature and degree of the problems to be solved. In some cases experience has shown that conventions concerning subjects of great political interest may be elaborated and enter into force relatively quickly while in other cases it may be that legal and political problems are so interwoven that even a fairly rapid drafting of legal provisions may be impeded by changing political problems which may arise. Such circumstances make it impossible to proceed to a meaningful comparison which might lead to reasonable conclusions as to whether the probable duration of work involved is an argument for or against the retention of the form of a convention. The main criteria in the making of this decision are, in fact, those set out above, namely their formality and legally binding nature, possibilities of follow-up, extension to non-member States etc.

15. Once a convention has entered into force, the subject-matter which it covers is less susceptible to dynamic development unless provision is made in the treaty itself for its continual adaptation. The question may thus arise with regard to many conventions as to whether the treaty should be amended, for example, to meet changed circumstances or to facilitate its implementation by Contracting Parties. Unfortunately, just as with the preparation of the convention itself, this may be a slow and difficult process and once effected amendments in any case are often cumbersome. Few Council of Europe conventions contain any express provision regarding amendment. These include, however, the following:

—Article 36 of the *European Social Charter*, under which any Member of the Council of Europe may propose amendments to the Charter;

—Article 24 (1) of the *Establishment Convention*, which sets up a Standing Committee which may formulate proposals for the amendment of the convention;

—Article 3 of the *War-Disabled (Repair of Appliances) Agreement*.

In many other cases it is provided that a subsequent bilateral or multilateral agreement may prevail over the convention in question, thus allowing variations in the obligations undertaken while not providing for an actual amendment of the text itself.

16. The possibility should be considered of making more frequent use in relation to appropriate subjects of the framework or outline treaty approach. According to this approach, which seems to be acceptable in the technical field only, the content of such a convention would be limited to general undertakings and/or principles to be followed by the Contracting Parties. Questions of detail concerning the implementation of the convention would be dealt with in either of the following ways:

(*a*) The drafting of more detailed provisions would be the task of a treaty body, as in the case of the European Convention on the International Classification of Patents for Invention, the Convention on the Elaboration of a European Pharmacopoeia and the draft European Convention for the Protection of Animals kept for Farming Purposes. Such a system could be accompanied by "contracting-out" procedures on the lines of those followed within the International Civil Aviation Organization and the World Health Organization;

(*b*) Detailed provisions would be appended to the convention by which a particular treaty body would have responsibility for amending or developing these provisions whenever this proved to be necessary. This is at present the case with the European Agreement on the Exchange of Therapeutic Substances of Human Origin, the European Agreement on the Exchange of Blood-Grouping Reagents and the European Agreement on the Exchange of Tissue-Typing Reagents.

The purpose of adopting either of these approaches for a framework treaty would be to attempt to overcome the problems already mentioned regarding the difficulty of amending a convention once it has entered into force.

Recommendations

17. Recommendations to Governments may be made by the Committee of Ministers in accordance with Article 15(*b*) of the Statute of the Council of Europe:

> "In appropriate cases, the conclusions of the committee may take the form of recommendations to the governments of Members, and the committee may request the governments of Members to inform it of the action taken by them with regard to such recommendations."

In practice, recommendations to Governments have frequently been embodied in resolutions of the Committee of Ministers and have been of great importance in implementing decisions of the Committee in pursuance of the Council of Europe Work Programme.

18. Recommendations to Governments have certain advantages over conventions in that, while great care must be taken in their preparation, in general they are easier to draw up than conventions and thus are more quickly made ready for adoption. Also, through being adopted in the form of a decision of the Committee of Ministers, they take effect immediately and directly and are not dependent for their operation on any further act of agreement by member States. Furthermore, they are more readily susceptible to amendment, should the need arise, by the passing of a further resolution on the same subject varying the recommendations originally made.

19. On the other hand, while recommendations take effect automatically with regard to all Council of Europe member States, the legal force they possess on being adopted is not the same as that which is attributable to conventions. While conventions are legally binding and enforceable in international law, recommendations, by definition, "recommend" a course of action to Governments which they may or may not subsequently choose to follow. While Governments may be under moral and political pressure to ensure its implementation, the legal duty to act upon the recommendation goes no further than to consider in good faith whether it should be implemented. Thus, while a recommendation has the advantage of being directly applicable to Governments, it lacks the legally binding force of a convention and is therefore normally less effective as a means of influencing the action of Governments.

20. According to Article 20(*a*) of the Statute of the Council of Europe, resolutions of the Committee of Ministers which embody recommendations under Article 15(*b*) require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee. The need for unanimity among the votes cast may lead to the result that the text of a recommendation which is finally adopted may be only a minimum solution which is possibly less far-reaching than a majority of representatives had originally envisaged and would have been willing to accept. In addition, it should be noted that, in accordance with Article 10 (2)(*c*) of the Rules of Procedure for the meetings of the Ministers' Deputies, a Deputy may express a reservation in relation to a text even though he does not vote against it.

21. In an attempt to encourage the implementation of its recommendations, the Committee of Ministers in 1959 decided to require the transmission of annual reports to the Secretary General of the Council of Europe on action taken to implement each recommendation. The general rule as to the presentation of annual reports, however, is qualified by the inclusion of express provisions, in particular recommendations, designating some other period for report, such as two, three, four or five years. Thus at present there is a twofold "control system" in operation with reports being presented annually under the general rule or at other periods in accordance with specific provisions. This system is not entirely satisfactory, as it necessitates the preparation by Governments of a steadily increasing number of reports each year, thus placing a heavy burden on the Governments concerned, as well as the Council of Europe, and at the same time diluting the effect of the report on each individual recommendation. In addition, it must be admitted that only in a few cases are these reports effectively followed up within the Council of Europe. In future, so as to ease the burden on Governments and to ensure

more efficient use of information received, this system will have to be revised so as to operate more selectively. Any solution to the problem of following up recommendations to Governments would probably have to involve:

(*a*) The abolition of the general rule as to annual reports, as well as the amendment of existing specific provisions;

(*b*) Their replacement by a systematic study of reports on a collection of recommendations on the same subject, with a limited number of subjects being selected for reporting each year. This would remove the patchwork appearance of the present system and would allow new recommendations to be allocated, wherever possible, to existing categories and thus to be fitted into the revised scheme.

In addition it should be considered whether it is necessary to request reports from member Governments in every case, but where a follow-up procedure is thought to be desirable this might usefully involve two elements:

(*a*) A follow-up within the Council of Europe in which reports submitted by member Governments are examined by the Secretariat with a view to assisting the Governments in their implementation of recommendations of the Committee of Ministers;

(*b*) Examination of the reports by the competent intergovernmental committee which could then make recommendations to the Committee of Ministers or to member Governments through the Committee of Ministers.

Exchanges of views

22. Exchanges of views are not expressly mentioned in the Statute of the Council of Europe but, although they are an informal means of achieving co-operation, they are nevertheless a means which can produce important practical results. Being of a less formal nature, an exchange of views involves a less arduous process of preparation than the production of a convention or recommendation and can be arranged relatively quickly. Discussion can be limited to States interested in the particular topic in question and so lead to progress in an area which is restricted but in which progress can more rapidly be achieved. Discussion can proceed more rapidly in a smaller group meeting in a less formal context than, for example, the Committee of Ministers and may more easily result in a compromise. Even if an exchange of views produces no definite outcome, it can achieve the useful purpose of providing an opportunity to compare experience in a particular field, which may stimulate action on a national level or lead to further discussion on an international basis.

23. While the exchange of views is undeniably a useful tool, it must be admitted that it is subject to certain limitations. Most importantly, perhaps, it is generally suitable only in certain restricted areas and only in relation to relatively new and unexplored topics or to new problems arising in familiar fields where it is still necessary to compare opinions and share experiences (for example, the question of the transplant of human organs). In the quickly changing conditions of the present, however, such problems arise with reasonable regularity.

24. In principle, an exchange of views should lead eventually to some further action on a national or international level, including the adoption of a convention or a recommendation to Governments, though in some cases the exchange of views might be seen as an end in itself. Where further action is envisaged, an exchange of views should be organized with the aim of assessing the advisability of preparing a formal instrument, choosing between the two possibilities and defining the broad lines of the content of the instrument. Where an exchange of views is used as an end in itself, it should lead to something more than only a short report on the discussions. For example, the parties might agree on a set of significant texts (such as reports, acts and proposed legislation) which could form a file to be sent by the Secretariat to each Government in order to bring this material to the notice of competent government departments. Exchanges of views themselves must not be too informal, as some degree of organization is clearly

necessary. The Secretariat of the Council could play an important role in ensuring a thorough and adequate preparation for an exchange of views in order to ensure that a maximum amount could be achieved by such a meeting. Such preparation could be undertaken alternatively or in addition by one or more Governments.

CONCLUSIONS

25. In the light of the above discussion the following conclusions might be drawn:

Conventions must still be regarded as a basic method of achieving progress in intergovernmental co-operation, especially in relation to subjects which need long-lasting changes in national law or require some special system of collective follow-up or supervision. Their conclusion within the framework of the Council of Europe is governed by a flexible procedure not requiring the express unanimous consent of the member States. Conventions embody legally binding obligations which may eventually be extended beyond the circle of member States of the Organization. Even if few States are interested at the outset, the conclusion of a convention designed to solve a long-term problem may still be justified, as it is quite possible that participation will gradually widen in the course of time. On the other hand, subjects which may suitably be dealt with in a convention should be carefully selected in view of the lengthy preparation involved, possible delays in ratification and the difficulty of subsequent amendment.

Recommendations are the most frequently used instruments for asking Governments to take certain action. They are directly applicable to member States and take immediate effect, but that effect is limited, especially due to their lack of strict legally binding force. Moreover, in view of the need for unanimity a recommendation tends to limit itself to proposing a minimum solution. In general, recommendations are less far-reaching than conventions, but apply immediately to all member States, though it must not be forgotten that they have no binding legal effect upon member States. If they are to be used, it would be desirable to improve the follow-up procedure by instituting a more systematic and effective reporting system. This in turn would warrant the more selective use of recommendations, as Governments must not be swamped with recommendations upon which they are unable to act.

Exchanges of views are a useful informal method of co-operation which may be used when speedy action is required on the national level and a common approach is desirable. They may achieve limited results in themselves or form the basis of future international action. In order to yield positive results such exchanges of views should be based on carefully circumscribed questions, in particular if the subject-matter to be discussed is of a complex nature. They may also be expected to produce their most useful results only in relation to particular topics, such as those which are relatively new and unexplored.

All three methods of co-operation still have a part to play, though under present conditions it may be necessary to revise the balance somewhat. With changes occurring more rapidly, it may be necessary to use conventions and recommendations more selectively. Exchanges of views should be encouraged as one way of dealing with an ever-increasing volume of work and as a way of getting new topics off the ground more quickly, while at the same time recognizing that a more formal step, including the preparation of a convention or the making of a recommendation, may subsequently be needed to achieve definite and lasting results.

26. In order to ensure a greater awareness of the considerations involved in the preparation of draft conventions and agreements and of recommendations to member Governments, it is suggested that this report should be distributed to all competent committees within the Council of Europe structure which are entrusted with the preparation of such instruments.

These committees should be invited to take into consideration the following *criteria* when examining the form which might eventually be given to an item of the Work Programme. In particular, the following points might be emphasized:

(*a*) A topic should be considered as being suitable for the drafting of a *convention* if there is a need for compulsory State undertakings, taking into account the need to assure the security of international relations. In this respect, it should be noted that a convention may be drafted not only so as to contain itself compulsory provisions but also to act as a framework for further enactments or the elaboration of compulsory regulations.

(*b*) A *recommendation* should be regarded as the appropriate instrument if its purpose is mainly to establish principles of conduct for member States in the particular area under examination and to organize an exchange of information on how those principles are to be implemented in member States, possibly with a view to further examination within the Council of Europe as to the follow-up which might be required as a result of the experience gained in implementing these principles.

(*c*) Greater recourse than in the past should be made to a simple *exchange of views* within the Council of Europe on those questions where very immediate problems are involved or where it is necessary to decide upon the scope and content of the problems involved before a solution can be sought. Attention has to be drawn to the fact that recourse to an exchange of views might very well lead at a later stage to the preparation of a convention or recommendation but that this should not be necessary in every case. An exchange of views under some circumstances might be sufficient in itself provided that its results are clearly and extensively recorded, unless there are special reasons why they should remain confidential, and by appropriate means are brought to the attention of all those responsible in member States for dealing with the problem concerned.

NOTES

[1] Dans la terminologie du Conseil de l'Europe, la différence entre une convention et un accord réside dans la manière selon laquelle un Etat membre peut exprimer son consentement à être lié par le traité; pour une convention, c'est nécessairement la ratification, l'acceptation ou l'approbation, consécutive à une signature; pour un accord, ce peut être une simple signature.

[2] L'Assemblée consultative compte à l'heure actuelle 170 membres. Ils sont nommés ou élus par les parlements nationaux parmi leurs membres. Le nombre des sièges attribués aux délégations va de deux à dix-huit, en fonction de la population.

[3] Le Comité des ministres est composé des vingt et un ministres des affaires étrangères des Etats membres. Les ministres se réunissent en principe deux fois par an. Entre-temps, leurs délégués, qui sont les représentants permanents de leurs gouvernements auprès du Conseil de l'Europe, ou les adjoints des délégués, se réunissent une quinzaine de fois dans l'année.

[4] Article 17 : "Le Comité des ministres peut constituer à toutes fins qu'il jugera désirables des comités ou commissions de caractère consultatif ou technique." Ces comités sont appelés ci-après "comités de l'article 17".

[5] Environ 35 p. 100 pour l'Assemblée consultative et 40 p. 100 pour les comités d'experts.

[6] Dans certains cas, toutefois, lorsque c'est l'Assemblée consultative qui a pris l'initiative, elle peut proposer un projet.

[7] Il n'y a à l'heure actuelle qu'un seul exemple d'un instrument conventionnel proposé et préparé par un Comité conventionnel. Il s'agit d'un protocole d'amendement, qui n'a pas encore été adopté.

[8] Original in both English and French; only the English version is reproduced here.

[9] The words "of signature or" apply only in the case of an agreement.

[10] The particulars concerning the rules according to which the decision is taken are intended for guidance. Obviously, there are other alternatives, such as: making no stipulation at all, in which case the decision has to be taken by the majority provided for in Article 20(*d*) of the Statute; requiring a unanimous decision by the Committee of Ministers; providing, in addition to the decision by the Committee of Ministers, for the agree-

ment of the States parties which are not members of the Council of Europe. In the text proposed above, "unanimous vote of the representatives of the Contracting States entitled to sit on the Committee" means that all of those States must approve the decision. The decision cannot be taken if some of those States are absent or abstain.

[11] Where a treaty contains no reservation clause, any reservation compatible with the object and purpose of the treaty may be formulated. If such is not the intention of the bodies responsible for drawing up the treaty, who might on the contrary wish that no reservations be made, an article such as the following should be adopted:

"No reservation may be made in respect of the provisions (of this Agreement) (of this Convention)."

Article (*e*) above is only one example of the different arrangements possible for the formulation of reservations, certain of which are already provided for in several Council of Europe agreements or conventions.

[12] The annex might be worded as follows:

"Annex

"(Article *e*)

"Any State may declare that it reserves the right:

"1. to . . .

"2. to . . .".

[13] If formulated when signing the treaty, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

[14] The sentence "No other reservation may be made" is intended to make it clear that the list of authorized reservations is exclusive. This sentence might, however, be deleted in appropriate cases.

C. COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE (CMEA)

1. The elaboration and preparation for signing of multilateral international treaties between the member countries of CMEA on matters of economic, scientific and technical co-operation is normally effected within the Council for Mutual Economic Assistance.

2. International treaties (including multilateral treaties, agreements, conventions and other such instruments relating to matters of economic, scientific and technical co-operation) are prepared within the CMEA on the basis of a recommendation or decision of the appropriate CMEA body. The initiative for raising the question of preparing and concluding a treaty may emanate from one or several member countries of CMEA or from the Secretariat of CMEA.

3. The recommendation to conclude a treaty may be adopted by a CMEA organ with universal competence (the Session of the Council or the Executive Committee of the Council) or by an organ with special competence in the particular field (CMEA committees, the Standing Commissions of CMEA, the Conferences of the representatives of the appropriate organs of CMEA member countries. For example, the session of CMEA, at its thirty-second meeting, approved the long-term specific programmes of co-operation among CMEA member countries in the field of energy, fuel, raw materials, agriculture, the food industry and machine-building for the period up to 1990, and recommended that CMEA member countries take the necessary steps to implement the measures of co-operation included in these specific programmes by concluding the appropriate multilateral and bilateral agreements on

economic, scientific and technical co-operation. The matters on which there is a need to prepare the appropriate multilateral agreements designed to implement the relevant provisions of the specific programmes, as well as the CMEA organs in which these agreements are to be drafted, have already been determined in the specific programmes.

4. The preparation of international treaties is one of the functions of the specialized Standing Commissions of CMEA. For example, the regulations of the Standing Commission on Electric Power provide that the Commission (among its other functions) on the basis of the recommendations or decisions of organs of the Council, "prepares, or organizes the preparation of drafts of multilateral agreements among the member countries of the Council on matters of economic, scientific and technical co-operation in the field of electric power".

5. A draft treaty is normally prepared by an auxiliary working organ (a working group, a conference of experts, etc.) or by the secretariat of the Council, which is responsible under its regulations for preparing, or assisting in the preparation of, drafts of multilateral agreements. The deadline for preparing a draft treaty is set by the CMEA organ, with due regard for the novelty of the subject of the treaty, the complexity of the matters to be regulated, and so forth.

6. All of the basic work involved in reaching agreement on the wording of a draft treaty is usually done in the appropriate working organ. The finished draft is submitted for approval by the CMEA organ which commissioned it. If necessary, additional concordance of all matters which were not fully agreed upon during the preparation of the draft treaty takes place at a meeting of this organ.

7. If the meeting of this CMEA organ does not succeed in reaching full agreement, the draft is either referred to the working organ for completion or submitted for consideration by a higher organ of CMEA.

The fully agreed text of a treaty is approved by the appropriate CMEA organ, which usually recommends that the countries concerned sign the treaty and take measures to approve (ratify) it if that is required by its provisions.

8. Once the treaty is signed, it acquires the force of an independent international legal instrument to which, depending upon its provisions, the relevant rules of treaty law apply, including those relating to possible accessions to the treaty, to ratification, to registration with the United Nations Secretariat, and so forth.

9. The depositary functions of treaties the drafts of which are prepared within CMEA are normally entrusted to the secretariat of CMEA.

10. The following are examples of such treaties registered with the United Nations Secretariat: Convention on the settlement by arbitration of civil law disputes arising out of economic, scientific and technical co-operation relationships, of 26 May 1972; Agreement on the legal protection of inventions, industrial and generally useful designs and trademarks in the context of economic, scientific and technical co-operation, of 12 April 1973; Convention on the application of standards of the Council for Mutual Economic Assistance, of 21 June 1974; Agreement on the unification of requirements with regard to the formulation and filing of patent applications, of 5 July 1975;

Agreement on mutual recognition of inventors' certificates and other titles of protection of 18 December 1976.

D. CUSTOMS CO-OPERATION COUNCIL

1. Under Article III of the Convention signed in Brussels on 15 December 1950, the Customs Co-operation Council is required:

—to study all questions relating to co-operation in Customs matters which the Contracting Parties agree to promote in conformity with the general purposes of the present Convention;

—to examine the technical aspects, as well as the economic factors related thereto, of Customs systems with a view to proposing to its members practical means of attaining the highest possible degree of harmony and uniformity;

—to prepare draft Conventions and amendments to Conventions and to recommend their adoption by interested Governments.

2. In addition to preparing and administering, the Convention on Nomenclature for the classification of goods in Customs tariffs and the Convention on the valuation of goods for Customs purposes, which were signed in Brussels on 15 December 1950, since 1956 the Customs Co-operation Council has prepared ten multilateral Conventions concerning questions of Customs technique.

3. In practice, in elaborating these various multilateral treaties the Council has followed the general pattern of techniqucs and procedures outlined below.

4. In the initial stage, the initiative in proposing the elaboration of a treaty has been taken by member States of the Customs Co-operation Council. Examples are the Customs Convention Governing Facilities for the Importation of Goods for Display or Use at Exhibitions, Fairs, Meetings or Similar Events (Brussels, 8 June 1961) and the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto, 10 May 1973). This initiative may also be taken in response to the wishes of other intergovernmental organizations. Examples are the Customs Convention Concerning Welfare Material for Seafarers (Brussels, 1 December 1964) which was elaborated in response to a Resolution by the Tripartite Sub-Committee of the Joint Maritime Commission of the International Labour Organisation; the Customs Convention on the Temporary Importation of Scientific Equipment (Brussels, 11 June 1968) and the Customs Convention on the Temporary Importation of Pedagogic Material (Brussels, 8 June 1970) which were elaborated in close consultation with UNESCO. Such initiative may also be taken in response to the needs of the International Chamber of Commerce, as in the case of the Customs Convention on the Temporary Importation of Packings (Brussels, 6 October 1960), the Customs Convention on athe Temporary Importation of Professional Equipment (Brussels, 8 June 1961) and the Customs Convention on the ATA Carnet for the Temporary Admission of Goods (Brussels, 6 December 1961).

5. The formal proposal to elaborate a new multilateral treaty has usually been made at a meeting of the Permanent Technical Committee which, under the Convention establishing a Customs Co-operation Council, is required to

assist the Council and is composed of representatives of Council member States; these representatives are officials specialized in technical customs matters, who may be assisted by experts.

6. The decision to elaborate a new multilateral instrument is taken, on a proposal by the Permanent Technical Committee, at a Council meeting attended by delegates representing the Member States of the Customs Co-operation Council.

7. Once the decision has been taken, the General Secretariat of the Council prepares a preliminary draft treaty.

8. The preliminary draft is submitted for comment to all Council members and to interested international, intergovernmental or non-governmental organizations.

9. The preliminary draft, together with the observations and suggestions made by member States and international organizations, is then examined by a Working Party whose meetings are open to representatives of all Council member States and to the observers of the representatives of non-member States and international organizations. This Working Party in fact consists of governmental experts who finalize the text of the draft treaty and refer to the Permanent Technical Committce or the Council any question of principle that they consider to lie outside their competence.

10. If the Permanent Technical Committee so decides, the text drafted by the Working Party is again submitted to member States and intcrested international organizations for comment.

11. The text is then examined by the Permanent Technical Committee to establish the final version of the draft. The Committee may assign it, if necessary, to a drafting group for the improvement of certain provisions.

12. The Permanent Technical Committee then reports to the Council and submits to it the tcxt of the draft treaty. The Council adopts the text and submits it to Member States for signature or accession.

13. As a rule, the Council adopts the draft as its stands, having already been informed through the reports of the Permanent Technical Committee of the various difficulties that may have arisen during the elaboration of the text.

14. Sometimes, the Council itself may make certain amendmcnts to the draft Convcntion submitted to it (for example, in the case of the Customs Convention on the ATA carnet for the temporary admission of goods and the International Convention on the simplification and harmonization of Customs procedures).

15. In as much as the decision to elaborate a treaty is taken by general agreement, following a broad exchange of views, and as the questions involved are purely techncial, the elaboration process is usually relatively short. For example, the preparatory work on the Customs Convention Governing Facilities for the Importation of Goods for Display or Use at Exhibitions, Fairs, Meetings or Similar Evcnts was begun by the Permanent Tcchnical Committee in September 1959 and the Draft Convention was adopted by the Council on 8 June 1961. On the same date, the Council adopted the text of the Customs Convention on the Temporary Importation of Professional Equipment, which had been elaborated over the same period. Preparatory work on the elaboration of the Customs Convention on the ATA Carnet for the Temporary

Admission of Goods was begun in October 1960 and the final text of the Convention was adopted by the Council on 6 December 1961. The resolution by the International Labour Organisation which led to the Customs Convention Concerning Welfare Material for Seafarers was communicated to the Customs Co-operation Council in 1962 and the text of the Convention was approved by the Council on 1 December 1964. Preparatory work on the elaboration of the Customs Convention Concerning the Temporary Importation of Scientific Equipment was begun by the Permanent Technical Committee in October 1966 and the draft Convention was adopted by the Council on 11 June 1968.

16. In this connexion, it is worth noting that the Council's Permanent Technical Committee meets twice yearly. In October 1972 the length of its sessions was reduced from two to one week; however, at the same time, the Working Party, which had previously met only during the week preceding each Committee session, had extended its meetings from one to two weeks.

17. At present, when the elaboration of an international treaty appears as an item on the Permanent Technical Committee's agenda, the discussions usually take up about two days of the session.

18. On the other hand, some meetings of the Working Party have been entirely devoted to the finalization of the texts of draft Conventions. In addition, of course, there is the preparatory work done by the secretariat.

19. The International Convention on the Simplification and Harmonization of Customs Procedures is a special case, inasmuch as it includes Annexes that can be accepted independently of each other by the Contracting Parties.

20. The body of the Convention and three Annexes were adopted by the Customs Co-operation Council at Kyoto on 18 May 1973. Six further Annexes were adopted by the Council on 10 June 1974, three more on 22 May 1975, five more in June 1976 and a further three in June 1977. At the Council's most recent meeting, which took place in June 1978, three more Annexes were adopted.

21. This method was chosen because each Annex concerns a specific Customs procedure and, together with the body of the Convention, constitutes a separate instrument. As it was planned to elaborate some 30 Annexes and as the work was expected to take several years, the Council decided, with a view to obtaining certain immediate results, that the body of the Convention and the first few Annexes should come into force without delay, with the other Annexes necessary to the completion of the work being progressively inserted.

22. The finalization of an Annex to the Kyoto Convention normally takes one year. The Working Party of the Permanent Technical Committee usually devotes about three or four days to the task and the Permanent Technical Committee itself one or two days, depending on the circumstances.

E. EUROPEAN FREE TRADE ASSOCIATION (EFTA)

1. The activities of EFTA are partly the result of the provisions of the Stockholm Convention and partly the result of the desire to take complementary action.

2. The first type of activities deals essentially with the operation and administration of the already established free trade area. They consist in

actions and decisions taken by the organs mentioned in the Convention; sometimes they take the form of agreements between the member States reached within the competent organs of the Association.

3. The second type of activities deals with subjects not directly related to the provisions of the Stockholm Convention. They mainly consist in measures aimed at eliminating non-tariff barriers to trade. In this context the following Conventions and Agreements have been concluded:

The Pharmaceutical Inspection Convention;

The Convention on the Control and Marking of Articles of Precious Metals; and

The Schemes for the Reciprocal Recognition of Tests and Inspections.

Details of these instruments are set out in the Annex.

4. The general pattern followed in their elaboration was that subjects for possible agreements were first discussed at experts level; a matter was then only pursued if it was not already or could not be dealt with satisfactorily in a wider forum than EFTA. In the course of the elaboration of an instrument, also interested circles were consulted. The final draft was adopted in the Councils and/or submitted for signature. The two Conventions mentioned entered into force after a certain period following the deposit of the fourth or fifth instrument of ratification respectively.

ANNEX

1. *Pharmaceutical Inspection Convention*

Signed in Geneva on 8 October 1970.

Entered into force on 26 May 1971.

Purpose: to facilitate trade in pharmaceutical products, by providing for the recognition of inspections in respect of the manufacture of pharmaceutical products.

Parties: the EFTA countries Austria, Finland, Iceland, Norway, Portugal, Sweden and Switzerland, and Denmark, Hungary, Ireland, Liechtenstein and the United Kingdom.

2. *Convention on the Control and Marking of Articles of Precious Metals*

Signed in Vienna on 15 November 1972.

Entered into force on 27 June 1975.

Purpose: to facilitate trade in articles of precious metals (gold, silver and platinum) by providing a Common Control Hallmark.

Parties: Austria, Finland, Sweden, Switzerland and the United Kingdom.

3. *Scheme for the Reciprocal Recognition of Tests and Inspections carried out on Ships' Equipment*

Entered into force on 1 January 1971.

Purpose: to facilitate trade in ships' equipment by providing for the recognition of tests and inspections thereof.

Participating are authorities responsible for approving any kind of ships' equipment in Denmark, Finland, the Federal Republic of Germany, Iceland, the Netherlands, Norway, Portugal, Sweden, the United Kingdom and Yugoslavia.

4. *Scheme for the Reciprocal Recognition of Tests carried out on Agricultural Machines and Tractors for Operational Safety and Ergonomics and for Road Traffic Safety*

Entered into force on 1 September 1972.

Purpose: to facilitate trade in agricultural machines and tractors by providing for the recognition of tests and inspections thereof.

Participating are authorities responsible for approving any kind of agricultural machines and tractors in Austria, Denmark, Finland, Norway, Portugal, Sweden, Switzerland and the United Kingdom.

5. *Scheme for the Reciprocal Recognition of Tests and Inspections carried out on Lifting Applicances*

Entered into force on 1 January 1978.

Purpose: to facilitate trade in lifting appliances by providing for the recognition of tests and inspections thereof.

Participating are authorities responsible for approving lifting appliances in Austria, Finland, Iceland, Norway and Switzerland.

6. *Scheme for the Reciprocal Recognition of Heating Equipment using Liquid Fuel*

Entered into force on 1 January 1978.

Purpose: to facilitate trade in heating equipment using liquid fuel by providing for the recognition of tests and inspections thereof.

Participating are the competent approval bodies in Austria, Finland, Iceland, Norway, Portugal, Sweden and Switzerland.

7. *Scheme for the Mutual Recognition of Evaluation Reports on Pharmaceutical Products*

Entered into force on 13 June 1979.

Purpose: to facilitate trade in pharmaceutical products by providing for the recognition of evaluations of pharmaceutical products with a view to their registration.

Participating are authorities responsible for the registration of pharmaceutical products in Austria, Finland, Norway, Sweden and Switzerland.

8. *Agreement* (under Article XXIV of the GATT)

Signed in Geneva on 26 June 1979.

Entered into force on 1 May 1980.

Objective: free trade in industrial products.

Parties: The seven *EFTA* countries (Austria, Finland, Iceland, Norway, Portugal, Sweden and Switzerland on the one hand, and Spain on the other hand).

The negotiations took place in plenary meetings which were prepared by expert groups. The positions of the EFTA countries were, after consultations between them, presented by a spokesman. The EFTA Secretariat provided legal and technical assistance during the negotiations.

A Joint Committee established under the Agreement has the task to administer the Agreement and supervise its application. The Committee, which is served by the EFTA Secretariat, is authorized to amend certain provisions of the Agreement.

F. EUROPEAN SPACE AGENCY (ESA)

1. *Introduction*

1. The European Space Agency (ESA) is an international governmental organization composed of 11 West European States. Its main purpose is to promote and provide for co-operation for exclusively peaceful purposes between its members in space research, technology and applications thereof and to carry out scientific and applications programmes in space.

2. The European Space Agency, as a technical international organization, needs a flexible legal framework in order to be able to adjust itself to the difficulties which appear constantly during the execution of technical programmes. It means that most legal instruments used by ESA in respect of its contacts with other bodies are not in the range of the classical form of treaties. Therefore, it could be more suitable to use the word agreement for the instruments used by ESA.

2. *The legal framework*

3. Due to the recent re-organization of European space co-operation a rather complex situation has arisen. The ESA Convention was signed in 1975 by the 10 former ELDO/ESRO member States and Ireland. Since only 6 of the 10 ELDO/ESRO members have deposited their instruments of ratification the ESA Convention is not yet in force. The member States have decided to pursue their activities under the former ESRO Convention while attention is paid in the greatest possible extent to the ESA Convention. This implies that the agreements signed by the Agency before 1975 are governed by the ESRO Convention and those after 1975 have been concluded *de facto* under the ESA Conventions. It is therefore imperative to treat both kinds of agreements separately.

3. *The treaty-making power*

4. Under both the ESRO and ESA Conventions, treaty-making power is attributed to the Council. Voting procedures are laid down in the Conventions. The conclusion of the agreement lies within the competence of the Agency, represented by the Director General, after final approval by the Council and recommendation by subordinate bodies such as the Administration and Finance Committee or technical boards.

4. *The ESRO agreements*

5. Under the ESRO Convention a special project outside the agreed (scientific) programme but within the scope of the Agency could be subject to an agreement between member States and the Organization. Due to the fact that the Convention provided no clauses about the conclusion of such agreements, the member States resorted to the formal conclusion of agreements with the possibility of the reservation that the agreement was subject to ratification. In practice programmes could be started (and had to be) before the participating member States had formally approved the agreement. So under the ESRO Convention the classical procedure such as negotiations, signature and ratification were used for the adoption of legal instruments.

5. *The ESA agreements*

6. The ESA Convention distinguishes two fundamental groups of activities carried out by the Agency:

(*a*) Mandatory activities in which all member States participate on a GNP basis: studies on future projects and technological research, scientific programme;

(*b*) Optional programmes in which all member States participate except if they formally declare that they are not interested in participation: development and operation of launching systems, pre-operational applications satellites.

The "arrangements" between the Agency and the participating members to carry out optional programmes can be classified as multilateral agreements.

(a) *Legal framework*

7. Annex III to the ESA Convention provides for 5 steps in the adoption of an optional programme:

(i) Any proposal brought up before the Council is submitted for study to the member States;
(ii) The Council agrees to carry out the programme in the framework provided by the Agency;
(iii) Declaration of the member States who will carry out the programme, define the content of the programme and the budgetary assignments;
(iv) Adoption by the Council of the rules of implementation.

The system provided by the ESA Convention is a great innovation in the field of multilateral agreements. The formal treaty procedures are replaced by a system similar to the form of concurring wills, which results in a considerable gain of time and a simplification of legal procedures. The Declaration is not signed and not submitted to ratification procedure because it is made within the legal framework already established by the Convention.

(b) *The practice*

8. The proposal for an optional programme can be forwarded by both the Agency and the members. Mostly the project will be referred to the Director General for study and preparation. The latter will report to the Council and its subordinate bodies about the feasibility of the programme, an item which will have been discussed at length with the delegations of the member States. This implies that when the matter and the legal texts appear before the Council consensus will have been reached already in most of the cases and most of the difficulties will have been solved during the elaboration of the report. Very few amendments are in fact introduced at this final stage.

6. *The Memorandum of Understanding of AEROSAT*

9. While most of the agreements signed by the Agency are bilateral, the most notable exception is the Memorandum of Understanding of AEROSAT concluded in 1974. Its full name is Memorandum of Understanding on a joint programme of experimentation and evaluation using aeronautical satellite capability. It was signed by ESRO, F.A.A. and the Government of Canada. The negotiations were conducted by a mixed delegation of the Agency and the member States and back-up talks were held with the Administrative and Financial Committee and with the Aerosat Programme Board. The Council approved the MOU and it was signed by the Director General.

7. *Conclusion*

10. The European Space Agency, as a technical international organization, needs a very flexible legal framework to function correctly. This implies that most agreements are "working agreements" that do not amount in form to the juridical value of multilateral treaties. The innovation of the system of optional programmes has made a formal approach to agreements superfluous, as for the relations between member States and the Agency. Multilateral treaties are not excluded under the ESA Convention but co-operation with entities other than member States is mostly conducted on a bilateral basis.

G. INTER-AMERICAN DEVELOPMENT BANK

1. Since the Inter-American Development Bank is an operational institution in the sense that it uses its resources for the purpose of contributing to the acceleration of the process of economic and social development of the regional developing member countries by means of providing loans and technical assistance and other related activities, rather than a legislating entity engaged in the preparation of treaties, recommendations or other legal instruments, we think that the questions listed in Annex 1 of Document A/36/553 should be answered by the latter type of institutions.

2. We should mention, though, that the task being undertaken by the General Assembly in order to improve the multilateral treaty-making process is an important one and very useful for the international organizations.

3. During the 1972-1977 period the Inter-American Development Bank expanded and almost doubled the number of its member countries, incorporating for the first time a number of non-regional member countries. In early 1972 membership in the Bank consisted of 23 regional countries; by the end of 1977 this membership had increased to 41 countries—26 regional and 15 non-regional. We think that the procedures and techniques utilized to carry out this expansion in membership may be both of interest and relevant to the report requested by the General Assembly.

4. This expansion started with Canada (May 1972) and was followed by the incorporation of Belgium, Denmark, Germany, Israel, Japan, Spain, Switzerland, the United Kingdom and Yugoslavia (July 1976); Guyana (November 1976); Austria, France and the Netherlands (January 1977); Italy (May 1977); Finland (June 1977); Sweden (September 1977) and the Bahamas (December 1977). It should be emphasized that this process should not be regarded as completed and that, under appropriate circumstances, additional countries—regional or non-regional—may still join the Bank in the future.

5. Apart from the obvious political and financial complexities entailed in the execution of the aforementioned non-regional membership exercise, significant changes were made to the international agreement which established the Bank. These amendments to the Agreement Establishing the Bank were first approved by our Board of Governors in accordance with the relevant amendment provisions of the Agreement (Article XII) and were subsequently ratified in compliance with the internal legislative requirements of each existing regional member country. During this same period within which the

amendments became effective the Bank and the prospective non-regional member countries concluded an ad-referendum agreement (the General Rules) on the terms and conditions of entry which, thereafter, was only duly ratified by these same countries as well as the existing regional member countries.

6. Both the uniqueness of this non-regional membership exercise and the relatively short time within which it was accomplished are evidenced by the documentation which we are presently attaching for your perusal. Among those procedural techniques which were utilized by the Bank in the course of this exercise and which would be highlighted as being relevant to the request of the General Assembly, we could mention the following: first, the establishment by our Board of Goveruors of a Committee with consultation authority as provided by Resolution AG-5/70 attached herewith; secondly, Section 5 of the Bank's by-laws which permits the Board of Governors, on given matters and under qualified circumstances, to take a vote without a formal meeting; and finally the procedures adopted during the 1975-1976 period to permit simultaneous action by the existing regional members to approve the necessary amendments to the Bank's Agreement and by the prospective non-regional members to accept or ratify the Agreement in its amended form.

H. INTERNATIONAL COMMISSION FOR THE SOUTHEAST ATLANTIC FISHERIES[1]

1. Multilateral treaties have been concluded in 1976 and 1977 under the Convention for the Conservation of the Living Resources of the Southeast Atlantic, signed at Rome on 23 October 1969, which came into force on 24 October 1971, and which, to date, has been ratified, accepted, or approved by 16 countries. The purpose of these treaties, called "Agreements", is the allocation of the total allowable catch of certain species among the countries concerned.

2. The basis for these agreements is Article VIII, paragraph 3, of the Convention, which reads as follows:

> "3. (*a*) If the Commission makes a recommendation under paragraph 2 (*g*) of this Article,[2] it may invite the Contracting Parties concerned, as determined by the Commission, to elaborate agreements on the allocation of a total catch quota taking into account the fishing interests of all the countries concerned and ensuring, as far as possible, that all the countries concerned abide by the Commission's recommendation for a total catch quota and by any agreed allocation.
>
> "(*b*) The terms of any such agreement shall be reported by the Contracting Parties concerned to the Commission as soon as possible. Without prejudice to the binding force of such agreements on the parties thereto, the Commission may thereupon make recommendations, pursuant to paragraph 1 of this Article on the subject matter of said agreements."

3. In practice, the Agreements were concluded in 1976 and 1977 in the following manner:

(i) The Recommendation regarding the limitation of the total catch of a species, in one or more areas of the Commission, is normally adopted by the Commission as such; a two-thirds majority of the Contracting Parties present and voting is required. These Recommendations are based on proposals put

forward by the Scientific Advisory Council, a subsidiary body of the Commission.

(ii) The heads of delegation of the countries interested in fishing the species in question in the said area then meet to draft an Agreement to allocate among the countries they represent the global quota set in the Recommendation.

The draft Agreement for the quota allocation is reached by consensus among the heads of delegation of the countries concerned and is based primarily on their catches in previous years and their respective economic interests.

A model text for an Agreement of this nature was adopted in December 1976. In 1977 the text was amended in order to: make provision for the extension of fishing zones by certain coastal States (Article 1); and to give the Contracting Parties to the Agreement the option of transferring quotas (Article 2). These amendments were adopted at the same time as the new Agreement, and were not voted on separately. The principal negotiations among the parties to the Agreement have concerned the size of the allocations.

Once the Agreement has been concluded, the Commission is notified to this effect by an *ad hoc* committee, which also submits a draft of a complementary Resolution, the purpose of which is to provide for putting the Agreement into force as soon as possible.

(iii) The Resolution is adopted unanimously at a plenary session of the Commission, in order to avoid the inconvenience and delay that may arise, on the one hand, from the power to object to Commission Recommendations established in Article IX of the Convention,[3] and, on the other, from the fact that the Agreement must be submitted to the Governments of the countries concerned for ratification or acceptance. This Resolution is, in effect, subject to a simplified objection procedure, which involves a sole delay of 90 days following notification thereof, that is, practically to the end of April of the following year.

(iv) From a chronological point of view, the entire procedure takes place during the two-week annual Commission meeting held in the month of December.

The Agreement, signed by the Chairman in office at the time, is normally published in the Proceedings of the annual Commission meeting. Furthermore, the text of the Recommendation, Resolution, and Agreement is notified without delay by the Executive Secretary of the Commission, who is the Depositary thereof, to the Ministers of Foreign Affairs of the member countries.

In accordance with the resolution, the Recommendation and Agreement adopted in December are applicable from 1 January of the following year, although quota closure for the species in question, the basis for possible penalties through the Scheme of Joint International Enforcement, does not affect each country party to the Agreement until that country's catches have reached the figure allocated to it, which as a general rule takes several months.

The official entry into force of the Agreement, according to the terms of Article 3, paragraph 1 comes about belatedly, due to the delays inherent in the acceptance or ratification process.

NOTES

[1] The original text is in French; this translation was provided by the Commission.

[2] Article VIII, paragraph 1:

"The Commission may make, on its own initiative or on the proposal of a Regional or Stock Committee and on the basis of the results of scientific investigations, recommendations relating to the objectives of the Convention. These recommendations shall become binding on the Contracting Parties under the conditions laid down in Article IX."

Article VIII, paragraph 2:

"The matters with respect to which the Commission may make recommendations shall be:

"2. (*g*) the regulation of the total catch by species, group of species, or, if appropriate, by regions."

[3] Article IX:

"1. Subject to the provisions of this Article, the Contracting Parties undertake to give effect to any recommendation adopted by the Commission in accordance with Article VIII.

"2. Any Contracting Party may, within ninety days of notification of a recommendation, present an objection to it to the Commission and in that event shall not be under an obligation to give effect to the recommendation.

"3. If an objection is presented within the ninety-day period referred to in the preceding paragraph any other Contracting Party may present an objection at any time within a further period of sixty days or within thirty days after notification of an objection presented by another Contracting Party made within the further sixty-day period.

"4. If objections to a recommendation are presented by at least three Contracting Parties, all the other Contracting Parties shall be relieved forthwith of any obligation to give effect to that recommendation; nevertheless, any or all of them may agree among themselves to give effect to it.

"5. Any Contracting Party which has presented an objection to a recommendation may at any time withdraw that objection and shall then, subject to the provisions of the preceding paragraph, give effect to the recommendation within ninety days.

"6. The Commission shall notify all Contracting Parties of each objection or withdrawal immediately upon receipt thereof."

I. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

1. The first and indispensable step in the conclusion of a multilateral treaty within the framework of UNIDROIT lies in the inscription of an item in the triennial Work Programme of the Institute. Topics may be proposed by member Governments, interested international organizations or professional circles, members of the Governing Council[1] of UNIDROIT or the Secretariat. The draft Work Programme is adopted by the Governing Council and approved by the General Assembly.[2]

2. Once a subject has been included in the Work Programme, a preliminary comparative law study is prepared either by a consultant expert (as was the case for example with the work on the warehousing contract and on the quality control of goods) or by the staff of the Secretariat itself. The latter will be based partly on direct research, which is greatly facilitated by the Institute's extensive library facilities, and partly on information provided by Governments

and by the interested international organizations and professional circles (for example, UNIDROIT's work in connection with the legal status of air-cushion vehicles, the hotel-keeper's contract, the leasing contract and the factoring contract).

3. At this stage, a number of alternative solutions are available. In the first place, if the degree of governmental interest has been particularly high, the Governing Council may immediately decide to convene a Committee of Governmental Experts with a view to the preparation of uniform rules on the subject in hand. As a rule, the Committee so created will be a restricted one composed of members designated by those States which have shown the greatest interest in the subject (e.g., the restricted Committees of Governmental Experts on the legal status of air-cushion vehicles and on pleasure navigation), and on the basis of certain guidelines laid down by it the Secretariat will then prepare a preliminary draft set of uniform rules together with an explanatory report for consideration by an enlarged Committee of Governmental Experts.

4. The Governing Council may not, however, be satisfied that the time is ripe for the convening of a Committee of Governmental Experts. In these circumstances it may decide on the basis of the preliminary comparative law report to set up directly a Study Group (e.g., the hotel-keeper's contract), composed of particularly well qualified experts, assisted when necessary by representatives of the interested organizations and professional circles and usually chaired by a member of the Governing Council, with the mandate to prepare uniform rules.

5. Alternatively, the Council may decide to circulate the preliminary report to the Governments of member States and/or the interested organizations and professional circles so as to satisfy itself that there is a reasonable degree of support for the initiative in question. This procedure was followed, for example, in connection with the reports on the warehousing contract and on the quality control of goods. If the replies are positive, the Council will either set up a restricted exploratory Committee drawn from its own membership, assisted when appropriate by outside experts, to report back to it on the desirability or otherwise of continuing work on the subject (e.g., the factoring and leasing contracts) or proceed directly to the constitution of a Study Group (e.g., the warehousing contract).

6. Assuming that a decision has been taken to set up a Study Group, then, as a rule, the first meeting will follow the lines of that of the restricted meetings of Governmental Experts and more or less precise indications will be given to the Secretariat to prepare a set of uniform rules. These will be discussed at subsequent meetings of the Group and the final draft is then submitted to the Governing Council, which may make amendments to the text.

7. In the past, the Council has followed three different approaches in connection with the next stage of the work. In the first place, it may consider that the text is already in a state in which it may be laid before a Diplomatic Conference for adoption by States. This was the case with the 1970 International Convention on Travel Contracts (CCV), but the precedent has not since been followed, as it is extremely hazardous to submit to a Diplomatic Conference, the length of which has been determined in advance, a text which has been elaborated by independent experts and which has at no time been considered by a Committee of Governmental Experts, as in such cases the

chances are greatly increased of substantial changes being made to the text without the necessary time being available for compromises to be reached.

8. Another solution adopted in the past by the Governing Council has been to transmit the text worked out by the Study Group to another international organization with a view to its adoption within the framework of the latter. A notable instance of this procedure being pursued is that whereby UNIDROIT transmitted to UNCITRAL its draft of a law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods.

9. The third avenue open to the Governing Council is that which has been most frequently followed in recent years, namely to transmit the draft together with its accompanying explanatory report to a Committee of Governmental Experts. All member States of UNIDROIT are invited to such meetings, together with those non-member States, international organizations and professional associations which it is considered might be particularly interested in the subject. The increasing use of this method within UNIDROIT (viz. the work which led to the opening to signature of the Washington Convention on the Form of the International Will of 1973 and the present work on the hotelkeeper's contract) is due to a recognition that attention should be paid in the first stages of the preparation of an international instrument dealing with a private law subject to ensuring the highest possible scientific quality of the draft while leaving full scope for States to modify it in the light of political considerations at a subsequent date but prior to the convening of the Diplomatic Conference of adoption.

10. While the tendency has latterly therefore been to communicate drafts to Committees of Governmental Experts, the Governing Council has, in the exercise of the powers conferred on it by Article 14 of the Statute of the Institute,[3] continued to follow the procedures already noted above in connection with drafts elaborated by Study Groups, namely either to communicate them to other organizations with a view to their opening to signature under the auspices of such organizations (as has been the case with the drafts on carriage of persons and goods by road and inland navigation transmitted to the Economic Commission for Europe and on air-cushion vehicles to the Intergovernmental Maritime Consultative Organization[4]) or alternatively to submit them to Diplomatic Conferences of adoption convened by one of the member States of the Institute (e.g., the above-mentioned Washington Convention on the Form of the International Will).

11. The crisis which has characterized the world economy over the last five years or so has however made States more reluctant than formerly to assume the cost of hosting expensive Diplomatic Conferences for the adoption of private law conventions, and in consequence the Secretariat of UNIDROIT has been increasingly attracted by a solution which would consist of the replacing of the traditional Diplomatic Conferences by a simplified procedure according to which the General Assembly of the member States of the Institute could, at an extraordinary session, decide upon the opening to signature by Governments of conventions containing uniform laws. There are precedents for such a procedure in a certain number of international organizations. The Council of Europe submits its drafts to the Committee of Ministers which, in its turn, opens them for signature by the member States, while the draft Con-

ventions of the United Nations Economic Commission for Europe concerning transport law are opened to signature by the member States at sessions of the Inland Transport Committee. Similarly, the International Commission on Civil Status approves its drafts at a special session of the Assembly and submits them to Governments for signature.

12. This proposal is at present under study by the competent organs of the Institute and it is therefore premature to enter into detailed discussion of the questions which would have to be settled, such as the conditions on which non-member States of the Institute might accede to such conventions and the choice of the depositary State or organization, although these difficulties do not seem to be particularly acute. What is on the other hand certain, however, is that such a procedure would necessitate the careful preparation of the texts by highly representative Committees of Governmental Experts so as to ensure that dispensing with the Diplomatic Conference would not prejudice the subsequent acceptance of the instruments by a wide circle of States.

13. On the question of the time taken in completing international conventions within the framework of the Institute, it is at present customary for the preliminary comparative law report to be prepared within two years of the subject being placed on the Work Programme of the Institute if the topic has been accorded priority, and three years if such priority has not been accorded. Allowing for a year to eighteen months to elapse for the consultation procedure with Governments and interested organizations to be conducted and its results analysed, it is reasonable to assume that a Study Group or Committee of Governmental Experts will be seized of a draft within three to five years of an item having been included in the Work Programme. On average, it would seem that a Study Group requires two or at most three meetings to prepare its final draft (allowing for examination of such a draft by the Governing Council, this usually means a total period of some two to two and a half years). Evidently the decision not to set up a Study Group and the direct convocation of a Committee of Governmental Experts involves an acceleration of the work, and since on the basis of most recent experience it would appear that a Committee of Governmental Experts needs some three or four sessions spread over a period of two to three years to complete its final draft, then it would seem that the total time elapsing between the inclusion of a subject in the Work Programme and the completion of work on a draft by a Committee of Governmental Experts would on average be some five to seven years (seven to nine if a Study Group has also been involved). Thereafter, the Institute has little control over the time at which the international instrument based on the draft is opened to signature, especially so when it has been communicated to another international organization. If the draft is to be adopted at a Diplomatic Conference, then all depends on the speed with which one of the member States of the Institute indicates its willingness to host the Conference. Once such an undertaking has been given, the normal time-limits in such cases are observed, sufficient time being given to States to submit their observations on the draft and for these observations themselves to be communicated to the States and organizations invited to attend the Conference.

14. In conclusion, it should be noted that in the Annex hereto which lists the state of ratifications of UNIDROIT conventions, only those which have been submitted to Diplomatic Conferences convened by member States of the

Institute are included. In other words, the list does not include the large number of international instruments, which now runs into double figures, prepared by UNIDROIT but concluded within the framework of other organizations, as it is assumed that these conventions will figure in the lists supplied by those organizations.

NOTES

[1] Composed of 21 members elected by the General Assembly.

[2] Representing all the member States of the Institute.

[3] Article 14 provides that:

"1. When the study of questions that have been taken up has been completed, the Governing Council shall, if it thinks fit, approve any drafts to be submitted to Governments.

"2. It shall send such drafts to the participating Governments or to the institutes, organizations or associations which made the relevant proposals or suggestions to it, asking them for their opinion on the expediency and the substance of the provisions.

"3. In the light of the answers received, the Governing Council shall, if it thinks fit, approve final drafts.

"4. It shall send these to the Governments or to the institutes or associations which made the relevant proposals or suggestions to it.

"5. The Governing Council shall then consider the best way of convening a Diplomatic Conference to examine the drafts."

[4] A procedure which may involve a certain duplication of effort when the draft is examined by governmental experts both at UNIDROIT and within the organization to which the draft is communicated.

J. INTERNATIONAL WHALING COMMISSION

1. At the 26th Annual Meeting of the International Whaling Commission held in June 1974, the Government of the United States of America submitted a draft protocol to amend the International Convention for the Regulation of Whaling, 1946. As a result the Commission adopted the following resolution:

"*Taking into account* the changes which have occurred in whaling and stocks of cetaceans since the International Convention for the Regulation of Whaling 1946 was signed and bearing in mind the necessity to strengthen the mechanism for the international conservation of whales and their rational management both at present and in the future; and

"*Recognizing* that the discussions in the Law of the Sea Conference may affect the activities of IWC,

"The Commission decides to establish a working group of interested member nations under the Chairman of the Commission. Such working group will commence its work prior to the 27th meeting of the Commission and will discuss problems posed to the present Convention in the light of the situations mentioned in the preambular paragraphs above, including the question of convening a conference of plenipotentiaries."

2. The Commissioners for the following countries indicated their wish to participate in the working group: Argentina, Australia, Canada, France, Iceland, Japan, Norway, South Africa, United Kingdom, USA, USSR.

3. At the 27th Annual Meeting, held in June 1975, the Commission received a document setting out suggestions for amending the convention prepared by a working group of representatives of member nations which had been asked to review the convention in the light of the changes in whaling and the stocks, and the possible impaet of the conclusions of the Law of the Sea Conference on the activities of the Commission. The Commission decided that the doeument should be sent to Contracting Governments for comments. A meeting of the working group will be held to consider the comments received before the 28th Meeting of the Commission.

4. At the 28th Annual Meeting, June 1976, the Working Group set up to review the convention reported that six Governments had replied to the document setting out the changes to the Convention proposed by the Group. Many of the amendments were of a minor nature, and Governments were clearly not in a position to form final views until the outcome of the Law of the Sea Conference was known. The Commission accepted the recommendation that those member Governments that had not replied already should be sent the comments so far received and asked to submit their comments within four months. The Secretariat would then prepare and circulate to Commissioners a new document incorporating all the substantial comments received. The Secretary should also circulate a draft of a covering letter intended for non-member Governments who conduct significant whaling operations or who have stocks of commercial interest off their coasts, suggesting the convening of a meeting of plenipotentiaries to elaborate a new International Whaling Convention. This document would be circulated by the Chairman of the Commission if no objections were received within a further four months, or he would convene another meeting of the Working Group. The timing of the meeting of plenipotentiaries will be decided if possible at the next annual meeting.

5. At the 29th Annual Meeting, June 1977, the Chairman reported on a meeting of the Working Group, attended by Commissioners from Australia, Canada, Japan, the USSR and the USA, held on 16 June 1977. At this meeting, the revised text and amendments proposed by the different countries during the preceding year by postal communication through the Secretariat were collated into a single document.

6. The Commission accepted this document for distribution to countries which have stocks of cetaceans off their coasts, and as a basis for convening a meeting of plenipotentiaries to elaborate a new convention. Canada proposed that there should be a preparatory conference on the boreal spring of 1978 to lay the groundwork for the revision of the convention, and the Commissioner for Denmark indicated that his Government might be prepared to host this preparatory conference.

7. After some discussion about the new convention in relation to the Law of the Sea Conference, the Commission agreed to proceed with this time-table, and noted that the USA would be prepared to consider hosting the meeting of plenipotentiaries in late 1978 or early 1979. Subsequently, at a Special Meeting of the Commission held in December 1977, the Commissioner for Denmark extended on behalf of his Government an invitation to hold a preparatory meeting in Copenhagen the next year. The Commission accepted this offer with gratitude and considered that a four-day meeting, 4-7 July 1978,

would be adequate. The Secretary was instructed to circulate the agreed negotiating text to IWC member nations and ten other whaling nations.

8. Following the preliminary work carried out by a Working Group within the IWC between 1974 and 1978, the Government of Denmark hosted a Preparatory Meeting in Copenhagen in July 1978 "to undertake the preparation of a draft Convention to be considered at a subsequent meeting of plenipotentiaries and to determine arrangements for such a meeting". Invitations to attend were extended to IWC member States and non-member Governments and inter-governmental organizations which had expressed an interest in the matter. A total of 26 delegations took part.

9. Discussion within the meeting quickly highlighted a number of areas where there was a significant divergence of opinion on matters of substance:

Whether, for example, the convention should cover just the great whales or all cetaceans;

Whether there was in fact a need for a whole new convention or simply revision by protocol of the 1946 Convention;

Whether the title and emphasis should be retained as "regulation of whaling" or be replaced by "conservation of cetaceans".

10. These issues could not be resolved, and in reviewing the draft revision of the text as prepared and accepted by the IWC in 1977, the meeting noted that a Drafting Group would need to be set up at some time to deal with general points of wording, style and order of presentation and agreed that, for the time being, in all places in the text (1) where the words "conservation" or "exploitation" appear the style [exploitation] [conservation] [utilization] should be used; (2) a style [whale] [cetacean] would be used in all appropriate places; (3) "Contracting Governments" should be changed to "Parties". Both the existing and the proposed new titles would be retained for consideration, namely International Convention for the Regulation of Whaling and International Convention for the Conservation of Cetaceans.

11. The meeting agreed that final clauses would need to be developed covering ratification, depositary Government, later adherence and withdrawal procedures, and also noted that "there is need for transitional arrangements to smooth the transfer from the 1946 Convention to the new Convention".

12. The meeting agreed that the preparatory work was not yet finished. Insufficient progress had been made to justify a plenipotentiary conference and a further meeting of a preparatory nature was suggested. An intermediate step would be to convene a small Working Group to tidy up the text, eliminate alternatives and consider proposals submitted to the present meeting but not considered through lack of time. These included a draft proposal submitted by Canada which involved an entirely new structure for management and scientific study of the cetacean resources.

13. Portugal offered to convene a Working Group in Lisbon early in 1979. An invitation would be sent to all participants in the Copenhagen meeting, but it was hoped that there would be a core group of seven delegations. The following mandate for the Working Group was developed by the Chairman of the Preparatory Meeting:

1. Retain all texts and proposals made at the Copenhagen meeting and add the Canadian proposal in text form;

2. Review bracketed language and consolidate alternatives where possible without substantive alterations;

3. Carry out editorial and drafting work including revised order of articles, final clauses etc.

4. Present its results as an additional alternative to those drafted in Copenhagen.

14. A further Preparatory Meeting would be held after circulation of the results of the Working Group meeting. Two different views were expressed on the participation in that second Preparatory Meeting:

(*a*) That it should be limited to those invited by Denmark to the Copenhagen meeting;

(*b*) That it should be extended to include all coastal States.

It was pointed out that who was invited might prejudge the questions both of whether the 1946 Convention was being revised or a new convention drafted and whether the scope of the convention included all cetaceans. Because of the fundamental disagreement on the main points of substance as well as the uncertainties arising from recent developments within the Law of the Sea, all participants recorded a general reservation of their positions.

15. A meeting of the Drafting Group was hosted by the Government of Portugal in November 1979 and was attended by seventeen delegations. The meeting agreed to proceed by constructing a new draft document which would show in column format the 1946 Convention text, the Copenhagen meeting text, the agreed Lisbon text and the Canadian proposal. In fact, following extensive discussion, the meeting was able to agree on a text for only the preamble and the first and part of the second articles, and there was a wide divergence of views on how the work should proceed in future, if indeed there was any value in proceeding at all. Finally, it was agreed that the Portuguese Government would communicate with the Governments participating in the meeting to seek their views on future work, especially on the question of whether or not the drafting exercise should be completed.

16. In July 1980, the Chairman of the International Whaling Commission convened an informal meeting to consider whether or not a revision of the Convention could be usefully pursued. Invitations were extended to all member Governments of the IWC and other parties that had attended earlier meetings on this subject. Most participants made statements of their position which served only to emphasize the lack of agreement that existed on the points of major substance already identified. The discussion also underlined the lack of clear distinction between revision of the existing convention and the development of a new convention. There was no formal report of the meeting, but the views expressed and the general consensus which was reached were considered and endorsed at the 32nd Annual Meeting of the Commission in July 1980, which instructed the Secretary "to urge a Government to convene another Preparatory Meeting to improve and update the present Convention".

17. The Government of Iceland hosted such a meeting in Reykjavik, 6-9 May 1981, invitations being extended to all previous participants and new members of the IWC. A thorough and wide-ranging discussion took place on many of the contentious issues and participants had the opportunity to explain opposing points of view. No firm conclusions were reached, however, and the

report of the meeting merely reflects the range of positions which exists. The meeting agreed that the Government of Iceland as the host Government should transmit the report to all the invited parties and to the IWC for consideration and possible future action. It was also agreed that the report might become a meeting document for the 33rd Annual Meeting of the IWC in July 1981.

18. At its 33rd Annual Meeting, held 20-25 July 1981, the Commission received the report of the Preparatory Meeting to Improve and Update the International Convention for the Regulation of Whaling, 1946, hosted by the Government of Iceland in Reykjavik, May 1981.

19. Denmark commented that this had been a more successful session than the earlier meeting in Copenhagen because the discussion had been concerned not with wording but with the principles involved. It proposed that a contracting Government should be urged to continue the initiative, and this was seconded by Japan.

20. Norway commented on the tensions experienced in the Commission, which are also reflected in the report, and Australia wondered if there was need for a spell without meetings. Argentina shared this view, because of the delicate stage of the Law of the Sea Conference. Jamaica spoke on the two major interest groups represented, those concerned with whaling and others concerned with the survival of whales, although these are not necessarily in conflict. The UK had reservations about the usefulness of holding another meeting, but Spain believed the difficulties experienced in the present meeting proved the urgent need to proceed with the revision and updating process. It identified four essential points—the object and purposes of the Convention; the jurisdictional problem; decision taking; and membership of the organization.

21. The USA remarked on the fact that any member is free to offer to host a meeting, and to develop terms of reference, so that discussions of the kind which took place in Reykjavik could be pursued. The Commission agreed to leave the matter as it is for member Governments to take note of what had been said.

22. This matter will be raised again at the 34th Annual Meeting, to be held in July 1982.

K. LATIN AMERICAN FREE TRADE ASSOCIATION

1. Within the framework of the Montevideo Treaty, which established a free trade area and instituted the Latin American Free Trade Association, six protocols and two basic resolutions have been adopted. They have distinctive characteristics, as will be seen below.

2. Two of the protocols are specifically related to the Montevideo Treaty in that they modify some of its provisions. One of the remaining protocols supplements institutional provisions; the others deal with matters of concern to the Association. The process of elaboration has not been the same for all these protocols. The sections below give a brief examination of each protocol, with an indication of the route towards signature.

1. *Protocols amending the Montevideo Treaty*

(a) *Protocol institutionalizing the Council of Ministers of the Association (12 December 1966)*

3. This Protocol was prepared by the Standing Executive Committee—one of the organs of the Association. With the assistance of the secretariat, the Committee formulated a draft, which was submitted to the Ministers for Foreign Affairs for their consideration and signature.

4. The process of preparation was clearly political, and the Protocol was adopted by a political organ.

(b) *Caracas Protocol amending the Montevideo Treaty (12 December 1969)*

5. Inasmuch as the period within which the free trade area was to be brought into full operation under the Montevideo Treaty was considered too short, the Contracting Parties decided to extend it to 1980. That called for an amendment to the Treaty. The draft was prepared by the Committee and submitted to the Conference, which endorsed the text. It was not submitted to the Ministers for Foreign Affairs for consideration, as in the previous case. The decision was a political one that followed a political process.

2. *Protocol supplementary to the Montevideo Treaty: Protocol for the Settlement of Disputes (2 September 1967)*

6. This Protocol is the only one that was adopted within the framework of the Association after being worked on by jurists. The Committee decided to establish a working group, composed of jurists appointed by the Contracting Parties, to prepare a text. When this was done, the preliminary draft was submitted to the Committee, which examined it, made some amendments and referred it to the Ministers for Foreign Affairs for consideration. The text was signed by the Ministers.

7. Concurrently, there was a discussion by the jurists and later by the Committee concerning the establishment of provisional machinery pending the entry into force of the Protocol.

3. *Other protocols and treaties*

(a) *Protocol on the Transit of Persons (12 December 1966)*

8. Since it was felt that enabling the Area's businessmen and industrialists to travel freely within the territories of the Contracting Parties would promote the process of integration, a meeting of the Parties' experts was convened. This was not a meeting of jurists, but of public officials with experience of such matters. Once the draft had been prepared by these experts, on the basis of instructions, it was submitted to the Committee, which referred it to the Ministers for Foreign Affairs for consideration. It was adopted at the same time as the Protocol institutionalizing the Council of Ministers.

(b) *Water Transport Agreement of the Association (30 September 1966)*

9. Of all the agreements adopted within the framework of the Association, this one took the longest to prepare. The initial studies began in 1962

after several meetings of the Advisory Committee on Transportation, composed of experts from the Contracting Parties.

10. When work was well under way, the Conference recommended that a water transport agreement should be concluded. In 1966, a committee met to prepare for the session of the Transport and Communications Council and formulated a preliminary draft agreement. Participants in this meeting were not only jurists, but also marine experts and other experts in this field. Also in 1966, the Council met and adopted a draft agreement. Subsequently, on the initiative of the Executive Committee, a meeting of plenipotentiaries was convened for the sole purpose of signing the treaty.

11. Effective implementation of this instrument has not been possible since it entered into force four year ago, because the Contracting Parties have so far failed to agree on the regulative machinery. In 1966, an attempt was made to hold a meeting with a view to reaching agreement, but the meeting was cancelled at the last minute. The issue has not come up again.

(c) *Privileges and immunities of the Association and its organs*

12. Regulations governing the privileges and immunities of the Association and its officials, embodied in the Montevideo Treaty, followed a rather distinctive procedure.

13. At its first session in 1961, the Conference adopted two resolutions: 6 (I), concerning privileges and immunities in the territories of member States; and 7 (I), concerning the territory of the headquarters country: Uruguay. These two resolutions were adopted by what was then the supreme organ of the Association, namely, the Conference.

14. However, it was felt that, in the case of Uruguay, it was necessary to draft a text reproducing word for word the provisions of resolution 7 (I) and submit it to Parliament for its approval. That was done, and Uruguay deposited the instrument with the secretariat in due course.

15. With respect to the other resolution, 6 (I), it was felt that ratification by each of the Contracting Parties was necessary, even though, in my opinion, that resolution was legally binding at the international level. The resolution was thus ratified, and some Contracting Parties have deposited their respective instruments with the secretariat.

4. *General considerations*

16. There is no one technique for the elaboration of instruments; the technique depends on the nature of the instrument. Only one of the protocols was examined beforehand by legal experts. The political factor is clearly predominant.

17. All the protocols, including the two aforementioned Conference resolutions, followed the traditional ratification procedure. The chronic disease—delay in the ratification of treaties—is acute in LAFTA; only the political instruments, which absolutely had to be ratified if a crisis was to be avoided, have been ratified by all Parties. It should be noted that the Caracas Protocol was ratified by Uruguay virtually on the deadline set by the Montevideo Treaty (1973), a deadline extended to 1980 by the Protocol.

L. LE COMITÉ INTERNATIONAL DE LA CROIX-ROUGE (CICR)

1. *Introduction*

1. Une étape décisive a été franchie dans les limitations opposées à la guerre lorsque a été signée à Genève, en 1864, la première "Convention pour l'amélioration du sort des militaires blessés dans les armées en campagne". Ses 10 articles ont assis le droit international humanitaire sur des principes généraux que n'ont jamais démentis les instruments juridiques postérieurs. Plutôt qu'une remise en cause de ses bases, l'histoire du droit de Genève reflète une extension constante de la notion de protection à des catégories plus larges de victimes et à des situations nouvelles provoquées par le développement des techniques de communication et d'armement et par l'évolution de la conception de la nature des conflits. C'est souligner à quel point les Conventions de Genève sont marquées par la continuité des efforts entrepris par le Comité international de la Croix-Rouge, continuité dont est directement fonction la technique d'élaboration des traités touchant au droit humanitaire.

2. Dès l'origine, en effet, et durant toute son œuvre, le CICR a désiré atteindre ses buts fondamentaux, la protection des victimes des conflits armés au sens le plus large, non seulement par des mesures pratiques ou d'organisation — telle la création de sociétés de secours dans chaque pays ou l'envoi de délégués sur place — mais aussi et tout autant par la consécration de ses efforts dans le droit international public. Ce dernier devait "sanctionner", comme l'écrit Henry-Dunant dans son ouvrage "Un souvenir de Solférino", la protection recherchée pour les victimes; il devait aussi — aspect souvent laissé de côté — faciliter l'aide que leur apportent les agents de l'Etat ou les organisations de secours, notamment la Croix-Rouge.

3. Cet effort a conduit le CICR à prendre l'initiative de préparer dix Conventions internationales, qui sont entrées en vigueur et qui sont les suivantes :

1. La Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne, du 22 août 1864. (Elle sera désignée désormais par l'abréviation "la Convention de Genève".)

2. La Convention de Genève du 6 juillet 1906 (révision de la Convention précédente).

3. La Convention de Genève du 27 juillet 1929 (révision de la Convention précédente).

4. La Convention de Genève du 12 août 1949 (révision de la Convention précédente) dont le titre, "militaires blessés", se transforme en "blessés et malades" et "armées" devient "forces armées".

5. La Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer du 12 août 1949 (révision de la X^{e} Convention de la Haye du 18 octobre 1907, pour l'adaptation à la guerre maritime des principes de la Convention de Genève de 1906).

6. La Convention de Genève relative au traitement des prisonniers de guerre, du 27 juillet 1929.

7. La Convention de Genève relative au traitement des prisonniers de guerre, du 12 août 1949 (révision de la Convention précédente).

8. La Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949.

9. Le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux, du 10 juin 1977. (Il s'intitulera par la suite "Protocole additionnel n° 1".)

10. Le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux, du 10 juin 1977. (En abrégé, "le Protocole additionnel n° II".)

4. En outre, le CICR a préparé quelques réglementations de droit humanitaire qui ne sont pas entrées en vigueur, mais qui ont été utiles, ultérieurement, dans l'élaboration des Conventions précitées. Il s'agit notamment:

— Des articles additionnels à la Convention de Genève de 1864, du 20 octobre 1868, véritable convention, mais non ratifiée;

— Du projet de convention concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'un belligérant ou sur un territoire occupé par lui, présenté par le CICR à la XV[e] Conférence internationale de la Croix-Rouge (Tokyo, octobre 1934) [dit projet de Tokyo"];

— Du projet de règles limitant les risques courus par la population civile en temps de guerre, présenté par le CICR à la XIX[e] Conférence internationale de la Croix-Rouge (New Delhi, novembre 1957).

Sans pouvoir prendre déjà en considération les Protocoles additionnels de 1977, qui entreront en vigueur le 7 décembre 1978, il faut relever que les huit autres Conventions internationales qui sont énumérées ci-dessus ont été sanctionnées très tôt d'une acceptation universelle. En 1867, toutes les grandes puissances d'alors avaient ratifié la Convention de 1864, à l'exception des Etats-Unis, qui s'y sont ralliés en 1882. Les Conventions suivantes ont reçu une consécration diplomatique comparable.

5. Le nombre étendu des conventions entrant en ligne de compte, leur consécration quasi universelle et surtout les services qu'elles ont rendus à l'humanité, même quand leur application ou leur contenu est apparu insuffisant, portent témoignage de la pratique et de l'expérience acquises par le CICR en matière d'élaboration du droit international humanitaire applicable dans les conflits armés. De cette pratique et de cette expérience, le CICR a-t-il dégagé une méthode d'élaboration des traités qui lui soit propre? Le mémorandum adressé par le CICR en février 1945 aux gouvernements des Etats parties à la Convention de Genève et aux Sociétés nationales de la Croix-Rouge apporte un premier élément de réponse :

"Le CICR se propose d'adopter à cette fin une méthode analogue à celle qu'il a suivie après la première guerre mondiale, à savoir :

— De réunir tout d'abord une *documentation préliminaire* aussi complète qu'il se pourra;

— Puis d'établir, si possible avec le concours *d'experts des gouvernements et des Sociétés de la Croix-Rouge*, des projets de conventions révisées et de conventions nouvelles;

— Pour les soumettre ensuite aux *conférences internationales de la Croix-Rouge*;

— *Il espère que les* Etats voudront bien alors, comme par le passé, prendre ces projets en considération et prévoir les mesures propres à leur donner une consécration diplomatique[1].

6. Une étude plus poussée — et ce sera l'objet des pages qui suivent — permettra de nuancer et de compléter cette réponse du CICR, sans en infirmer les éléments essentiels.

7. Il faut souligner d'emblée que cette étude ne portera, dans le processus d'élaboration des conventions précitées, que sur la phase des travaux préparatoires, dont le CICR a assumé l'initiative et la direction, et non pas sur la phase finale de l'élaboration des instruments au sein de la Conférence diplomatique. Quel que soit le rôle important que le CICR ait continué à jouer à ce stade final, en sa qualité d'expert et à titre de rapporteur de fait, ce stade de l'élaboration a incombé principalement au gouvernement chargé de convoquer la Conférence diplomatique, c'est-à-dire au Gouvernement suisse. Par conséquent, il appartiendra à ce gouvernement, dans sa réponse relative à la résolution de l'ONU, A/RES.32/48, du 8 décembre 1977, de faire part de son expérience quant aux méthodes suivies dans l'élaboration finale des Conventions de Genève. Il y a certes des liens très étroits entre les travaux préparatoires assumés par le CICR et la phase finale de la Conférence diplomatique.

8. La présente étude sur les méthodes suivies par le CICR dans les travaux préparatoires des Conventions de Genève portera sur quatre aspects :

— Les organes entrant en ligne de compte. Comme le laisse entendre la réponse précitée du CICR, le mouvement de la Croix-Rouge dans son ensemble, prend une grande importance dans cette élaboration, et il s'agit d'en préciser les différents organes;

— Les initiatives qui sont à la base même de l'élaboration de ces différents traités, les modalités de ces initiatives, ainsi que la délimitation des compétences (droit de La Haye et droit de Genève);

— L'organisation des travaux. Cette section s'étendra notamment sur les différents types de consultation d'experts, trait marquant des méthodes employées par le CICR; et enfin

— L'établissement et la présentation des projets de convention.

2. *Les principaux organes entrant en ligne de compte dans les processus d'élaboration (travaux préparatoires) des Conventions de Genève*

a) *Le CICR*

9. Institution relevant du droit privé suisse et ayant un caractère uninational (le terme "international" s'appliquant à son activité et non à sa composition), le CICR n'a été investi pour la première fois qu'en 1929, par les Conventions de Genève de cette date, de certaines tâches humanitaires précises en cas de conflit armé, tâches qui, confirmées par les Conventions de 1949 et les

Protocoles additionnels de 1977, entraînent certains à considérer qu'il a également en droit international public une personnalité juridique de nature limitée. Cependant, dès l'origine, le CICR s'est considéré habilité à prendre des initiatives pour la création de la Convention de Genève de 1864 et ultérieurement pour le développment et l'expansion du "droit de Genève".

10. Ce n'est pas par ce droit que son rôle, quasi organique dans ce domaine, a été consacré expressément[2], mais il l'a été dans les statuts de la Croix-Rouge internationale de 1928, dont l'article VI, chiffre 7, prévoit que le CICR "travaille au perfectionnement et à la diffusion des Conventions de Genève". C'est sur cette base que se fondent principalement ses compétences dans le domaine des travaux préparatoires, compétence très large comme le montreront les pages qui suivent.

b) *Le mouvement de la Croix-Rouge internationale*

11. Le processus d'élaboration des Conventions de Genève fait intervenir dans une large mesure le mouvement de la Croix-Rouge et la structure à la fois complexe et étendue de ce mouvement. Ce sont, en premier lieu, les Sociétés nationales de la Croix-Rouge, du Croissant-Rouge et du Lion et Soleil-Rouges, dont le CICR a favorisé la création dans chaque pays et dont il est chargé de reconnaître officiellement l'exitence comme membres de la Croix-Rouge internationale, une fois qu'elles remplissent un certain nombre de conditions bien précises. Ces sociétés nationales, actuellement au nombre de 125, ont joué et jouent un rôle important en secondant le CICR dans ses efforts pour la préparation du droit interuational humanitaire, et cela à différents stades et sous différentes formes, notamment dans les réunions d'experts examinées plus loin, mais aussi comme organe de pression, soit auprès de leur gouvernement, soit parmi l'opinion publique, pour faire admettre plus facilement l'opportunité d'un développement du droit international humanitaire.

12. Ces sociétés nationales ont elles-mêmes, en 1919, constitué une fédération, la Ligue des Sociétés de la Croix-Rouge, tournée principalement vers les activités du temps de paix, mais qui elle-même a pris une part active à l'élaboration des protocoles additionnels de 1977.

13. A côté du CICR et des Sociétés nationales, c'est sans doute la Conférence internationale de la Croix-Rouge qui représente l'organe le plus important dans ce processus d'élaboration du "droit de Genève". Autorité délibérante suprême et se réunissant en principe tous les quatre ans, cet organe a une nature particulière, *sui generis* : elle comprend non seulement toutes les Sociétés nationales ainsi que la Ligue et le CICR, mais aussi les représentants des gouvernements parties aux Conventions de Genève. En acceptant ainsi, dès les premières Conférences internationales de la Croix-Rouge de 1867 (Paris) et de 1869 (Berlin), d'être représentés à ces forums, les gouvernements ont tenu à montrer l'intérêt qu'ils portaient à l'œuvre de la Croix-Rouge et le fait qu'ils étaient directement concernés par elle. En vertu des statuts de 1928, la Conférence, par ses résolutions, n'engage pas juridiquement ceux qui y participent, et en particulier les gouvernements. Mais ces résolutions ont du moins pour tous, y compris pour ces derniers, une certaine valeur, disons morale. Le chapitre II de cette étude fera ressortir la portée de la Conférence internationale dans l'élaboration des Conventions de Genève, à la fois comme

élément moteur déterminant du point de vue formel et comme "caisse de résonance" des projets de convention élaborés par le CICR.

c) *Le Gouvernement suisse*

14. Il a été indiqué plus haut, dans l'introduction, que cette étude ne porterait pas sur la phase finale de l'élaboration des Conventions de Genève, c'est-à-dire sur celle de la Conférence diplomatique, parce qu'il appartiendra à la Suisse, pays traditionnellement hôte de cette conférence, de se prononcer sur cette phase dans sa réponse à la résolution A/Res. 32/48 de l'ONU du 8 décembre 1977. Ce qu'il y a lieu de relever ici, c'est que déjà au stade des travaux préparatoires une certaine activité incombe au Conseil fédéral, indépendamment de la participation de ses représentants aux réunions d'experts. Il s'agit, en effet, déjà à ce stade, de s'enquérir des chances de réunir une future conférence diplomatique destinée à aboutir à de véritables instruments de droit international.

15. Les compétences respectives du Gouvernement suisse et du CICR dans ce domaine n'ont été fixées qu'après les deux premières Conférences diplomatiques de 1863 et de 1868 (articles additionnels). Pour ces deux réunions, c'est le CICR qui a pris certaines initiatives directement auprès des délégués gouvernementaux, mais à la fin du XIX^e^ siècle est intervenue entre lui et le Conseil fédéral une entente mettant au point le système qui a prévalu jusqu'à maintenant.

16. Selon ce système, alors que le CICR se charge des travaux préparatoires quant à la matière, il appartient au Conseil fédéral de sonder les Etats sur l'opportunité d'une conférence diplomatique, par l'entremise de ses représentants à l'étranger.

17. Ces activités parallèles et superposées se rejoignent parfois, quand les conférences d'experts convoquées par le CICR émettent elles-mêmes une série d'avis judicieux sur l'opportunité de réunir la future conférence diplomatique. C'est d'ailleurs à la Conférence d'experts gouvernementaux de 1972 qu'un expert suisse a annoncé l'intention du Conseil fédéral de convoquer la conférence ayant abouti aux Protocoles additionnels[3].

d) *L'organisation internationale*

18. La Société des Nations, principalement tournée vers une œuvre de paix, n'a pas pu et n'a pas eu l'occasion de jouer un rôle important dans le processus d'élaboration des Conventions de droit humanitaire, si ce n'est, indirectement, pour le Protocole de Genève de 1925. Au contraire, l'Organisation des Nations Unies a pris, elle, une part marquante, non pas dans l'élaboration des Conventions de Genève de 1949, mais dans celle qui a conduit aux Protocoles additionnels de 1977, en particulier par son intérêt pour la protection des droits de l'homme en période de conflits armés. Dans son rapport présenté à la XXI^e^ Conférence interuationale de la Croix-Rouge (Istanbul, 1969) sur la réaffirmation et le développement des lois et coutumes applicables dans les conflits armés, le CICR s'est longuement étendu sur ses relations avec les Nations Unies et sur la coordination des travaux entre eux[4].

19. Le CICR souligne en particulier, dans ce rapport, qu'il a été considéré comme un organe qualifié pour entreprendre des études

préparatoires non seulement en raison de sa longue tradition dans ce domaine, mais aussi du fait qu'il est un organisme d'action pratique, appelé à exercer son activité humanitaire dans les conflits armés à travers le monde entier et qu'il peut ainsi tirer directement des expériences et constatations faites sur le terrain des enseignements d'une grande importance pour le développement du droit humanitaire.

20. Le CICR a associé étroitement le Directeur de la Division des droits de l'homme à ses travaux, notamment aux réunions d'experts convoquées par lui, et il lui a même réservé la primeur d'un rapport spécial consacré en 1970 à la guérilla et aux conflits internes[5]. Certains experts du CICR ont pris part de leur côté à des réunions d'experts convoquées par l'ONU (en 1970 et 1971).

21. Il est certain, en outre, que les résolutions adoptées par l'Assemblée générale dès 1968, et qui ont pris acte avec satisfaction et encouragé le CICR dans ses efforts, ont constitué également pour lui un appui d'un grand poids dans les travaux préparatoires des Protocoles additionnels de 1977[6].

3. *L'initiative des travaux préparatoires dans l'élaboration du droit international humanitaire et les modalités de cette initiative*

a) *Les fondements réels*

22. Toute l'œuvre du CICR pour le développement du droit international humanitaire a été fondée principalement sur la constatation qu'il a été amené à faire, à la suite de conflits armés et de l'action secourable qu'il a pu y mener, soit de l'insuffisance de certaines normes protégeant des catégories déterminées de personnes et, par conséquent, de la nécessité de les réviser et de les renforcer, soit de l'inexistence de dispositions de protection pour d'autres catégories de personnes et de la nécessité de compléter pour ces dernières le droit international existant.

23. Cette constatation lui paraît, par exemple, si évidente à la fin de la seconde guerre mondiale que, dans son mémorandum précité du 15 février 1945 adressé aux gouvernements, après avoir souligné qu'il sera nécessaire d'envisager pour l'avenir la révision des Conventions de Genève de 1929 à la lumière des expériences faites et la conclusion éventuelle de nouveaux accords, le CICR ajoute qu' "il ne doute pas que les Gouvernements et les Sociétés nationales de la Croix-Rouge ne professent à cet égard une opinion semblable".

24. Les idées qui sont à la base de la codification à entreprendre vont trouver une expression encore plus large dans les travaux du CICR qui aboutiront aux Protocoles additionnels de 1977. Dans son rapport présenté à la XXI[e] Conférence internationale de la Croix-Rouge (Istanbul, 1969), le CICR ajoute à la constatation de l'insuffisance des règles de protection deux autres raisons fondamentales qui militent en faveur d'une nouvelle codification. D'une part, le déséquilibre qui existe "entre le droit de Genève largement développé et le domaine des règles touchant à la conduite des hostilités. . . Or le CICR a été amené à se rendre compte. . . qu'il n'est pas possible de maintenir — ainsi qu'on le pensait parfois — une distinction nette entre ces deux domaines du droit applicable aux conflits armés : les belligérants considèrent forcément ce droit comme un tout et l'insuffisance des règles relatives à la conduite des hostilités se répercute défavorablement sur l'observation des Conven-

tions de Genève[7]. D'autre part, l'élargissement de la communauté internationale : "Vu l'ancienneté des règles de La Haye encore valables et le caractère imprécis des règles coutumières, les nombreux Etats qui ont nouvellement accédé à l'indépendance peuvent avoir quelques difficultés à savoir exactement quelles sont les règles à observer – surtout si leurs dirigeants ont à la mémoire les pratiques contraires des nations plus anciennes. D'où la nécessité de réaffirmer et de préciser ces règles par des instruments et procédures auxquels seront associés ces nouveaux Etats".

25. Mais encore faut-il que le sentiment du CICR quant à la nécessité de réviser les conventions existantes ou de les compléter soit partagé par l'ensemble de la communauté internationale et que ses initiatives en vue des travaux préliminaires puissent se fonder sur une base plus formelle et plus officielle. C'est en général le cas, comme le montrent les pages qui suivent, et le mémorandum du 15 février 1945 que le CICR avait adressé directement aux gouvernements, présumant en quelque sorte leur acceptation de principe, représente plutôt une exception dans les modalités des travaux préparatoires.

b) *Les sources formelles des travaux préparatoires*

i) *Résolutions de Conférences internationales de la Croix-Rouge*

26. C'est le plus souvent les résolutions des Conférences internationales de la Croix-Rouge qui ont apporté un appui formel et officiel aux initiatives prises par le CICR pour développer le droit international humanitaire. Un vœu de la Conférence de 1863 qui fonde la Croix-Rouge est à l'origine de la première Convention de Genève de 1864. La X[e] Conférence internationale de la Croix-Rouge (Genève, 1921) adopta deux résolutions, n° XIX et n° XV, qui sont respectivement à l'origine de la Convention de 1929 révisant celle de 1905 ayant trait aux blessés et aux malades, et de la Convention de 1929 sur le traitement des prisonniers de guerre. Pour les Conventions de 1949, comme nous l'avons vu, le CICR s'est contenté des réponses, le plus souvent positives, qu'il a reçues des gouvernements à son appel du 17 février 1945. Enfin ce sont les résolutions n° XXVIII de la XX[e] Conférence internationale de la Croix-Rouge (Vienne, 1965), relative notamment à la protection des populations civiles contre les dangers de la guerre indiscriminée, et n° XIII de la XXI[e] Conférence internationale (Istanbul, 1969) qui ont fondé les travaux préparatoires des Protocoles additionnels de 1977.

27. Cette dernière résolution portant sur la réaffirmation et le développement des lois et coutumes applicables dans les conflits armés est intéressante à plus d'un titre : elle ne se borne pas à souligner la nécessité de renforcer le droit international humanitaire; elle précise également les étapes des travaux préparatoires, en demandant au CICR "de poursuivre activement ses efforts dans ce domaine, sur la base de son rapport, en vue :

"– D'élaborer, le plus rapidement possible, des propositions concrètes de règles qui viendraient compléter le droit humanitaire en vigueur;

"– D'inviter des experts gouvernementaux de la Croix-Rouge et d'autres experts, représentant les principaux systèmes juridiques et sociaux du monde, à se réunir avec lui afin d'être consultés sur ces propositions;

"– De soumettre ces propositions aux gouvernements, en les invitant à lui faire part de leurs commentaires; et

— De recommander, si la chose est jugée souhaitable, aux autorités compétentes de réunir une ou plusieurs conférences diplomatiques, réunissant les Etats parties aux Conventions de Genève et autres Etats intéressés, pour mettre au point des instruments juridiques internationaux tenant compte de ces propositions."

28. En dépit de la nature particulière des Conférences internationales de la Croix-Rouge, le CICR a toujours considéré — attitude toujours acceptée par les Etats — que leurs résolutions constituaient une base juridique suffisante pour l'habiliter à mener à bien les travaux préparatoires, à s'adresser à cet effet aux gouvernemcnts en vue d'obtenir leur concours, notamment lors des consultations d'experts gouvernementaux examinées plus loin, et pour soumettre, par l'entremise du Conseil fédéral, des projets de conventions révisées ou nouvelles aux Etats appelés à participer à la Conférence diplomatique.

29. Ces résolutions, sources formelles des travaux préparatoires du CICR, ont des contenus très divers. Parfois elles se bornent à manifester le vœu que soient entreprises les recherches nécessaires à l'établissement d'une convention. Parfois, comme la résolution d'Istanbul précitée, elles sont plus précises sur les étapes de l'élaboration de la convnetion. Parfois également, elles contiennent déjà les principes sur lesquels devra reposer la convention à établir. C'est le cas notamment de la résolution n° XV de la X^e^ Conférence internationale de 1921, qui énumérait 13 principes devant être à la base de l'établissement d'un "code des prisonniers de guerre, déportés, évacués et refugiés". De même, la résolution n° XXVIII de la Conférence de Vienne (1965) formulait quatre principes fondamentaux, dont les trois premiers, outre le rôle qu'ils ont joué dans l'élaboration des Protocoles additionnels de 1977, ont été repris et sanctionnés par une résolution de l'Assemblée générale des Nations Unies en 1966 (2444/XXIII).

ii) *Résolutions des conférences intergouvernementales*

30. Parfois la source formelle a résidé dans un vœu encore plus officiel et d'une qualité juridique encore plus incontestable : les résolutions et vœux adoptés lors de conférences diplomatiques elles-mêmes et qui donnaient l'impulsion pour des travaux futurs parfois étendus. Il en est ainsi :

— Du vœu n° X formulé par la première Conférence de La Haye de 1899 en vue de la révision de la Convention de Genève de 1864 (ainsi que des articles additionnels de 1868) — vœu qui a amené le CICR à préparer les projets de la Convention de Genève de 1906;

— Du vœu n° VI formulé par la Conférence diplomatique de 1929 sur la "nécessité de l'élaboration d'une Convention internationale conceruant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'un belligérant ou sur un territoire occupé par lui" — vœu à l'origine des travaux du CICR ayant abouti au "Projet de Tokyo" de 1934.

31. En réalité, de telles résolutions répondent souvent à une solution de compromis entre ceux qui auraient désiré voir la matière traitée par la Conférence en question et ceux qui ne le souhaitaient pas. Ainsi, en 1899, c'est le CICR lui-même qui désirait que la révision de la Convention de Genève de 1864 se fît dans le même cadre que celui qui avait présidé à l'élaboration de ce premier instrument. Quant au vœu n° VI de 1929, alors que les milieux humanitaires avaient souhaité ardemment l'établissement d'une Convention

pour la protection des civils, dans le sens de la résolution rappelée plus haut de la Conférence internationale de la Croix-Rouge de 1921, certains milieux politiques, et notamment ceux de la SDN, étaient réservés à cet égard, estimant qu'un tel instrument évoquait trop l'idée de la guerre, à une époque où la recherche de la paix était encore prédominante.

32. Souvent aussi, la Conférence diplomatique a formulé un vœu que soit poursuivie dans un domaine *plus limité*, parfois *plus technique*, l'élaboration commencée et qu'elle n'avait pas eu le temps de parachever dans le domaine considéré. Tel est le cas :

— Du vœu n° III de la Conférence diplomatique de 1929, recommandant d'étudier plus à fond la réglementation de l'emploi de l'aviation sanitaire en temps de paix;

— Des résolutions n^{os} 3 et 6 de la Conférence diplomatique ayant établi les Conventions de Genève de 1949. La première priait le CICR d'établir un accord type concernant le pourcentage du personnel sanitaire à retenir en fonction du nombre des prisonniers de guerre; la seconde portait sur l'établissement d'un code international réglementant l'usage des moyens modernes de transmission entre les navires-hôpitaux, d'une part, et les navires de guerre et aéronefs militaires, d'autre part.

33. Les résolutions de ce type ont constitué également la base de travaux entrepris par le CICR et dont les résultats ont été communiqués aux gouvernements. Mais, il est intéressant de le relever, en général, ces travaux ont trouvé leur véritable aboutissement non pas dans une réunion diplomatique consacrée spécialement à la question, mais lors d'une Conférence diplomatique générale, ayant porté sur l'ensemble des Conventions de Genève. Ainsi la matière des résolutions n^{os} III de 1929 et VI de 1949 a été reprise et consacrée par le Protocole additionnel n° I.

c) *La délimitation des compétences*

34. Comme le montre le développement des Conventions de Genève, le CICR a été amené à étendre ses travaux préparatoires à des matières qui, jusque-là, relevaient de la compétence d'autres Etats ou d'autres organisations. Il en est ainsi, par exemple, du traitement des prisonniers de guerre, de la protection des civils, de la conduite des hostilités, qui dépendaient du droit de La Haye, ou de la question des armes traitée par les Nations Unies. Comment le CICR a-t-il franchi ce pas ?

35. Il faut bien distinguer deux aspects. En ce qui concerne les travaux préparatoires, le CICR a considéré que les résolutions des conférences internationales de la Croix-Rouge qui prévoyaient elles-mêmes cette extension — telles les résolutions des Conférences de 1921 ou de 1969 — du fait qu'elles avaient été approuvées par les gouvernements représentés, y compris par celui des Pays-Bas, lui donnaient un "feu vert" pour poursuivre ses travaux. Il a tenu d'ailleurs, notamment pour les Protocoles additionnels, à se rendre spécialement à La Haye, en 1970, pour tenir les autorités néerlandaises parfaitement informées de ses études.

36. En revanche, il a toujours considéré qu'il appartenait aux gouvernements intéressés de s'entendre sur la question de savoir qui serait compétent pour présider la phase finale de l'élaboration, c'est-à-dire convoquer la

conférence diplomatique. C'est ainsi, par exemple, que le Gouvernement suisse a convoqué la Conférence diplomatique de 1949 en précisant qu'il le faisait "avec l'assentiment du Gouvernement néerlandais".

37. En ce qui concerne les armes, le CICR, à la demande d'un certain nombre de délégations lors de la Conférence d'experts gouvernementaux, a accepté de prêter son concours[8] pour faciliter la poursuite des travaux portant sur l'interdiction ou la limitation de certaines armes "conventionnelles", mais il n'a pas estimé que cette question relevait nécessairement de sa compétence. Aussi la résolution n° 22[9] de la Conférence diplomatique de 1974-1977 a-t-elle normalement attribué aux Nations Unies la suite des efforts dans ce domaine. Des experts du CICR y sont d'ailleurs associés.

4. *Organisation des travaux*

38. L'action législative du CICR traduit le souci constant d'édifier des instruments qui correspondent suffisamment aux exigences des Etats et de la communauté internationale pour avoir des chances d'être appliqués. C'est pourquoi la phase des travaux préparatoires est marquée non seulement par la constitution au sein du CICR d'une structure appropriée, mais aussi et surtout par de multiples consultations d'experts. Par la variété des personnes ou des entités interrogées, par l'étendue des avis recueillis et par la souplesse des formes qu'elles prennent, ces consultations suivies constituent un des traits les plus marquants du processus suivi par le CICR dans l'élaboration des Conventions humanitaires.

a) *Le processus de consultation*

i) *Les consultations menées par le CICR*

39. Les personnes ou entités consultées par le CICR peuvent, en général, se répartir en trois catégories : les experts interrogés à titre privé et individuel, séparément ou en groupe, les experts de Sociétés nationales de la Croix-Rouge (Croissant-Rouge, Lion et Soleil-Rouges) et les experts gouvernementaux. L'ordre dans lequel sont mentionnées ces trois catégories correspond, le plus souvent, à l'évolution du processus de consultation.

Les experts consultés à titre privé

40. La première catégorie présente une grande diversité. Il s'agit aussi bien de personnes privées, spécialisées dans tel ou tel domaine, que d'organisations, telles que l'International Law Association ou l'Institut de droit international, ou enfin d'institutions caritatives. Ce type de consultation se distingue de ceux qui sont décrits plus loin en ce sens qu'il s'agit toujours de personnalités invitées *directement* par le CICR, le plus souvent à ses frais, et ne représentant qu'elles-mêmes. Il va sans dire que, pour le choix de ces personnalités, le CICR a reçu fréquemment une aide précieuse des Sociétés nationales de la Croix-Rouge.

41. Si, tout au long de sa pratique d'élaboration des traités humanitaires, le CICR a recouru à ce premier type de consultation, celui-ci a pris cependant une importance particulière dans les réglementations qu'il a préparées après la seconde guerre mondiale, et notamment pour les Protocoles additionnels de 1977. Pour ces derniers, ce ne sont pas moins de cinq séries de consul-

tations d'experts privés qu'il a menées de 1966 à 1971. Il n'est pas inutile de les préciser pour faire ressortir les modalités de ce type de consultation.

— En 1966, afin de mieux déterminer les suites à donner à l'importante résolution n° XXVIII adoptée à la XX^e^ Conférence internationale de la Croix-Rouge (Vienne, 1965), des représentants spécialisés du CICR auront, à Genève ou sur place et sur la base d'un questionnaire envoyé à l'avance, des entretiens approfondis avec une quinzaine de personnalités représentant les principaux courants de l'opinion mondiale[10].

— En 1969, afin de mettre au point le rapport qu'il entend présenter à la XXI^e^ Conférence internationale de la Croix-Rouge (Istanbul, 1969) sur la "Réaffirmation et le développement des lois et coutumes applicables dans les conflits armés", le CICR réunit en janvier une vingtaine de personnalités particulièrement qualifiées par leurs connaissances du droit international ou des réalités politiques et militaires du monde actuel. La liste de ces personnalités, qui figure en note, donne une vue de l'éventail des opinions représentées[11].

— Enfin, en 1971, pour établir les propositions concrètes de règles demandées par la résolution n° XIII de la Conférence d'Istanbul, le CICR mène *trois* séries de consultations auprès d'une cinquantaine de personnalités au total, appartenant aux principales régions du globe. La plupart sont consultées par écrit ou lors d'entretiens dans leur pays; quelques consultations ont lieu au siège du CICR. Elles porteront sur trois points : conflits non internationaux et guérillas, protection de la population civile contre les dangers des hostilités et protection des blessés et des malades[12].

Experts de la Croix-Rouge

42. La deuxième catégorie des entités consultées est celle des Sociétés nationales de la Croix-Rouge ou, plus exactement, des experts désignés par ces sociétés nationales. Ce sont elles qui reçoivent l'invitation du CICR et ce sont elles qui choisissent le ou les experts à déléguer à la conférence convoquée soit par le CICR, à Genève, soit dans un autre pays sur l'invitation de la Société nationale de ce pays (qui prend alors à sa charge les frais d'organisation et d'interprétation). Dans la longue pratique du CICR, le recours à ces experts a été l'un des plus constants et l'un des plus réguliers.

43. En principe, l'expert de la Société nationale n'est pas le porte-parole officiel de cette dernière et ne l'engage pas par ses déclarations. Néanmoins, la réunion a d'autant plus de valeur que l'on peut partir de la présomption que les experts délégués ont eu l'occasion de se préparer dans leur pays, sur la base d'avis recueillis non seulement au sein de leur société nationale, mais aussi auprès d'autres personnalités privées ou gouvernementales.

44. Ainsi, les travaux préparatoires des Protocoles additionnels de 1977 ont été marqués par deux Conférences d'experts de Sociétés nationales de la Croix-Rouge : l'une à La Haye en 1971 (1-6 mars), qui a groupé 70 experts provenant de 34 Sociétés nationales, et l'autre à Vienne en 1972 (20-24 mars), qui a groupé une centaine de délégués provenant de 36 Sociétés nationales.

45. Si les consultations de cette catégorie d'experts portent, en principe, sur l'ensemble de la matière qui fait l'objet de travaux préparatoires, il n'en reste pas moins — et cela aussi en raison de la durée relativement brève de ces

réunions – que le CICR en attend surtout des avis autorisés sur les matières intéressant plus spécialement les Sociétés de la Croix-Rouge[13].

Les consultations d'experts gouvernementaux

46. Enfin, la troisième catégorie comprend les consultations d'experts gouvernementaux. Elles aussi ont été constantes dans la pratique du CICR, mais ont pris un développement particulier dans les travaux préparatoires ayant mené aux Protocoles additionnels de 1977. Ce ne sont en effet pas moins de neuf réunions d'experts gouvernementaux que le CICR a convoquées et organisées au cours de ces travaux.

47. Deux ont un caractère étendu ou même tout à fait général, portant sur l'ensemble de la matière à traiter : celle de 1971 (Genève, 24 mai-12 juin) qui a groupé 200 experts provenant de 41 Etats[14], et celle de 1972 (Genève, 3 mai-3 juin) à laquelle ont participé 400 experts provenant de 77 Etats. Alors que la Conférence de 1971 avait été limitée à une quarantaine de gouvernements en tenant compte de l'intérêt actif qu'ils avaient porté jusqu'alors aux efforts de la Croix-Rouge dans le domaine considéré, ainsi qu'à la nécessité d'une représentation des principaux systèmes juridiques et sociaux du monde, l'invitation pour la Conférence de 1972 fut étendue à tous les Etats parties aux Conventions de Genève, conformément à un vœu exprimé par les experts réunis en 1971. Bien qu'on ait officiellement parlé en 1972 de la "deuxième session" de la Conférence d'experts gouvernementaux, il est permis de considérer, du point de vue de la préparation matérielle et intellectuelle demandée au CICR, qu'il s'agissait là de deux conférences distinctes.

48. Quant aux 7 autres réunions d'experts gouvernementaux, elles ont été de caractère beaucoup plus limité dans leur composition et dans les objets examinés. Elles ont permis notamment d'approfondir certains problèmes qui n'avaient pas été traités de façon suffisante ou qui n'avaient pas réuni l'unanimité souhaitable lors des conférences plus générales de 1971 et 1972. Cinq de ces réunions ont eu lieu en 1973 et quatre ont porté sur des objets limités et parfois techniques. Il s'agit des réunions d'experts :

– Sur le signe distinctif international de la protection civile (Genève, 22-26 janvier 1973);

– En droit pénal (Genève, 29 janvier et 1er février 1973);

– En matière de signalisation et d'identification des moyens de transport sanitaires, maritimes et terrestres (Genève, 5-8 février);

– Sur les armes de nature à causer des maux superflus ou à frapper sans discrimination (Genève, 26 février-2 mars et 12-15- juin[15]).

49. C'est le plus souvent l'intérêt particulier que certains Etats avaient porté à la matière traitée ou la compétence spéciale de leurs experts en ces matières qui ont facilité au CICR le choix des quelques gouvernements, chaque fois différents, invités à déléguer des experts à ces réunions. Ces dernières, à l'exception de celle sur les armes, n'ont pas fait l'objet de rapports particuliers et leurs résultats se sont traduits dans les projets de disposition suggérés par les experts et qui ont été incorporés dans les projets que le CICR a présentés à la Conférence diplomatique.

50. Plus importante a été la cinquième consultation, à savoir le groupe consultatif d'experts gouvernementaux que le CICR a réuni à deux reprises (15-19 janvier et 5-9 mars 1973); il a passé en revue, pour l'essentiel,

l'ensemble de la matière que le CICR allait soumettre l'année suivante à la Conférence diplomatique. Pour déterminer la composition de ce groupe, question assez délicate, le CICR a suivi un critère assez original et ingénieux en s'adressant :

a) Aux gouvernements dont les experts avaient occupé des postes officiels à la Conférence d'experts de 1972;

b) Aux cinq membres permanents du Conseil de sécurité des Nations Unies (pour autant que leurs experts ne figuraient pas déjà dans la première catégorie); et

c) A la Suisse, Etat dépositaire des Conventions de Genève.

51. Enfin, dans l'intervalle des sessions de la Conférence diplomatique, le CICR a réuni en 1974 (Lucerne, 24 septembre-17 octobre) et en 1976 (Lugano, 28 janvier-26 février) deux réunions d'experts gouvernementaux sur l'emploi de certaines armes conventionnelles (là aussi, bien qu'on ait parlé d'une seconde session pour celle de 1976, il s'agissait, quant à l'organisation et à la préparation, de deux réunions distinctes). Quoique ces deux réunions se soient déroulées après le début de la Conférence diplomatique, elles peuvent être rangées dans les travaux préparatoires confiés au CICR, ayant été demandées par la Conférence d'experts gouvernementaux de 1972 (cf. p. 16, note 1).

52. Ainsi, alors que les travaux préparatoires menés par le CICR avant la seconde guerre mondiale entraînaient en moyenne de deux à cinq consultations d'experts et que la Conférence diplomatique de 1949 a été précédée de six consultations de ce genre (trois d'experts privés, deux d'experts de la Croix-Rouge en 1946 et 1948 et une d'experts gouvernementaux en 1947), l'élaboration des Protocoles additionnels de 1977 a amené le CICR à organiser *plus d'une quinzaine* de consultations d'experts des différentes catégories mentionnées ci-dessus. Cette augmentation du nombre des consultations est révélatrice de la complexité et de la difficulté de la matière traitée, compte tenu également de l'élargissement de la communauté internationale, par rapport à l'élaboration des conventions antérieures.

ii) *Procédures des consultations d'experts notamment gouvernementaux*

53. Toutes les réunions d'experts gouvernementaux que nous avons décrites plus haut se caractérisent par leur grande souplesse, par la nature privée de leurs débats, par leur caractère purement consultatif qui n'engage pas les gouvernements comme tels ni n'oblige le CICR à suivre nécessairement les avis recueillis en vue des projets qu'il élabore. Tout est prévu pour permettre une discussion aussi libre que possible, exempte de toute propagande politique, de toute manifestation tournée vers l'opinion publique. Il suffit à cet égard de citer quelques dispositions du règlement intérieur de la Conférence d'experts gouvernementaux de 1971 dont les dispositions se retrouvent semblables ou identiques pour toutes les autres conférences d'experts gouvernementaux.

54. Ainsi, selon l'article 6 "Les experts s'expriment à titre personnel; ils n'engagent pas le gouvernement qui les a désignés. La Conférence ne prend aucune décision, résolution ou recommandation. Elle ne procède pas à des votes. Cependant, lorsque des avis divergent sur un point, un vote pourra être pris à titre purement indicatif."

Selon l'article 3 "Les séances et travaux de la Conférence ne sont pas publics et aucun observateur n'est admis. Des renseignements sur la progression des travaux seront régulièrement donnés à la presse."

Selon l'article 10 "Le CICR se propose d'établir, à la suite de la Conférence, un rapport analytique complet." Ces rapports sont non seulement analytiques mais ils ont aussi un caractère impersonnel. Seuls sont personnalisées les propositions présentées par les délégations d'experts gouvernementaux.

Enfin, selon l'article 11 "Tous les cas non visés par le présent Règlement seront réglés en s'inspirant des Statuts de la Croix-Rouge internationale et du Règlement de la Conférence internationale de la Croix-Rouge, ainsi que des usages parlementaires généralement admis." Cette disposition a une importance particulière, puisque les Statuts de la Croix-Rouge internationale prévoient expressément (article II, chiffre 5) qu'elle ne *peut s'occuper de questions d'ordre politique ni servir de tribune pour les débats à caractère politique.*

iii) *Préparation et rapports des consultations d'experts*

55. Les consultations et réunions d'experts organisées par le CICR, quelle que soit la catégorie dont elles relèvent, ont été régulièrement précédées de l'envoi aux personnes consultées d'une documentation idoine, parfois très étendue et contenant le plus souvent des questions précises, qui constituaient, en quelque sorte, l'ordre du jour détaillé de la consultation.

56. Quant aux résultats et conclusions des consultations d'experts, ils ont pris trois formes. Le plus souvent, ces consultations ont fait l'objet de rapports, parfois très étendus, établis par les services du CICR, sous une forme impersonnelle, analytique ou synthétique. Le CICR a envoyé ces rapports non seulement aux personnes ou organes ayant pris part à la consultation, mais aussi généralement à toutes les Sociétés nationales de la Croix-Rouge ou même à tous les gouvernements des Etats liés par les Conventions de Genève, quand le document était destiné à une Conférence internationale de la Croix-Rouge.

Ainsi, par l'entremise du mouvement de la Croix-Rouge, les résultats de ces consultations d'experts ont-ils connu, dans la règle, une très large diffusion. En effet, les Sociétés nationales ont l'habitude de communiquer les documents de ce genre aux ministères intéressés de leur pays.

57. Dans quelques rares cas, cependant, et s'agissant de réunions de la première catégorie (experts privés), le CICR n'a rien publié des avis recueillis auprès des experts, estimant qu'ils lui étaient surtout utiles pour déterminer à titre interne certaines options fondamentales[16].

58. Enfin, dans quelques cas, les conclusions des experts n'ont pas fait l'objet d'un rapport distinct, mais le CICR les a utilisées dans la préparation d'un projet de convention, en y faisant parfois expressément référence dans le commentaire accompagnant le projet.

b) *L'organisation des travaux au sein du CICR*

59. Une nette distinction peut être faite entre l'élaboration des Conventions de Genève antérieures à la seconde guerre mondiale et celle des conventions qui a suivi 1945.

i) *Jusqu'en 1945*

60. Jusqu'alors, le CICR a régulièrement constitué, en son sein, des Commissions comprenant un nombre restreint de membres (en général jusqu'à cinq), la plupart appartenant au Comité lui-même, et chargé chacune d'elles de l'élaboration d'un projet de convention distinct, quand deux ou trois conventions étaient simultanément en préparation. Le plus souvent, la préparation même de l'ensemble du projet incombait finalement à un membre de la Commission. Tout en restant sous l'autorité de la Commission et, en dernier ressort, du CICR, l'élaboration avait donc un caractère en partie individuel et personnel, au niveau du Comité lui-même.

ii) *Après 1945*

61. En raison de l'ampleur de la tâche à accomplir, l'élaboration a pris un caractère à la fois plus diversifié et plus collectif. Le CICR a créé, au sein de son secrétariat, une *Division juridique* qui a compris jusqu'à une dizaine de personnes. Cette division s'est chargée non seulement de la préparation intellectuelle et parfois administrative des nombreuses consultations d'experts, mais aussi et surtout de l'étude des questions de fond, du rassemblement des matières s'y rapportant et de l'élaboration des avant-projets de texte – chaque membre de la Division s'attachant plus spécialement à un domaine particulier de la matière à réglementer.

62. En outre, le CICR a créé, en son sein, une *Commission juridique* chargée d'animer et de superviser l'ensemble des travaux. Composée à la fois de membres du CICR et de collaborateurs supérieurs de son secrétariat (notamment de la Division juridique), la Commission (10 à 15 personnes) s'est réunie aussi souvent que nécessaire, en général trois à cinq fois par an[17].

63. Bien entendu, il a toujours incombé au CICR lui-même de se prononcer en dernier ressort sur les textes et propositions qu'il a destinés à des réunions officielles (réunion d'experts gouvernementaux, conférence diplomatique). Mais, dans la pratique, le CICR a dû, forcément en raison de ses nombreuses tâches (dont l'action humanitaire sur le terrain), se prononcer principalement sur les options fondamentales de ces projets et propositions.

5. *La préparation des projets de convention*

64. Indépendamment des cas qui ont vu les Conférences internationales de la Croix-Rouge prendre elles-mêmes l'initiative d'établir des projets de convention, l'élaboration même de ces derniers par le CICR s'est déroulée en trois phases.

65. Dans la *première phase*, sur la base de ses études préliminaires, le CICR va soumettre aux experts consultés des idées et des propositions non encore rédigées sous forme de dispositions conventionnelles (par exemple, pour la réunion d'experts de la Croix-Rouge de 1946 ou celle d'experts privés de 1969).

66. La *seconde phase* est marquée par la présentation aux experts gouvernementaux, dans une documentation appropriée, des différents problèmes à traiter, la description de chacun d'eux *étant suivie de propositions rédigées sous forme de dispositions conventionnelles.* Parfois, une partie seulement des problèmes présentés sont suivis de telles dispositions, les autres paraissant trop

difficiles pour permettre au CICR d'avancer déjà des propositions sous cette forme. (Citons à titre d'exemple la documentation présentée aux experts gouvernementaux réunis en 1947 en vue des Conventions de Genève de 1949, ou en 1971 en vue des Protocoles additionnels de 1977.)

67. Cette deuxième phase prendra une tournure encore plus poussée pour la Conférence d'experts gouvernementaux de 1972, à laquelle le CICR a soumis, accompagnés de commentaires, deux projets complets de Protocoles additionnels aux Conventions de Genève, seules certaines dispositions restant en blanc.

68. Les experts gouvernementaux vont eux-mêmes, dans *certains domaines,* transformer les propositions du CICR en un projet de réglementations complet quant aux règles de fond. (Il en est ainsi de la protection des personnes civiles, en 1947, ou de celle des blessés et malades, en 1971.)

69. Enfin, dans la *troisième phase,* le CICR va établir, à l'intention de la Conférence internationale de la Croix-Rouge, des projets de convention entièrement rédigés, en y incluant les dispositions finales (entrée en vigueur, ratification, etc.). Ces projets sont toujours accompagnés de commentaires, parfois développés, qui se réfèrent aux travaux antérieurs.

70. Quels qu'aient été l'autorité et le poids des projets partiels issus des réunions d'experts, gouvernementaux notamment, et tout en leur accordant l'importance qu'ils méritaient, le CICR a toujours considéré qu'il restait libre dans le choix des solutions définitives à retenir en établissant les projets de convention destinés à la Conférence internationale de la Croix-Rouge.

71. Une *quatrième phase,* ne dépendant plus alors du CICR et intervenant avant la Conférence diplomatique, est marquée par les modifications que la Conférence internationale de la Croix-Rouge apporte *éventuellement* aux projets du CICR. Ainsi, celle de 1948 (XVII[e] Conférence, Stockholm) a, en créant plusieurs sous-commissions, examiné de façon approfondie les projets du Comité et y a apporté une série d'amendements. Ce sont les projets de convention *issus de cette Conférence internationale* de la Croix-Rouge qui ont servi de texte officiel *de base à la Conférence diplomatique de 1949*[18].

72. Si l'on considère enfin *les délais* écoulés entre l'initiative des travaux préparatoires, dans sa source formelle, et l'adoption du projet définitif, ayant servi de texte de base à la Conférence diplomatique, ils sont de trois ans et demi pour les Conventions de Genève de 1949 (mémorandum du CICR de février 1945 – Conférence de Stockholm de 1948) et de quatre ans pour les Protocoles additionnels de 1977 [résolution de la XXI[e] Conférence internationale de la Croix-Rouge (septembre 1969) – adoption du projet par la XXII[e] Conférence internationale (Téhéran, octobre 1973)].

NOTES

[1] Documentation préliminaire pour la révision et l'établissement des conventions ayant trait à la Croix-Rouge, mémorandum adressé par le CICR aux gouvernements des Etats parties à la Convention de Genève et aux Sociétés nationales de la Croix-Rouge, *Revue internationale de la Croix-Rouge,* n° 314, février 1945.

[2] Il l'est maintenant indirectement et partiellement, en vertu de l'article 97 du Protocole additionnel n° I, qui prévoit en substance que l'Etat dépositaire se prononcera sur l'opportunité d'une conférence chargée d'examiner les amendements au Protocole soumis par des Etats, après avoir consulté les hautes parties contractantes *et le CICR.*

[3] Compte rendu des séances plénières initiales, seconde session de la Conférence d'experts gouvernementaux sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés, Rapport sur les travaux de la Conférence, volume I, Genève, juillet 1972, p. 27.

[4] Rapport précité, p. 29 à 34.

[5] Rapport préliminaire sur les Consultations d'experts concernant les conflits non internationaux et la guérilla. Genève, juillet 1970.

[6] Citons à titre d'exemple :

— La résolution 2852 (XXVI) adoptée par l'Assemblée générale au cours de sa vingt-sixième session (21 septembre-22 décembre 1971) et intitulée "Respect des droits de l'homme en période de conflit armé, p. 95 et 96, chiffre 3, alinéa *a*

ou

— La résolution 3102 (XXVIII) adoptée par l'Assemblée générale au cours de sa vingt-huitième session (18 septembre-18 décembre 1973) et portant le même titre que la résolution précitée, p. 151 et 152, chiffre 1.

[7] Rapport présenté par le CICR à la XXI[e] Conférence internationale de la Croix-Rouge (Istanbul, 1969) et intitulé "Réaffirmation et développement des lois et coutumes applicables dans les conflits armés", p. 8, chiffre 1.

[8] Conférence d'experts gouvernementaux sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés. Rapport sur les travaux de la Conférence, vol. I, Genève, juillet 1972, p. 206, proposition CE/SPF/2, paragraphe 5.11.

[9] Suite à donner aux travaux sur l'interdiction ou la limitation de l'emploi de certaines armes conventionnelles, Protocoles additionnels aux Conventions de Genève de 1949, p. 120 à 122.

[10] Rapport présenté par le CICR à la XXI[e] Conférence internationale de la Croix-Rouge (Istanbul, 1969) et intitulé "Réaffirmation et développement des lois et coutumes applicables dans les conflits armés", p. 17 et 18.

[11] Ont participé : général A. Beaufre (Paris), Dr M. Belaouane, président du Croissant-Rouge algérien (Alger), A. Buchan, directeur de l'Institute for Strategic Studies (Londres), général E. L. M. Burns (Ottawa-Genève), Pr B. Graefrath [Berlin (DDR)], ambassadeur E. Hambro (Oslo-New York), Pr R. Hingorani (Patna), juge Keba M'Baye (Dakar), ambassadeur L. E. Makonnen (Addis-Abeba - New York), général A. E. Martola (Helsinki-Nicosie), sénateur A. Matine-Daftari (Téhéran), S. McBride, secrétaire général de la Commission internationale de juristes (Dublin-Genève), Pr S. Meray (Ankara), Pr J. Patrnogic (Belgrade), Pr B. Roeling (Groningue), Marc Schreiber, directeur de la Division des droits de l'homme (ONU, New York), Pr R. Taoka (Kyoto), baron C. F. von Weizsaecker (Hambourg).

En outre, trois personnalités ont fait part de leurs avis au CICR, soit par écrit, soit au cours d'entretiens ultérieurs : juge Ch. Cole (Freetown, Sierra Leone), E. Garcia-Sayan, président de la Croix-Rouge péruvienne (Lima), Pr N. Singh (New Delhi).

Rapport présenté par le CICR à la XXI[e] Conférence internationale (voir note précédente), p. 26 et 27.

[12] Rapport d'activité du CICR de 1970, p. 100 à 103.

[13] Ainsi, à propos de la Conférence préliminaire des Sociétés de la Croix-Rouge réunies en 1946, le CICR disait, dans les projets de convention préparés en vue de la Conférence diplomatique de 1949 : "Ayant recueilli les suggestions nombreuses et importantes des Sociétés nationales sur les matières qui sont particulièrement de leur compétence, le CICR approfondit ses études . . ." [Projets de conventions révisées ou

nouvelles protégeant les victimes de la guerre, présentés à la XVII[e] Conférence internationale de la Croix-Rouge (Stockholm, août 1948), Genève, mai 1948, p. 2, paragraphe 4.]

[14] "Conférence d'experts gouvernementaux sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés". Rapports de la Conférence de 1971 publié en août 1971 et de celle de 1972 publié en juillet 1972.

[15] Rapport d'activité du CICR en 1973, p. 70, 71 et 75.

[16] Il en a été ainsi de la réunion de personnalités organisée au CICR en 1961. Après le peu d'écho rencontré auprès des gouvernements par son projet de règles de 1956 relatif à la protection des populations civiles, le CICR a été incité par cette réunion à se limiter au rappel de quelques principes fondamentaux qu'il a proposés avec succès à l'approbation de la XX[e] Conférence internationale de la Croix-Rouge (Vienne, 1965).

[17] Depuis 1945, elle a été présidée successivement par MM. Léopold Boissier, président du CICR de 1955 à 1964, décédé, Frédéric Siordet, ancien vice-président, et Jean Pictet, vice-président du CICR.

[18] En revanche, c'est le projet établi par le CICR pour la XXII[e] Conférence internationale de la Croix-Rouge (Téhéran, 1973) qui a servi de base à la Conférence diplomatique de 1974-1977, les remarques faites à Téhéran ayant été communiquées *séparément* par le Gouvernement suisse aux participants à la Conférence diplomatique de 1974 à 1977.

M. OFFICE CENTRAL DES TRANSPORTS INTERNATIONAUX PAR CHEMINS DE FER (OCTI)

1. L'Office central des transports internationaux par chemins de fer (OCTI) est l'organe permanent de l'union des Etats membres de la Convention CIM (Convention internationale concernant le transport des marchandises par chemins de fer, du 7 février 1970) et de la Convention CIV (Convention internationale concernant le transport des voyageurs et des bagages par chemins de fer, du 7 février 1970), ainsi que de la Convention additionnelle à la CIV du 7 février 1970 relative à la responsabilité du chemin de fer pour la mort et les blessures des voyageurs (signée le 26 février 1966 et amendée par les Protocoles du 22 octobre 1971 et du 9 novembre 1973).

2. La première "Convention internationale sur le transport de marchandises par chemins de fer" du 14 octobre 1890, devancière de la CIM, a été conclue par 10 Etats européens; le texte de cette Convention a été élaboré par trois conférences internationales, convoquées par la Suisse sur l'initiative de deux avocats suisses. Le projet mis au point par ces trois conférences a été entériné par une conférence diplomatique; le texte adopté lors de cette conférence a été soumis à la ratification des Etats signataires. Cette Convention a été révisée à deux reprises avant la première guerre mondiale. Après cette guerre, la troisième Conférence de révision (1923) a élaboré, sur l'initiative de certains Etats contractants, une nouvelle Convention, dont le texte a été signé lors d'une conférence diplomatique (1924) convoquée à cet effet par la Suisse. Lors des Conférences de révision successives (1933, 1952, 1961 et 1970), une nouvelle Convention CIM a été chaque fois élaborée et signée; elle a été toujours soumise à la ratification. Le fondement de cette procédure se trouve dans les dispositions de la Convention elle-même; il s'agissait par conséquent du renouvellement de la Convention originale plutôt que de la création d'une nouvelle convention. Ajoutons que les quatre

dernières révisions ont été préparées par des commissions préliminaires, prévues dans la Convention elle-même et convoquées par l'OCTI.

3. La Convention CIV a été élaborée par la troisième Conférence de révision, sur la base d'un projet préparé par la Suisse; l'initiative d'une telle Convention a été prise par un autre Etat contractant lors d'une conférence de révision de la CIM, tenue avant la première guerre mondiale. Lors des révisions ultérieures, la CIV a été renouvelée de la même manière que la CIM.

4. L'idée de la création d'une Convention additionnelle à la CIV a été lancée lors de la cinquième Conférence de révision (1952); celle-ci a donné mandat à l'OCTI d'examiner de plus près la question de la réglementation uniforme de la responsabilité du chemin de fer pour la mort et les blessures de voyageurs, question qui n'avait pas été réglée dans le cadre de la CIV. Les travaux préparatoires ont été exécutés par l'OCTI et par une série de sessions d'une commission d'experts convoquée par l'OCTI. Une commission préliminaire de la sixième Conférence de révision s'est également occupée de cette question. Le projet de la Convention additionnelle à la CIV relative à la responsabilité du chemin de fer pour la mort et les blessures de voyageurs a été entériné par une conférence diplomatique en 1966; le texte signé a été soumis à la ratification.

5. En résumé, on peut dire que l'initiative de créer de nouvelles conventions a été toujours prise au sein de l'organe compétent pour la révision de la première Convention (CIM) [Conférence de révision]; les projets élaborés par un Etat membre ou par l'OCTI ont été mis au point par une conférence de révision ou par des commissions préliminaires.

Le projet définitif d'une nouvelle Convention a été entériné par une conférence de révision ou par une conférence diplomatique spéciale. Les nouvelles conventions ont été toujours soumises à la ratification.

6. La 8e Conférence de révision des Conventions CIM et CIV a adopté, le 9 mai 1980, une nouvelle Convention intitulée "Convention relative aux transports internationaux ferroviaires (COTIF)"; elle a été signée par tous les Etats contractants des Conventions CIM et CIV de 1970. La COTIF remplacera, après ratification et mise en vigueur, les Conventions CIM et CIV ainsi que la Convention additionnelle à la CIV de 1966. Selon les termes de la Convention COTIF, l'Union des Etats membres des Conventions CIM et CIV sera remplacée par une nouvelle organisation formelle qui s'appellera "Organisation intergouvernementale pour les transports internationaux ferroviaires (OTIF)", l'OCTI fonctionnera également comme secrétariat de cette organisation. Conformément à la COTIF, le rôle de la Conférence de révision et d'autres conférences diplomatiques convoquées sur la base des Conventions CIM et CIV sera transféré à l'Assemblée générale de l'OTIF, convoquée périodiquement par l'OCTI. En cas de besoin, l'initiative de créer une nouvelle convention pourra donc être prise au sein de cet organe. Les travaux préparatoires devront alors être effectués par la Commission de révision prévue également par la COTIF.

7. Eu égard à nos expériences acquises à l'occasion des conférences diplomatiques tenues après la seconde guerre mondiale au sein de notre organisation et notamment à la 8e Conférence de révision des Conventions CIM et CIV, nous nous permettons de vous présenter les observations ci-après :

a) Il nous semble opportun d'arriver, dans la phase préparatoire, à des textes aussi avancés que possible. Il nous paraît plus utile de prolonger la phase des travaux préparatoires, plutôt que de soumettre un projet de texte fort contesté à une conférence diplomatique. C'est ainsi que la Conférence de révision de 1980 a pu accomplir sa tâche en 8 jours ouvrables et qu'à la séance de clôture de cette conférence la nouvelle convention COTIF a pu être signée par la plus grande majorité des Etats ayant participé à la conférence.

b) Au cours de toute la procédure d'élaboration, de la nouvelle convention, les Etats ont apprécié les contributions actives du secrétariat. En effet, au cours de la 8e révision des Conventions CIM et CIV, l'OCTI a préparé, à l'intention de différents organes de révision, de nombreux rapports circonstanciés contenant également des suggestions de textes. Ajoutons à ce propos que la participation des organisations internationales (gouvernementales et non-gouvernementales) aux délibérations avec voix consultative s'est également avérée très utile au sein de nos réunions.

c) A notre avis, il est désirable d'établir un règlement de délibérations modèle. En élaborant un projet de règlement de délibération à l'intention de la 8e Conférence de révision des Conventions CIM et CIV, l'OCTI a été heureux de pouvoir s'inspirer des réglements de délibérations appliqués dans les récentes conférences diplomatiques convoquées par l'ONU.

d) En ce qui concerne la documentation relative aux travaux d'élaboration d'une convention, la publication d'une telle documentation nous paraît très utile. D'une part, elle peut contribuer à résoudre les questions d'interprétation, d'autre part, elle peut fournir des précieuses informations pour des travaux ultérieurs ayant pour but de développer les textes déjà en vigueur. Cette documentation devrait également contenir, dans la mesure du possible, les procès-verbaux ou les comptes rendus établis sur les travaux préparatoires.

e) Selon la pratique moderne, une convention multilatérale entre en général automatiquement en vigueur dès qu'un nombre déterminé de ratifications est atteint. Dans le domaine de nos Conventions qui ont pour but de créer et de développer un régime de droit uniforme, la procédure d'une mise en vigueur par une conférence diplomatique, qui est convoquée dès qu'un certain nombre d'Etats ont ratifié la convention, s'est avérée utile même de nos jours.

On peut s'imaginer que, dans certains cas spécifiques, une telle procédure favorise la ratification ou acceptation et ultérieurement l'application d'une convention internationale.

f) La 3e Conférence de révision des Conventions CIM et CIV (1923/1924) avait déjà établi une procédure de révision simplifiée qui permettait d'adapter une annexe technique de la CIM, le Règlement international concernant le transport des marchandises dangereuses par chemins de fer (RID). Cette procédure a fait et fait encore ses preuves; elle a servi de modèle à une procédure semblable permettant de modifier de manière simplifiée deux autres annexes de la CIM: le Règlement international concernant le transport de wagons de particuliers (RIP) et le Règlement international concernant le transport de conteneurs (RICo), ainsi que plusieurs dispositions dans le corps même des Conventions CIM et CIV. Les décisions de modifications entrent en

vigueur pour *tous* les Etats membres, sauf opposition de cinq Etats dans un délai fixé par les Conventions. La 8e Conférence de révision, dont est issue la Convention relative aux transports internationaux ferroviaires du 9 mai 1980, a adapté la procédure de révision aux dispositions institutionnelles modifiées, et elle a élargi les possibilités de la procédure de révision simplifiée.

Forts de nos expériences, nous sommes persuadés que, dans certains domaines appropriés, des procédures de révision simplifiées seront à même de favoriser considérablement le développement des traités multilatéraux.

N. ORGANIZATION FOR THE PROHIBITION OF THE USE OF NUCLEAR WEAPONS IN LATIN AMERICA (OPANAL)[1]

1. In regard to the special characteristics of the process of elaborating the Treaty, reference is made to the following:[2]

"The Treaty of Tlatelolco is a multilateral treaty which evolved from a process of elaboration completed during the period 1964 to 1967 through a series of international meetings of Latin American States, in accordance with the purpose set forth in the Joint Declaration of the Presidents of Bolivia, Brazil, Chile, Ecuador and Mexico on 29 April 1963.[3]

"The first was the preliminary meeting of the denuclearization of Latin America (23-27 November 1964), convened at the invitation of Mexico, while the second and subsequent meetings of the Preparatory Commission for the Denuclearization of Latin America were convened in accordance with a decision of the Preliminary Meeting. This process was completed by a group of Latin American States, varying in number at the different stages as the establishment of the Preparatory Commission by the Preliminary Meeting was based on the participation of the 17 American Republics which attended the Meeting and those which acceded later (resolution 2). At the beginning of the process, this group of Latin American States did not constitute an international organization. On the contrary, it was as the result of its action in elaborating a treaty that the Agency—OPANAL—was created. Accordingly, the Treaty of Tlatelolco is not a multilateral treaty prepared in accordance with a process established within a pre-existing international organization. Nevertheless, it should be pointed out that the United Nations was fundamentally linked to this process. General Assembly resolution 1911 (XVIII) of 27 November 1963, paragraph 2, by expressing 'the hope that the States of Latin America will initiate studies, as they deem appropriate, in the light of the principles of the Charter of the United Nations and of regional agreements and by the means and through the channels which they deem suitable, concerning the measures that should be agreed upon with a view to achieving the aims of the said declaration' (the reference was to the declaration of Heads of State of five Latin American Republics, dated 29 April 1963), provided the international impetus which set off the process and established the general framework within which it was to be accomplished. General Assembly resolution 2286 (XXII) of 5 December 1967 welcomed with special satisfaction the Treaty for the Prohibition of Nuclear Weapons in Latin America (paragraph 1) and, in paragraphs 3 and 4, recommended

that States should ratify the Treaty and its Additional Protocols I and II as soon as possible.

"This tangential and atypical manner of creating, or rather, of promoting the creation of international law by the United Nations, falls outside the areas of study generally covered by doctrine in the analysis of the work of the United Nations in that field[4] and it should therefore be stressed that the process followed in drafting the Treaty of Tlatelolco is a very interesting supplement to the traditional methods of elaborating multilateral treaties."[5]

2. The Treaty of Tlatelolco was elaborated between 1964 and 1967. Together with its two additional Protocols, it was opened for signature on 14 February 1967. It entered into force on 25 April 1969.

3. The Agency elaborated the Convention on Privileges and Immunities of OPANAL. The draft was prepared by the secretariat in accordance with the relevant provisions of the Treaty.[6] It was adopted by the General Conference in resolution 9 (I) of 8 August 1969 and was opened for signature and ratification by States parties to the Treaty, members of OPANAL.

4. Article 9, paragraph 2(*g*) of the Treaty of Tlatelolco regarding the competence of the General Conference, provides that it "shall be the organ competent to authorize the conclusion of agreements with Governments and other international organizations and bodies". Pursuant to this provision, the General Conference authorized the conclusion and adoption of the Convention on privileges and immunities which is a multilateral treaty.

5. As the matter is not within our competence, no reference has been made to bilateral agreements, Headquarters Agreement with the Government of Mexico and Co-operation Agreement with IAEA.

NOTES

[1] Original in Spanish; this is an unofficial translation.

[2] From H. G. Espiell, "*El Derecho de los Tratados y el Tratado de Tlatelolco*", OPANAL, Mexico, 1974, pp. 11-12.

[3] The history of this process is described in the following works of Alfonso García Robles: "*La Desnuclearización de la América Latina*", Carnegie Endowment for International Peace, New York 1967; "*El Tratado de Tlatelolco*", Mexico 1967; "*México en las Naciones Unidas*", 2 volumes, Mexico, 1970; "*Mesures de Désarmement dans des zones particulières: Le traité visant l'interdiction des armes nucléaires en Amérique Latine*", Académie de Droit International, Recueil des Cours, Vol. 1, 1971. The official documentation was published in nine volumes by the Ministry of External Relations 1964-1967; "*La Proscripción de las Armas Nucleares en la América Latina*", El Colegio Nacional, Mexico, 1975.

[4] From H. G. Espiell, "*El Derecho de los Tratados y el Tratado de Tlatelolco*", OPANAL, Mexico, 1974, pp. 11-12.

[5] Jorge Castañeda, "*La Creación de Derecho Internacional por las Naciones Unidas, Foro Internacional*", Vol. IX, No. 2, Mexico, 1970; Manfred Lachs, "*La Contribución de las Naciones Unidas al desarrollo del Derecho Internacional*", 1945-1970, Foro Internacional, Vol. XI, No. 2, Mexico, 1970.

[6] Manfred Lachs, "*Le développement et les fonctions des traités multilatéraux*", chapters I, II and VIII, 3 *Recueil des Cours, Académie de Droit International*, 1957, II, t. 92.

O. PERMANENT COMMISSION FOR THE SOUTH PACIFIC (CPPS)

1. *History*

1. CPPS is an intergovernmental organization with juridical personality under international law, and was established by an Agreement dated 18 August 1952, signed and approved by the Governments of Chile, Ecuador and Peru. Recently, on 24 March 1982, Colombia became a member of CPPS.

2. The aim of this Organization is to ensure compliance with the purposes of the so-called Santiago Declaration or Maritime Zone Declaration of 18 August 1952, in which the Governments of Chile, Ecuador and Peru proclaimed, "as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast", and that "their sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the seafloor and subsoil thereof . . .".

2. *Structure of the Commission*

3. CPPS has a General Secretariat which is the organ responsible for carrying out the work and function entrusted to it.

4. Its headquarters changes in rotation and is situated for four consecutive years in each of the capitals of the contracting States.

5. The headquarters is currently in Lima, Peru.

6. The General Secretariat is composed of the Secretary-General, the Deputy Secretaries-General for Legal Affairs, for Scientific Affairs and for Programming and Administration, and administrative personnel. It also has three advisory bodies: a Legal Commission, a Scientific Research Co-ordinating Commission (COCIC) and a Programming Commission.

7. The Secretary-General is the legal representative of CPPS and he directs the office of the General Secretariat.

8. The Deputy Secretaries-General are his immediate collaborators in their own fields of specialization.

9. The Legal Commission is composed of the Deputy Secretary-General for Legal Affairs and of representatives of each of the member States which also designate alternates.

10. COCIC is composed of the Deputy Secretary-General for Scientific Affairs, and the Technical Directors of the Fishery Research Institutes, the Directors of Fisheries, the Directors of the technical bodies conducting naval oceanographic research and the national representatives of university institutions of each signatory State conducting research in marine sciences, all of whom may avail themselves of the advisory services of any experts they may wish to appoint.

11. To co-ordinate the work of CPPS and its General Secretariat there is a regional body in each contracting State, called the National Section of CPPS. Its function is to act as a link, for the purposes of CPPS, between the General Secretariat and the respective Governments, or between the secretariat and

the organizations engaged in marine science studies in each of the contracting States.

3. *Operation*

12. CPPS holds regular and special meetings in order to achieve the purposes set forth in the Maritime Zone Declaration and ensure that the principles and objectives in the agreements, resolutions and pacts on the South Pacific are duly complied with and furthered.

13. Regular meetings are held every two years and the special meetings whenever special circumstances so require.

14. States members of CPPS are represented at these meetings by an appropriate number of delegates and they may also designate any alternates and advisers they deem necessary.

15. Representatives of other Governments and international bodies and institutions may also attend these meetings as observers.

16. The procedure to be followed in concluding international agreements does not differ from the traditional system of formal ratification of treaties, since such international agreements are subject to ratification in accordance with the internal constitutional requirements of each contracting State.

17. Texts of agreements are adopted at so-called special conferences or meetings for the conservation and exploitation of the maritime resources of the South Pacific, which are attended by the respective plenipotentiaries of the Governments of Chile, Colombia, Ecuador and Peru.

18. Five such special conferences have been held to date, the first of them being the one which established, on 18 August 1952, the Permanent Commission for the South Pacific.

4. *Procedure for adopting resolutions*

19. CPPS is authorized to adopt at its meetings resolutions which are valid and binding on each of the signatory States from the date of their adoption, except for such resolutions as are repudiated by any of those States within 90 days, in which case the repudiated resolution or resolutions shall not take effect in the country which objects to it so long as it maintains its objection. For the purposes of the time-limit mentioned, Governments are deemed to have been notified as from the date of adoption of the agreement by the very fact that their respective delegates were present. Should the representatives of a State be absent, that State shall be notified of the agreements in writing in the person of its accredited diplomatic representative in the country which is the headquarters of the Commission.

20. Resolutions are instruments dealing with all questions which, because of their content, are not subject to the internal constitutional adoption and ratification procedures of each State.

21. As early as 1952, the States members of CPPS, desiring to make it a dynamic organization, agreed that its resolutions would enter into force within a very short period—90 days—the time allowed to each Party to register any objection. Thus they avoided any complicated formal procedure that might stand in the way of the effective operation of the Commission.

22. Similarly, notification of the Agreement, for purposes of the time-limit, was simplified and the presence of their delegates is alone sufficient for the Governments concerned to be deemed to be notified and for the above-mentioned time-limit of 90 days to begin.

23. The foregoing explains the success of CPPS, which has adopted countless resolutions enabling it to accomplish satisfactorily the purposes of the Maritime Zone Declaration signed by the Governments of Chile, Colombia, Ecuador and Peru.

P. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

1. *General remarks on the scope and history of the multilateral treaty- making process within the Hague Conference on Private International Law*

1. The Conference has been engaged in the preparation of multilateral treaties in the field of private international law since its formation in 1893. The Conference may also, following a decision taken at its Fourteenth Session (1980), draw up recommendations or even prepare model laws.

2. The treaties prepared include those which are universal and those which are more restricted in purpose, nature or participation.

3. The techniques and procedures which are used for elaboration of multilateral treaties are essentially the same, whether the treaty in question is universal or more restricted.

4. Since 1951 the preparation of individual treaties has been organized in principle on a four-year cycle. Some variance is occasionally necessary in this cycle, but usually this is not more than one year for a particular treaty. There also exists the possibility of an extraordinary session for preparation of a treaty, falling out of the normal four-year cycle; such an extraordinary session has only been employed one time to date.

5. The normal four-year cycle between plenary sessions of the Conference includes the entire process from the point where the possible preparation of a treaty on a given subject is taken under consideration to the point where a definitive text is adopted. However, in recent cycles the practice has developed to undertake the preparation of feasibility studies on a possible topic as much as a year or more before commencement of the cycle in which the treaty on that topic is expected to be prepared.

2. *The normal system for elaboration of a multilateral treaty within the Hague Conference*

(a) *The stages of work*

(i) *The selection stage*

6. This stage includes all activities undertaken within the Conference prior to the point of making a definitive decision to prepare a treaty on the given topic. Approximately nine months prior to the Plenary Session of the Conference, a Special Commission meeting is held to consider the future work to be carried on by the Conference following the upcoming plenary session. Most suggestions for topics to be undertaken are presented by delegates of the

member States at such meetings. Topics may also be suggested by members of the secretariat of the Hague Conference and at times suggestions are made by other international organizations, within the framework of the Conference's co-operation agreements with them. These are then discussed and considered in the Special Commission meeting and a certain number of topics are retained for further study of their feasibility. Members of the secretariat then prepare short feasibility studies on the topics retained which are sent out to the Member Governments in advance of the Plenary Session meeting. At the Plenary Session, in addition to the commissions charged with the preparation of treaty texts, one commission meets to deal with questions of future work, having before it for consideration the feasibility studies prepared by the secretariat. On the basis of such studies and the discussions held within that commission, decisions are made and a list of topics for future work is drawn up. Qualifications concerning the timing of work or other conditions for pursuit of the work may be added. These decisions, when adopted by the Plenary Session of the Conference in question, are implemented by the Permanent Bureau of the Conference, in consultation with the Netherlands Standing Government Committee on Private International Law, which under the Statute of the Conference directs the work of the Permanent Bureau. Final decisions as to the timing of work on particular topics are then made by a Committee of representatives of the member States, acting on proposals presented by the Permanent Bureau, usually within a year following the Plenary Session in question. Because of the limited number of topics which may be carried to the conclusive point of preparation of a treaty text under this system, some topics are carried on the list from one session to the next until ultimately they are definitively undertaken or dropped from the list.

(ii) *The research stage*

7. Once a topic has been definitively undertaken with a view to the preparation of a treaty, an individual member of the secretariat is assigned to prepare a research study on the subject in question and to draft a questionnaire directed to member Governments in connection with the subject. The nature of the research study and the questionnaire will vary depending on the stage of development of the subject matter at the international level. By "stage of development at the international level" we are generally referring to the amount of basic underlying work and study which has been given to the particular sorts of problems involved, in connection with earler work done by the Hague Conference, by other international organizations or by independent scholars or research institutions.

8. Determination of the form and content of a report and questionnaire to be directed to the Governments of member States on a particular topic is in the first place to be made by the responsible member of the secretariat who has prepared drafts of these documents, following extended research which may be pursued for as much as a year's time. The drafts in question are subject to review and consultation between that member and the Secretary-General of the Conference. Further review may then be undertaken by the Netherlands Standing Government Committee on Private International Law, which may make suggestions for certain changes. The questionnaire in particular is likely to be modified in some respects during this process, since it is designed to elicit precise responses from the Governments of member States.

The report on the other hand is normally sent out over the name of the member of the secretariat who has prepared it and may therefore reflect opinions which are personal to the author.

9. The nature of the reports and questionnaires varies considerably according to the nature and stage of development of the subject matter. A few general remarks may be made however about the techniques employed in the preparation of the questionnaires. Most questions are directed either to obtain information or to elicit opinions from the member Governments. Where the subject matter is not very highly developed at the international level, the questionnaire may be directed primarily to eliciting opinions from the Governments, since the report may have to identify a wide variety of options, the questionnaire then presenting these to the Governments and seeking their opinions for the purpose of reducing the number of options. On the other hand, where the subject has been extensively studied at the international level, the number of options will often have been reduced as a result of such study, by elimination of those which are not feasible. Therefore, the questionnaire on such a highly developed topic may be very carefully directed to obtain factual information on specific remaining critical points and occasionally the separate report will be dispensed with, being replaced instead with a question-by-question commentary throughout the questionnaire. This process is also affected by the breadth of the topic as originally defined, which may in itself determine the range of the options available. Sometimes, also, a topic by its very nature will call for a fairly even balance of information-seeking and opinion-eliciting questions. Attention is in any case directed to limiting the length of the questionnaire as much as possible, in order to reduce the burden on the administrations of the member Governments and to improve the quality of the responses, which will be more valuable if the questions are precise and to the point.

(iii) *The discussion stage*

10. The first meeting of Governmental representatives on each topic is normally a meeting of legal experts, who will have studied the questionnaire and report on the replies of the Governments and sometimes a synthesis of the replies prepared by the secretariat. Experts attending the first meeting are asked to express their opinions on the various questions broadly and personally without binding their Governments at this stage. A chairman, a vice-chairman and a rapporteur are selected from among the experts attending. The chairman, and in his absence the vice-chairman, generally conducts the discussions with technical assistance from members of the secretariat, who also participate in the discussions. The rapporteur will take notes on the important points of the discussions and will participate *ex officio* in any drafting committee which may be set up to draw tentative conclusions from the meeting. The continuing discussion process is facilitated by the practice of the secretariat to prepare on a daily basis summary reports of each meeting which take the place of a full set of minutes; since the report of the latest meeting is normally available at the commencement of the next session, these reports improve both the continuity of the discussions and the work of the drafting committee.

11. This first meeting usually lasts one week and normally results in a set of written conclusions, drawn up by a small drafting committee or sometimes by a member of the secretariat, following the meeting. The responsible

member of the secretariat may also prepare and distribute a written document identifying the options which will be presented to the next Special Commission meeting and the decisions which will have to be taken by that Commission.

(iv) *The drafting stage*

12. The work of drafting a treaty text normally begins with the second Special Commission meeting. This meeting will have before it certain written conclusions drawn from the first meeting, and it may have the benefit of a text drawn up, as a basis for discussion, by a small working group during the interim. It should be particularly noted that the general practice of the Hague Conference has been to avoid preparation of draft articles of a treaty in advance of the experts' meeting and rather to leave the form and structure of the draft produced to the Commission of experts themselves and their drafting committee or small working group following the first round of general discussions. On a few occasions drafts which had been prepared at previous meetings of the Conference were taken as the basis for discussions on a new treaty; in only one instance *(Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions)* did the secretariat of the Conference itself draw up a draft of treaty articles in advance of the first meeting of the experts. The preparation of an advance text by the secretariat is not favoured because of its tendency to fix the attention of the delegates from the participating States on particular language directed to particular solutions, before there has been a general discussion. A general round of remarks by the experts in attendance seems to be a useful preliminary to the first draft, since some problems anticipated by the secretariat may not arise, or at least they may not be so acute as to require the radical treatment of an express provision in the treaty.

13. The drafting committee usually consists of five or six experts headed by a chairman, the rapporteur of the Special Commission being an *ex officio* member of the Committee. Since the official lanaguages of the Conference are French and English, the Committee will normally include at least one native speaker of eaeh of these languages. The drafting committee also normally includes experts who are native speakers neither of French nor of English, both for the broader range of legal experience which this brings and because potential difficulties of translation into non-official languages may thus be raised already at the drafting stage. Texts are drafted in French and English simultaneously by the Committee, with the assistance of members of the permanent secretariat, and the effort to obtain full correspondence between the texts thus begins at this stage. The bilingual discussions held by the drafting committee are also important with regard to the substance of the treaty, since the effort to develop texts in two languages at the same time often brings out points of misunderstanding which had not come out in the general discussions of the Commission.

14. Formal and technical clauses are normally not dealt with by the Special Commission but referred to the Plenary Session. These are co-ordinated to the extent possible for the several conventions under study by a general committee of each Session which attempts to maintain uniformity of language and technique for the formal and protocol clauses. This is not always possible, since the nature of the subject matter and the type of convention dictate some

deviations from the model, but in recent years the effort to rationalise and standardise the clauses which provide the operating mechanisms of the treaties has made great progress.

15. The Commission which deals with a subject at the Plenary Session of the Conference is organised along much the same lines as the Special Commission which preceded it, though it will usually have broader representation.[1] At the Plenary Session, full summaries of the remarks of the speakers are prepared following each sitting of the Commission and distributed the next morning, providing a basis for continuity in the discussions.

16. The process which has been described generally provides some guarantees against wholesale or radical revision of the text in the late stages. The fact that the text arises directly from the discussions of the experts tends to create a fairly stable base, even though there will be States represented at the Plenary Session by experts who did not participate in the Special Commission's work.

17. Occasionally, for one reason or another, the text of a convention cannot be completed at the Plenary Session for which it is scheduled. In these cases, the Conference has scheduled a further Special Commission to meet, continuing the work of the Plenary Session for the limited purposes of establishing that treaty text. This procedure was used following the Twelfth (1972) and the Thirteenth (1976) Sessions.

18. At times the Conference drafts recommendations concerning the application or the operation of a convention.

(v) *The consolidation stage*

19. After the definitive text of the convention has been established, consolidation of the result achieved begins. The same Plenary Session of the Conference that prepared the treaty also usually sets an approximate date upon which it will be opened for signature; this is usually about one year after the end of the session at which the text has been prepared, which allows time for the Report on the convention to be prepared and distributed.

20. When the rapporteur submits his draft to the Permanent Bureau of the Conference, members of the Permanent Bureau, in particular, the responsible member who worked with the Commission that prepared the convention and the secretary-general, review the draft and may propose suggested changes, deletions or additions.

21. The definitive edition of the report is the last document in the bound volume concerning the convention, and the seeretariat prepares tables for inclusion at the end of the report which show not only the contents of the volume but also the historical development of the different provisions in the convention, from the preliminary draft prepared by the Special Commission through the principal drafts worked upon by the Commission at the Plenary Session, and including references to the minutes of the particular sessions of the Commission at which the individual provisions were discussed. Any recommendations adopted concerning the application or the operation of the convention will also be included.

22. The final publication of the materials on a particular convention, which will take the form of a bound volume in the series of the *Actes et documents de la Conférence de la Haye de droit international privé,* will also include

the names and capacities of the persons who attended the Special Commissions and the relevant Commission of the Plenary Session and a full set of summary minutes of the remarks made orally by delegates at the Plenary Session, as well as the working documents submitted by delegates, drafting committees or the secretariat at that Session.

23. Publication of these materials in a definitive version is the final step in this very important consolidation stage, where the work of the four-year cycle is pulled together and preserved in bound form for future users of the convention and for researchers.

(b) *Personnel*

24. No description of techniques and procedures used by the Conference in the elaboration of multilateral treatics would be complete without some description of the people who employ the techniques and carry out the procedures. The organizational structure and the general cycle of activity of the organisation are determined along broad lines by the Statute of the Hague Conference on Private International Law (United Nations, *Treaty Series,* 1955, p. 123, No. 2997, hereafter referred to as the "Statute") which entered into force on 15 July 1955 and now has 28 States Parties to it. Those States and the treaties which they have signed or ratified are indicated on the attached table of signatures and ratifications, while accession by States non-members of the Conference are shown on the reverse side of the table. It should be mentioned that the admission of the Kingdom of Morocco to membership in the Conference has been proposed by the Netherlands Government and that this proposal has been approved, pursuant to the procedures set out in the Statute of the Conference mentioned above.

(i) *The permanent secretariat*

25. The Permanent Bureau of the Conference was organized in 1955 under the terms in particular of articles 3, 4 and 5 of the Statute. It presently consists of a secretary-general, a deputy secretary-general and two secretaries, belonging to different nationalities, all of whom must have legal knowledge and practical experience appropriate to their positions. It carries out its activities under the supervision of the Netherlands Standing Government Committee on Private International Law.

26. The Permanent Bureau is primarily a "scientific" secretariat. Its role in the "research stage" of the preparation of a treaty as mentioned above is preponderant. Once the first Special Commission meets, that role becomes less obtrusive for, as mentioned above, the texts are developed directly from the discussions of the experts attending the meetings.

(ii) *The National Organs*

27. Under article 6 of the Statute, the Government of each member State is to designate a National Organ for the purpose of facilitating communications between the members of the Conference and the Permanent Bureau. The Permanent Bureau is authorized to correspond with all of the National Organs so designated and with concerned international organizations.

28. The National Organ of a member State is usually a designated office within its Ministry of Justice or its Ministry of Foreign Affairs; however, a few States have designated their Embassies at The Hague as their National Organs.

29. The National Organs serve a very important purpose since they provide the normal channel of communication between the Permanent Bureau and the body within each member State which prepares replies to the questionnaires on technical subjects and which is usually consulted in connection with the naming of experts and delegates for meetings organized by the Conference. The designation of National Organs by the member States therefore greatly facilitates the preparation of multilateral treaties.

(iii) *The expert delegates*

30. The designation of experts to attend Special Commission meetings on behalf of a member State is normally confirmed to the Permanent Bureau by the National Organ of the particular country. The experts should have a fine appreciation of the problems of private international law. The technical expertise which the delegates need to have helps to assure the essentially non-political nature of the Conference's work. No geographic or regional subgroups are formed or represented either among the Commission's members or on the drafting Committees.

31. The delegation of each country at the Plenary Session of the Conference is headed by a fully accredited diplomatic representative who is authorised to represent his country and to sign the Final Act of that Plenary Session on behalf of his Government. The Final Act of each Session of the Conference therefore reflects the considered judgement of the experts and diplomatic representatives of the member States of the Conference as to the definitive treaty texts there established, any provisions for continuation or consolidation of the work there undertaken and recommendations as to future work to be pursued.

(iv) *Observers of international organizations*

32. *Representatives of other inter-governmental organizations*—A number of other international organizations have overlapping interests with the Hague Conference to a greater or lesser degree. Depending on the nature of the subject-matter, then, some of these organizations will be invited to send representatives as observers to participate in the preparatory meetings and the Plenary Sessions in the preparation of treaties on particular topics. The attendance and participation of such observers is of importance, as well for the contribution of relevant experience which they bring as for the continuing exchange of current information on work going on among various international organizations which results. The tradition of the Conference is that observers may take the floor freely and make suggestions, even in writing.

33. In the United Nations Organization, the Legal Counsel's Office and the United Nations Commission on International Trade Law (UNCITRAL) have made continuing and helpful contributions to the Conference's work and there is excellent liaison and continuing exchange of information between the Permanent Bureau and their staffs. The Council of Europe has partially overlapping interests with the Conference in a number of fields and the liaison through the exchange of observers is continuous and fruitful. Also, some of the work of the European Economic Communities touches upon or parallels the work of the Conference, calling for exchanges of observers; this overlap has recently been expanded from the field of obligations to include also certain specific aspects of family law and procedure. There is a continuous exchange

of documentation and observers between the Conference and the Organization of American States, the Asian-African Legal Consultative Committee and the Commonwealth Secretariat. In some areas of the law of family status, exchange of documentation and liaison through the sending of observers occurs with the International Commission on Civil Status (CIEC). On a specific subject, recognition and validity of trusts, the Conference received an observer from the Bank of International Settlements.

34. *Non-governmental organizations*—Among the non-governmental organizations, International Social Service, based at Geneva, has provided substantial input on the sociological aspects of several major problems of international family law taken on by the Conference—in particular, protection of minors, adoption and currently international abduction of children by one parent ("legal kidnapping"). The *Union internationale du Notariat latin* has made substantial contributions from its expertise in regard to a broad range of subjects where the preparation of authenticated contracts or other documents is either customary or required by law in certain States. The *Union internationale des huissiers de justice et officiers judiciaires* has on several occasions brought the benefit of its experience, in connection particularly with problems of service of documents internationally. The *Comité européen des assurances* has sent observers on questions involving insurance law and practice.

(v) *Non-member States*

35. A number of States non-members of the Conference have sent invited observers to Special Commission meetings and Plenary Sessions. This can be a prelude to a formal application for membership by the State represented.

36. When non-member States are Parties to a Convention which is being revised by the Conference, pursuant to Article 40 of the Vienna Convention on the Law of Treaties, those States are invited to participate in the work of revision with full voting status.

(vi) *Temporary assistants*

37. It is necessary to obtain competent jurists to serve as *secrétaires rédacteurs* for the larger meetings, both to reduce the work of the permanent staff in preparation of necessary summaries of discussions and to free the members of the Permanent Bureau for participation in the discussions and in the work of the drafting committees. Attendance by temporary *secrétaires rédacteurs*—usually professors, practising lawyers or advanced students of private international law—helps to ensure the availability of minutes of high quality on a daily basis.

3. *Extraordinary Sessions of the Conference*

38. Article 3 of the Statute provides that, in addition to the ordinary Sessions of the Conference which take place in principle every four years, the Netherlands Standing Government Committee may, in case of need, if the members of the Conference are in favour, ask the Netherlands Government to call an Extraordinary Session of the Conference. This has been done only once. The Extraordinary Session in question was held in 1966 for the purpose of preparing the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

39. The provision for Extraordinary Sessions is primarily designed to deal with those subjects which are so large that their inclusion in the agenda of an ordinary Session would overburden and thereby distort the work on the other subjects being dealt with at that Session. This was felt to be the case with the subject of the recognition and enforcement of foreign judgements in civil and commercial matters.

40. The Conference decided at its Fourteenth Session in 1980 to hold an Extraordinary Session for the purpose of revising the Convention of 15 July 1955 on the Law Applicable to International Sales of Goods. At the same time the Conference decided that such subjects of broad interest in the field of international trade law called for a wider opening of the Conference, which would assure the participation of States which are not members of the Hague Conference on Private International Law—in particular that this would provide a broader range of input from developing countries and from countries with fully-planned economies.

41. Since the revised Convention, when prepared, will be a counterpart and to a large extent a complement to the United Nations Convention on Contracts for the International Sale of Goods, drawn up at Vienna in 1980 on the basis of a draft prepared within the United Nations Commission on International Trade Law (UNCITRAL), it was felt that it would be appropriate to invite all member States of UNCITRAL to participate in the preparatory work. The preparatory phase therefore will be carried out by meetings of a Special Commission which will consist of Hague Conference member States and UNCITRAL member States, each with full rights of participation, including the right to vote. The final stage of adoption of the revised Convention will be carried out at a diplomatic conference to be held at The Hague in 1985 or 1986, to which all States will be invited.

42. The procedure for holding an Extraordinary Session to deal with a single topic of international trade law, in which non-member States of the Hague Conference are invited to participate with the full right of vote, may be followed in the future for subjects other than the international sale of goods. In particular, the revision of the Geneva Conventions of 1930 and 1931 on the conflict of laws for negotiable instruments and cheques may be undertaken through the use of a similar procedure.

NOTE

[1] Formal rules of procedure are adopted for each Plenary Session.