The International Law Commission

R. Q. Quentin-Baxter*

At the conference of the Australasian Universities Law Schools Association held in Auckland in August 1983, Professor Quentin-Baxter presented a paper on the International Law Commission, of which he had served as a member since 1972. Later in 1983, in his capacity as the New Zealand representative in the Sixth (Legal) Committee of the United Nations General Assembly, Professor Quentin-Baxter made a statement commenting, among other things, on the Commission's role and methods of work — issues he had discussed in his earlier paper. With the object of preserving, in published form, those of Professor Quentin-Baxter's observations about the work of the International Law Commission which remain of on-going interest, this article consists of an edited version of his paper, followed by extracts from his statement to the Sixth Committee.

I. INTRODUCTION

For many years Australia and New Zealand have shared with Canada a notional entitlement to present a candidate for membership of the International Law Commission — a body of persons of some legal experience, elected by the United Nations General Assembly at five yearly intervals, to serve in their personal capacities. As such, they are members of a body which reports annually to the General Assembly on the progress it is making with the progressive development and codification of various international law topics. The consideration of the Commission's report is always the largest single item on the agenda of the Assembly's Sixth Committee, which deals with legal matters. The Commission's choice of topics, and their priorities, are settled in consultation with the Sixth Committee, which in practice allows the Commission a fairly loose rein to order its own affairs.

[Professor Quentin-Baxter then discussed the workload of Commission members, including those seven or eight who were Special Rapporteurs for one or other of the topics on the Commission's current agenda. This matter is dealt with in the extracts from his subsequent statement to the Sixth Committee of the United Nations General Assembly, reproduced below.]

Since its establishment in 1949 as a body of fifteen members serving for a three-year term, the Commission has been enlarged to twenty-one in 1956, to twenty-five in 1961, and to the present thirty-four in 1981. From 1950, the original three-year term has been changed to five years; and from 1973 the customary ten-week session has been extended to twelve weeks. The alternative

* Professor of Law of Victoria University of Wellington and member of the International Law Commission.

concept of a Commission of salaried members in permanent session was considered when the Commission was first established, and has again been proposed in recent years; but both on professional and on financial grounds, this proposal is not at present a realistic one. In fact, the only obvious scope for a modest improvement in the Commission's working conditions lies in a slight increase in the number of professional officers in the Codification Division assigned to research and other duties connected with the Commission's current work programme.

There is at present little or no support for the contention — canvassed from time to time in years past — that the Commission should be composed of the representatives of member states, rather than of individual members serving in their personal capacities. Commission members do bring to their work — and are expected to bring to their work — the viewpoints likely to be held in the countries or areas to which they belong. The overwhelming advantage of service in a personal capacity is simply that members do not wait upon government instructions, and cannot take refuge in an obligation to do so. The choice of members is, however, as much governed by political and geographical considerations as that of any select and specialised body on which states are represented. The distribution of seats among regional groups has until recently been governed by informal understandings, but since 1981 the regional composition of the Commission has been set out in the Commission's Statute.

Not surprisingly, there has always been within Europe — east and west — more than an adequate supply of aspirants to Commission membership; and a great deal of the Commission's success is owed to the large contribution that members from European countries have made. There have never been enough available seats to satisfy all sub-regions of Western Europe. By custom, three of the seven seats allotted the Western European and others (WEO) group have been reserved for nationals of the three countries which are permanent members of the Security Council — that is, the United States, the United Kingdom and France. Usually, the five Nordic countries have contributed one member, and the three Benelux countries one member. That leaves two seats for the rest of Western Europe; and for well over twenty years Italy accounted for one of these two seats. Spain, Austria, Greece and Turkey have from time to time provided a Commission member: the present members from southern Europe are nationals of Greece and of Spain. The Federal Republic of Germany has not yet contributed a national to the membership of the Commission; and its evident claim to do so increases the press of competition.

Until my election in 1971 to a first term as a Commission member, only one national of an "old" Commonwealth country — Marcel Cadieux of Canada — had been nominated and elected; and his appointment as Under-Secretary of State for External Affairs, during his single five-year term, had prevented him from playing much part in the Commission's work. No doubt this meagre record of "old" Commonwealth participation was partly because both Canada and Australia had provided members to the International Court of Justice; but another factor was the peculiarity of the "old" Commonwealth countries' electoral situation. The "gentleman's agreement" had provided that, within the total Commission

membership of twenty-five, one seat should alternate between Latin America (which had otherwise four seats) and the "old" Commonwealth countries, in recognition that the latter could not receive fair treatment within the four-seat allocation available to WEO countries which were not permanent members of the Security Council.

Effective membership of the International Law Commission demands at least the possibility of election to more than one term. It had therefore suited Western Europe well enough to regard the "old" Commonwealth sub-grouping as having a separate and non-renewable entitlement to one Commission seat for a single term; and Western European countries were the beneficiaries when that limited entitlement was not taken up. In 1976, however, it was eventually recognised in WEO negotiations that a member from an "old" Commonwealth country must have the same standing as all other Commission members to be re-nominated and re-elected. As a corollary, the national of an "old" Commonwealth country would compete on equal terms with the nationals of Western European countries, who have always been nominated in numbers exceeding the places available to them. As long as the present regional groupings remain, there seems no reason to doubt that a single nominee of the three "old" Commonwealth countries will be as consistently successful as the single candidate of the five Nordic countries has been in the past.

II. WORKING METHODS

It is not intended to evoke in this short paper the considerable literature that relates to the procedures of the Commission, and to the selection and treatment of the topics that have engaged its attention. The commentators were most numerous fifteen to twenty-five years ago, culminating in Briggs' meticulous study in 1965,[1] and his Hague lectures on the same subject in 1968.[2] A more recent full-length study, also careful and competent, is that of Ramcharan in 1977.[3] More recently still, the United Nations Institute for Training and Research (UNITAR) has issued a pamphlet[4] arguing "the need for a new direction" in the Commission's work. Without accepting UNITAR's arguments or analysis — to which it will be necessary briefly to return — it should be said that the perception of a certain unease about the balance and orientation of the Commission's work

1 H. W. Briggs *The International Law Commission* (Cornell University Press, Ithaca, N.Y., 1965).

2 H. W. Briggs *Reflections on the Codification of International Law by the International Law Commission and by other agencies,* 126 Recueil des Cours, Vol. I (1968) 235.

3 B. G. Ramcharan *The International Law Commission* (Martinus Nijhoff, The Hague, 1977).

4 M. El Baradei, T. M. Franck and R. Trachtenberg *The International Law Commission: the Need for a New Direction,* project of the UNITAR Research Department, Policy and Efficiency Studies No. 1 (1981).

is accurate, and almost as old as the Commission itself.[5]

Sometimes a tentative comparison is made between the working methods of the International Law Commission and those of a much newer body — the United Nations Commission on International Trade Law (UNCITRAL) — the reports of which are also considered annually by the Sixth Committee. One of the very few people with experience of the sessions of both bodies felt that their very different working methods were fully explained by the difference in subject matter. UNCITRAL, faced with an embarrassment of differing national practices in the field of private international law, could proceed efficiently on the basis of its Secretariat's comparative analysis of a wealth of materials. For the International Law Commission — which has so far chosen to work only in the field of public international law — it was much more often a question of finding or constructing a path where there appeared to be none. For this task, the system of the Special Rapporteur — the scout sent out ahead of the main body to reconnoitre and to suggest a way forward — was felt to be uniquely appropriate.

It could be argued that the Commission carries almost to a fault its belief in the system of the Special Rapporteur. Quite exceptionally, in 1972, the Commission undertook and completed in a single session — without the appointment of a Special Rapporteur, and without greatly disturbing the pattern of its regular work — the text of a draft Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. This precedent has often been invoked as proof of the Commission's flexibility and of its capacity to undertake occasional small jobs, while still applying its proven slow-and-sure methods to its ordinary work. Yet, in the later case of another comparatively small topic concerning the status of the diplomatic courier and of the unaccompanied diplomatic bag, it was found necessary to follow the normal procedure of appointing a Special Rapporteur. It is not a criticism of this decision to point out that this choice of methods does materially affect the speed of the Commission's work on larger topics. Because the topic of the diplomatic courier is comparatively small — being, in effect, a corollary to the larger conventions on diplomatic and consular immunities — it offers the prospect of relatively quick results, and thereby generates its own priority. At the same time, this small topic, raising acute practical problems but no profound doctrinal disputes, can proliferate draft articles that move quickly through the Commission, but add greatly to the burdens of its Drafting Committee.

One device, developed in the last decade to ensure that the Commission maintains its collective sense of direction, is the annual appointment of a Planning

5 Julius Stone had voiced concern in 1957: J. Stone "On the Vocation of the International Law Commission" (1957) 57 Columbia Law Review 16; and Luke T. Lee had responded reassuringly in the more comfortable climate of 1965 : L. T. Lee "The International Law Commission Re-Examined" (1965) 59 A.J.I.L. 545. Shabtai Rosenne had already contributed a notable and positive assessment of the Commission and its work : S. Rosenne "The International Law Commission 1949-59" (1960) XXXVI B.Y.I.L. 1040, though his postscript, referring to the 1960 debate of the General Assembly's Sixth Committee on the International Law Commission's report, records another of the recurrent occasions on which anxieties about the role of law in the United Nations bubbled over into reflections about the Commission's role and contribution.

Group. Though the group is small, all members may attend its meetings, which can in this way become a full exchange of views without the constraint of a summary record. In the Planning Group, Special Rapporteurs can be asked how their work is progressing; and a rough time-table can be worked out for the allocation of meetings to different topics on the active agenda. More than that, the Planning Group has been encouraged to initiate plans and priorities for the whole quinquennium; and this was done during the first session of the current quinquennium, in 1982. Nevertheless, both in 1982 and in the current year [1983], the Planning Group has promised more than it fulfilled. Meetings early in the session have been followed by weeks and months during which the Planning Group was in abeyance, while the Drafting Committee absorbed all the time and energy available. Only when the sessions were running out did the Planning Group meet again to record its conclusions hurriedly, on the basis of a last-minute Secretariat draft.

III. THE NEW, ENLARGED COMMISSION

Underlying the demand for enlargement of the Commission was the perennial concern that the developed world has been over-represented, and that the emphasis of the Commission's work has therefore been tilted towards topics and objectives that reflect the minority interest of developed countries. This state of affairs was the less acceptable because it is the countries of the developing world which feel the need for a general restatement of customary international law in order to relieve their apprehension that the received, unwritten law mirrors the interests of the states which have had a share in its making. The fear, and the justification for the fear, cannot be better illustrated than by reference to the developments, during the lifetime of the United Nations, in the law of the sea. Increasingly, however, there is a parallel concern that the developed world prefers to concentrate legal effort on traditional text-book topics, avoiding as long as possible any colloquy about topics that engage divergent policy interests, as well as legal interests.

Nevertheless, the immediate reason for the enlargement of the Commission from twenty-five to thirty-four members was simply to ease the pressures within several regions, and to give a better reflection of the balance of membership in the United Nations. In the old Commission, the WEO group had seven seats, including the three occupied by nationals of the United States, the United Kingdom and France; and the Eastern European group had three seats, including that of the Soviet Union. In addition, the WEO group shared with the Latin American group the seat which had originally represented the claim of the three "old" Commonwealth countries. Apart from their half-interest in this seat, Latin America had only four seats, though ten Caribbean countries had been added to their region since the existing seat allocation was established. Asia, with five seats, was under at least equal pressure, in view of China's renewed claim to the seat that was due to her as a permanent member of the Security Council. African countries had not experienced the same grass roots demands for an increased regional quota; but, in view of the relatively large number of African countries, it would not have been acceptable for Africa to have less than parity with Asia.

The case for some expansion having been conceded, Western European countries wished it to be kept to a minimum, lest the micro-climate of the old Commission be completely lost. In the result, this preference for minimal change perhaps cost the WEO group the thirty-fifth Commission seat, which could have reduced the clash of interest among Western European sub-groups, and provided a better final balance with Eastern Europe. As matters turned out, the Latin-American group's total rose from four to six, the Asian group's total from five to seven, and the African group's total from five to eight. The WEO group's demand to round off its entitlement to eight seats — thus eliminating the seat shared with Latin America — was granted, but the price was equal satisfaction for the Eastern European group. To find the extra half-seat for Eastern Europe, two more seats were created and divided among the four groups other than the WEO group.

It should be said at once that the enlargement of the Commission has not in itself justified any fear about a loss of quality. The additional members from developing countries include some distinguished lawyers who are already well-known in the work of other United Nations bodies, and some whose careers as judges or ministers have gained equal distinction in their own countries. There appears to be no evidence that the increase in numbers has slowed debate in the Commission. On the contrary, the larger reservoir of members has ensured that the members present at any Commission meeting are seldom less than twenty or more than twenty-six, and that the Commission avoids entirely the old evil of occasions in mid-session when attendance dropped to twelve or thirteen. Again, it is possible to achieve a better regional balance of members actually participating in meetings of the Drafting Committee.

It is also not the case that the European contribution has been in any way diminished. 1983 has been a year in which every Commission member from the WEO and Eastern European groups — with the exception of one member who had for a few weeks to give preference to another United Nations commitment — was almost continuously present. In the other groups, however, there were half a dozen members who occupied such important positions in the government of their own countries that they could manage only a token attendance. There were also members who, though taking a prominent part in the Commission's work when present, had to limit their attendance to six or eight weeks of the Commission's twelve-week session. On a numerical count, therefore, members of the WEO and Eastern European groups amounted to almost half of the members present on any given day; and, in terms of individual contributions, they had the great advantage of continuity of attendance. If there is a significant change in balance, it is more likely to become manifest in the next quinquennium, when the alternation of half-seats now occupied by Asian and African members will give the relatively small Eastern European group four seats — half as many as those shared by Western Europe with North America and Australasia.

There are, however, other problems which have, in the writer's opinion, as much to do with the present content of the Commission's agenda, and with conflicting regional approaches to politico-legal issues, as with the change in the Commission's composition. In particular, there is less readiness than in the past to make the adjustments that are indispensable to an organisation which must

depend for its motive power on part-time members, whose loyalties are divided between their employers' business and the business of the Commission. Members who can with difficulty attend all or some of a twelve-week Commission Session would like to explore the possibility of dividing the session. They would like also to ensure that everything possible is provided to facilitate their own work when they can be present. If they are members of the Drafting Committee — which in 1983 held more meetings, spread over a larger number of weeks, than ever before — they would naturally expect their colleagues to receive gratefully the fruits of their labour, and not to complain that there is less time than ever to peruse and assimilate the Drafting Committee's solutions.

Yet each of these demands has a counterpart. To provide Special Rapporteurs' reports in advance of the session demands a saving in the time taken to release Sixth Committee records, as well as in the time taken to translate and issue the Special Rapporteurs' ensuing draft reports. The Special Rapporteur can himself cut corners by not waiting for Sixth Committee views, by curtailing the depth and coverage of his report, or by relying on officers of the Codification Division for help in the actual preparation of his report. Nevertheless the cumulative effect of such expedients is quietly to whittle away the qualitative difference between the Commission's work and that of an ad hoc Committee, which may rely rather heavily on the Secretariat's input for everything except the preparation of statements for oral delivery.

An exceptionally heavy burden in the Drafting Committee, and a corresponding curtailment of sessions of the full Commission, leaves under-employed the Commission members who are not members of the Drafting Committee. It is hardly to be expected that such members will make the sacrifices entailed in clearing other professional work, or in completing a pre-sessional Special Rapporteur's report, if the only consequence is to have a long stay in Geneva, with less than five Commission meetings in a normal week, and a minimal influence upon the disposition of Drafting Committee reports. In the worst case, expansion could lead to a kind of contraction — that is, the emergence of the Drafting Committee as a commission within the Commission, supported only by a floating and unstable fringe of under-employed, non-Drafting Committee members.

[Professor Quentin-Baxter went on to point out that these dangers were not unrecognised by the Commission. In his statement to the Sixth Committee which follows, he described the reasons why the work of the Commission and that of its Drafting Committee were out of step, and suggested ways in which the problem might be remedied.]

In summary, there are improvements that can be made in the Commission's working methods, and in the extent of the help which an augmented Codification Division could provide. There are, however, no solutions of the kind that entails a dramatic reorganisation: there cannot be, and should not be, in the foreseeable future, a Commission of salaried members permanently in session, or even of salaried Special Rapporteurs giving their full time to the development of their topics. The United Nations would not be willing to meet the expense, and few of the Commission's present members would be willing or able to give up their regular employment. A general improvement in Secretariat back-up, at least for

the work of Special Rapporteurs, is desired both by the Commission and by very senior members of the Secretariat.

IV. THE CONTENT OF THE COMMISSION'S CURRENT PROGRAMME OF WORK

The UNITAR pamphlet, to which reference was made earlier, differed from the writer's appraisal — and from that of Ramcharan and other commentators — in supposing that extensive organisational changes were necessary and possible to reinstate the International Law Commission at the centre of United Nations legal activities, and to counter the repeated complaint that the Commission's work is too slow and too cumbersome to keep up with the world community's demands. The authors of the UNITAR pamphlet also accepted that the Commission was too heavily engaged in the codification of existing customary law, and too timid to embroil itself in the current politics of major progressive development. In fact, they regarded the topic on the non-navigational uses of international watercourses — one of the oldest and least tractable of the areas in which states have habitually put their own interests before those of their neighbours — as the only topic on the Commission's working agenda that met the criterion of progressive development.

In dealing with each of these criticisms, it may be useful to look in long perspective at the Commission's pattern of activity over more than thirty years. From the beginning there have been a few great themes, pursued from one set of draft articles to another. The first great theme was that of the law of the sea, which ended in 1956 with the completion of the preparatory work for the 1958 Geneva Conference. Although it has often been regretted that the Commission did not retain its position of leadership in later developments relating to the law of the sea, the reasons it did not do so are compelling. In the years of unilateral action after 1958, the shift in priorities from a mercantile interest to that of the coastal state in its own environment, was an area in which the realities of change could not effectively be helped or hindered by any institutional catalyst. Nor would it have been realistic to suppose that the hard bargaining which characterised the long-drawn-out Third Law of the Sea Conference could have been conducted by proxy, through the deliberations of a group of international lawyers serving in their personal capacities.

In other large areas, the work of the Commission was not so abruptly brought to an end. Draft articles on diplomatic and consular privileges and immunities were followed by those on special missions, and on the representation of states in their relationships with universal organisations. Now, at the end of that long sequence, the Commission is making very significant progress with the largest problem area — the jurisdictional immunities of states and their property. It would, however, seem appropriate to concede that progress on this topic is facilitated because it engages, in particular, the interest and support of developed countries.

In the field of treaty law, the great Vienna Convention brings in its wake the draft articles on the most-favoured-nation clause, on succession to treaties, and on treaties with organisations. At least in the first two of these cases, the genuine interest of the international community is not fully engaged; and the same may

be said of succession in matters other than treaties. Thus, the Commission's slow and thorough treatment of adjacent areas of law allows the relevance of its work to be questioned, even while the Sixth Committee expects the completion of projects in which time and skill and learning have been invested.

There is, in fact, a certain dichotomy about the attitudes of the representatives of states towards Commission projects. In the Sixth Committee from year to year, representatives groping for comments on the Commission's current work, sometimes measure it in terms of the number of articles adopted, and fret at the delays in formulating the profound generalities of articles such as those on state responsibility. The Commission is not immune to the habit of conserving its past work, and of making quantitative measurements. Perhaps some such criticism may fairly be levelled at this year's [1983] decision to revive, after a lapse of years, the question of the representation of states in relation to organisations other than those covered by the earlier draft articles. Nevertheless, it is submitted that decisions of this kind do not merely reflect the view that intolerance of one Commission topic will rebound on all: there is also a deep ambivalence among states themselves about what is worth attempting and what should be opposed. In legal matters, as in others, states and their representatives do not necessarily have positive convictions about the value of what can be accomplished in the quarter of the year that the General Assembly is in session. That concern may be rather to fend off the developments they do not want; and they may breathe more easily while attention turns to a matter not perceived to be of burning importance.

It is, of course, quite possible that negative appraisals may affect the International Law Commission with some of the characteristics more often associated with ad hoc committees of member states, whose main task is to keep in equipoise, unreconciled political and legal positions. Prescriptions on the non-use of force or on the revision of the powers of the Security Council under the United Nations Charter exemplify such positions. Listening this year [1983] to the International Law Commission's attempts to settle the terms of its first report on the draft Code of Offences, there did indeed seem some danger that a collegiate enterprise might in the end collapse when faced with such a question as the application of the draft Code to the crimes, not of individuals, but of states.

While not closing one's eyes to these dangers, it is legitimate and necessary to adopt a much more positive approach to the Commission's current work. Even while UNITAR was deploring the Commission's engulfment in arid works of codification, the old agenda was moving to completion. The Commission's increased involvement in issues of political moment has become the major reason for the disquieting symptoms that observers have discerned. It has never been the case that the Commission's work is without a large political content. Even in the 1950's, the project to codify the topic of state responsibility for the treatment of aliens brought the Commission face to face with a political imperative: some Latin American states and others were not prepared to set the seal of international approval on rules which they had learned to regard as an instrument of oppression in the hands of the developed countries which exported capital and technology.

A body bound by legal principle has no counter to an ideological imperative.

It must see whether there is another way forward that maintains the integrity of legal reasoning, and that may ultimately provide a context in which political and legal elements can be reconciled. So began the process which became the Commission's major work in the 1970's — the elaboration of draft articles dealing with the origin of state responsibility. The great excitement of that enterprise under Professor Ago's guidance was felt by most Commission members; but the resulting articles lend themselves to widely different appraisals. Their very abstraction offends the spirit of the common law; and for some readers the perspectives opened by these drafts lead only to a series of conundrums about the content, forms and degrees of state responsibility. It is these subsequent questions, which also entail the relationship of the older international law with the law of the United Nations Charter, that the Commission is now hesitantly exploring.

Meanwhile a large group of developing states are waiting with limited patience for a second reading of the articles on the origin of state responsibility; and for them the Commission's distinction between the criminal and delictual conduct of states has become a cardinal principle. Among countries of the WEO group, however, a number attach importance to delaying the completion of these draft articles, until their effect has been moderated by the second phase articles dealing with content, forms and degrees. In this impasse it was surely foreseeable that the Code of Offences item would become a vehicle to mount a new attack upon the West's reluctance to accept the principle of criminal responsibility of states for grave breaches of international law. In the resulting confusion, Commission members of the Eastern European and WEO groups have found themselves in a minority coalition, insisting upon the absolute distinction between the concept of the international crimes of individuals and that of the criminal wrongs committed by states.

From the Commission's work on state responsibility comes, as a companion topic, the question of a liability arising without wrongfulness. By confining the latter topic to the physical uses of territory, causing physical transboundary harm to other states or to their inhabitants or nationals, this topic postulates more generally the very issues which arise concretely in the case of the non-navigational uses of international watercourses. The liability topic may also provide a new counterpoint to the old, mothballed subject of state responsibility for the treatment of aliens; for there is a parallel between obligations for harm done to aliens within and without the territory of the source state. The liability topic has, however, its own sharp detractors, especially among European countries which deny in principle any general liability for transboundary harm arising without wrongfulness. North American doctrine, on the other hand, tends to treat such situations as engaging either the responsibility, or the strict liability, of the source state.

These brief references to various topics on the Commission's current programme of work should at least dispel any impression that the Commission is now, or was in the recent past, confining its attention to issues that are politically sterile. On the contrary, it remains very much an open question whether the Commission can succeed in grand designs that aim to take account of conditions which groups of states categorically impose upon particular lines of development, and to find

ways of alleviating the fears that lead to such embattled positions. While a good deal may depend upon the collective skills and sensitivities of Commission members, they are not the final arbiters of the questions with which they deal. Only states and their representatives can in the end determine which of their transactions they are prepared to resolve on the basis of rules that apply indifferently in all situations that are not distinguishable. There is bound to be a good deal of shuffling and feinting on the way.

[In that part of his following statement to the Sixth Committee headed "The role of the Commission", Professor Quentin-Baxter developed further the theme dealt with in the concluding section of this paper.]

The following addendum contains extracts from an address delivered on 9 November 1983 by Professor Quentin-Baxter, the New Zealand representative, in the Sixth Committee of the United Nations General Assembly at its thirty-eighth session. Professor Quentin-Baxter's remarks specifically concern Agenda Item 131: Report of the International Law Commission on the work of its thirty-fifth session. The address puts in more immediate and dramatic form, the issues which have been treated more academically in the above AULSA paper; and while the editors regret some inevitable repetition, they deemed it fitting to preserve a little of Professor Quentin-Baxter's spoken word — a medium in which he conveyed a flavour of his own.

Mr Chairman, already in this debate we have heard, together with expressions of appreciation for work done by the International Law Commission, some intimations of regret that the dividend is not larger, and that some topics seem to languish. My delegation shares these sentiments, and is at the same time acutely conscious that the reasons are complex and not easily surmounted. I would therefore propose in this intervention to range widely, but selectively, over questions that touch both on substance and on organisation. I am more concerned at this stage with the broad perspective than with a sharp focus on individual topics.

I. THE METHODS OF WORK OF THE COMMISSION

A good place to start is at the beginning of the last chapter of the Commission's report on the work of its thirty-fifth session,** dealing with its programme and methods of work. In a few short paragraphs there is evidence that Commission members are giving thought to questions of organisation — that they have pinpointed some problems and identified some specific remedies. Reading between the lines of the report, we will find — as we might expect — that there are identifiable pressure points in the annual cycle of work.

First, each member must make his own accommodation between his ordinary professional responsibilities and the demands of a body which is in session for a quarter of each year. For some members, there is no possibility of unbroken

** General Assembly Official Records: Thirty-eighth Session, Supplement No. 10 (A/38/10).

attendance; for others, attendance at Commission sessions is a commitment that rules their lives, because a year's other activities have to be crowded into the eight or nine months that remain.

In either case, members are conscious that they are privileged to belong to the Commission, and they take their duties seriously. From that flows the demand — reflected in paragraphs 309 and 311 of the report — that the Commission's servicing should be at a high level, and that essential documents should reach members in ample time. This demand creates other points of pressure, both for the Secretariat and for Special Rapporteurs.

To take the case of Special Rapporteurs first, they have, in addition to the normal duties of Commission membership, the obligation to prepare the reports on which the Commission's work is usually based. How and when they go about the preparation of their reports depends on many things — competing obligations; the nature and stage of progress of their topics; their own working methods; and the help available to them within the Codification Division of the Secretariat, or from other sources.

The Commission has often benefited greatly from the research assistance that a Special Rapporteur has found within his own country. Yet, if we are to follow through the logic of the recent increase in Commission membership, and to maintain a reasonable geographical distribution of Special Rapporteurships, it is important that a Rapporteur should feel able to accept appointment without the necessity of providing the whole of his own research assistance. In the opinion of my delegation, that is the largest single justification for the emphasis which the Commission, and the Legal Counsel, have placed upon a modest increase in the staffing and capability of the Codification Division.

On the other hand, it is, of course, just as important to stress that a Special Rapporteur's reports should be his own, in concept and in execution. The Secretariat's assistance can only be effective — for example, in compiling a volume of the Legislative Series or in preparing an analytical study — within the context that the Special Rapporteur provides, as his work progresses. This point also is usefully spelled out in paragraph 308 of the Commission's report.

In the conditions specified, research officers of the Codification Division have a mandate to carry out research work in the exercise of their own professional skills and judgment. In most cases the work they do ought not to be for the immediate benefit of the Special Rapporteur alone. It should provide also an independent source of reference for other Commission members, and for representatives in this Committee, to help them form their own opinions about the solutions offered by the Special Rapporteur and, if need be, to propound alternative solutions.

One important suggestion, which can help everybody, is that mentioned in paragraph 307 — namely, that the Commission should stagger from year to year the major consideration of topics on its current programme of work. This allows more time for every phase of a process which inevitably becomes congested if it is tied too tightly to the wheel of the annual calendar. Apart from that — as

paragraphs 311, 313 and 314 indicate — the International Law Commission has always worked upon tolerances, recognising that neither Special Rapporteurs nor other Commission members are free to give unbroken attention to Commission matters, and charting a course according to current possibilities.

II. THE WORK OF THE DRAFTING COMMITTEE

In the final analysis, it is an even more important matter — addressed squarely, but laconically, in the last sentence of paragraph 313 of the Commission's report — that the work of the Drafting Committee is now almost completely out of phase with that of the Commission itself. In 1983 the Drafting Committee, under the inspiring leadership of Ambassador Lacleta, worked even harder and longer than in other years; and several of the articles returned to the Commission represent triumphs over major difficulties. Even so, the Drafting Committee has been running faster to stay in the same relative position — that is, at least one annual lap of the course behind the Commission itself.

The origins of the problem are simple enough. The second readings of two sets of draft articles, in the last years of the previous quinquennium, left a spillover which further delayed the progress of the new Commission's Drafting Committee in 1982. At the same time, the Commission referred more draft articles to the Drafting Committee, including a first batch of no less than fourteen draft articles relating to the topic of the diplomatic courier. In the result, of the articles adopted by the Drafting Committee and the Commission this year [1983], only one — draft article 15 on the topic of jurisdictional immunities — had been discussed in the Commission and referred to the Drafting Committee during the 1983 session. In 1984 the Drafting Committee will still have, on its pending list, several draft articles of substantial difficulty: from 1981 and 1982 in the case of state responsibility, Part II; and from 1983 in the case of jurisdictional immunities. In addition, the Drafting Committee will have eleven draft articles from 1982 and 1983 relating to the diplomatic courier, with the prospect of many more to come.

Mr Chairman, there is no doubt at all about the central position occupied by the Drafting Committee in the functioning of the International Law Commission; and nobody would wish that tradition to change. The Drafting Committee has always had a mandate to deal with unsettled questions of substance as well as with drafting. The Commission has always been willing to forego an occasional meeting to facilitate the work of the Drafting Committee; and from time to time the Commission has been prepared to adopt, without a pause for deliberation, draft articles which have defied solution in the Drafting Committee until the final days of the session. This is no more than a due acknowledgement that the Commission's ablest and most dedicated members have always been ready to serve on the Drafting Committee.

Nevertheless, it seems to my delegation that the pre-condition for the discretions reposed in the Drafting Committee is an annual accounting — a return to the Commission, in time for consideration by the Commission, of matters referred to the Drafting Committee during the current Commission session. If the Drafting

Committee cannot complete the work referred to it during the Commission session, that may be for reasons beyond anyone's control — or because the Commission itself has too lightly referred to the Committee draft articles containing unfathomed difficulties.

If there is no accounting, constitutional control must atrophy. The Drafting Committee then becomes a court of final appeal, which can hold on its agenda indefinitely a draft article about which its members have not agreed. Alternatively, the Drafting Committee can from year to year confer with the Special Rapporteur, to the virtual exclusion of the Commission itself, about progressive changes in the character and development of the scheme that the Rapporteur originally laid before the Commission. The Drafting Committee can also return to the Commission, too late in the session for substantive reconsideration, the drafts of articles which have not been before other Commission members during the current session, and of whose reappearance the latter have no foreknowledge.

We are far enough down this path to know that such a pattern could develop by sheer inadvertence; and the warning in the last sentence of paragraph 313 is therefore not to be taken lightly. The work of the Drafting Committee must be kept in step with that of the Commission itself: otherwise power and authority will pass from a recently enlarged Commission to a much smaller, and technically subordinate, body. It is, however, not so clear to my delegation that the solution is for the Commission to mark time until the Drafting Committee catches up. In the result, the role of the Commission may wither, while the Drafting Committee, carrying the whole burden, labours mightily to achieve modest results.

The Commission's report, on the other hand, implies in paragraph 309 that there is a direct relationship between the Commission's enlarged membership and an increased workload. The real question is how to translate that equation into an increased work output. The limitations are the Commission's justified adherence to its proven working methods, and the absence of provision for the servicing of more than one meeting at the same time.

Nevertheless, the Commission's new source of strength is its enlarged membership. In consequence, the Commission has for the last two years had a larger — and more balanced — attendance at its meetings; and this is a resource of which the most should be made. It is at least a hypothesis worth testing that negotiations in the Drafting Committee could be expedited, if the Commission's debates provided clearer guidance in relation to the texts referred to the Drafting Committee. Equally, the Drafting Committee should perhaps be a little more willing to report back to the Commission when it discovers a trackless wilderness in the texts referred to it. Debates on the record in the Commission, and debates off the record in the Drafting Committee, each have their part to play. In some cases, however, the work of the Drafting Committee and of the Commission might be advanced if a better balance between the two bodies were restored.

What possibilities are there of re-establishing an equilibrium between the Commission and its Drafting Committee, without slowing down the pace of

work in the full Commission? It seems to my delegation that the way to do this is to write off the Drafting Committee's backlog, except for two articles on jurisdictional immunities, and to assign the completion of the draft articles on the diplomatic courier to a suitably constituted working group. In this way, the Commission can make full use of its enlarged membership, both to ensure the early completion of the draft articles relating to the diplomatic courier, and to allow unimpeded progress on major topics.

III. THE ROLE OF THE COMMISSION

Behind all questions of organisation and procedure there lies a deeper, less accessible question: what is the role of the International Law Commission? Is it true, as critics are apt to say, that the Commission has in recent years failed to occupy the central place originally assigned to it in the development of public international law? Although these questions do not admit of any simple answer, they cannot in good conscience be brushed aside.

There are at least three general points that can be made. First, the most resounding of the past successes of the International Law Commission have been in areas in which the common interest plainly outweighed any separate, conflicting interests — notably, the early work in codifying the law of the sea; the articulation of the law of treaties; and the development of the law of privileges and immunities as it affects diplomatic and consular activity and in other areas.

Secondly, there are some phases of legal development in which the International Law Commission cannot play a useful role. In particular, when progress depends upon a trading of advantages to produce a package deal, as in the context of the Third Law of the Sea Conference, thirty-four individuals who serve in their personal capacities cannot act as surrogates for bargaining governments. Therefore, in an area of law which has strong polarities, such as that relating to the non-navigable uses of international watercourses, the Commission's possibilities of success depend upon developing a context in which the common interests can be reconciled with separate, potentially conflicting interests.

Thirdly, as a broad generalisation to which there are many exceptions, older and larger states feel less need for the progressive development and codification of international law than do those states which have more recently joined the international community. For the latter, the very guarantees of fair dealing in an unstable international environment demand a restatement and updating of international law. For the former, who have learned to live comfortably with customary law — and even to find security in its ambiguities and imprecisions — there is sometimes felt to be virtue in pragmatism, and in leaving things as they are. These countries have, of course, the experience, skills and interest to play an indispensable part in every field of legal development; but they have first to be persuaded that any development is a step in the right direction.

It seems to my delegation that this is in large measure the explanation of the Commission's long, and still indecisive, encounter with the law of state responsibility — the Everest among the mountains on the map of international

law. As other main areas of Commission activity are traversed and worked out, state responsibility — the Commission's great preoccupation and excitement in the decade of the 1970's — looms dimly above the Commission's other work. From it may be traced, by historical and logical linkages, the topics of the code of offences, of liability for injurious consequences, and even of international watercourses.

In principle, the International Law Commission, while consolidating its coverage of topics in other legal areas, has a long time been preparing to campaign in the still more difficult environment of the topics which now make up the larger part of the Commission's active agenda. There has also been one great achievement — the completion on first reading of the draft articles on state responsibility, Part I. For the rest, it has to be admitted that no peaks have yet been scaled, and that those concerned have with difficulty established their base camps. It is therefore not enough to look for improvements in organisation. There is also the question of a common will.

Where there is a deep divergence of attitudes about the policy of legal development, there are two quite distinct ways of pursuing a dialogue. One is by continued assertion in a political forum of conflicting positions of principle, until by attrition the problem is resolved or changes its form. The other method is by seeking to unravel the problem and to find, beneath the turmoil, a prospective area of common ground. The latter method is the only one open to the International Law Commission, whose members have no standing to assume the role of protagonists in a political encounter.

This distinction is the first step in any assessment of the International Law Commission's role. It may also be a first step in breaking the log-jam which seems to affect progress in the field of state responsibility and related topics. The reference to the crimes of states in the draft articles on state responsibility, Part I, fuels a demand for progress with Part II, before Part I is reconsidered. There then develops an unprofitable argument whether the study of Part II should begin or end with a consideration of the most serious breaches of international law — now designated international crimes. Finally, the frustrations of those who are waiting boil over in the proposal that the draft Code of Offences should deal with the crimes of states, as well as with those of individuals. There is then a clear danger that a confusion of objectives, and a confusion of political and legal methodologies, will paralyse the Commission's handling of both topics and cause a flow-on effect into other topics.

If such risks can be avoided, the outlook is much improved. Then, with patience and goodwill, the possibilities of finding common ground begin to emerge; and there is a new incentive to streamline working methods and to increase output.