(ix) the safe conduct or immunity from prosecution of persons who, pursuant to the treaty, could give testimony before the Court.

Implementation of sentences: The most common form of sentence will be imprisonment, and this raises the question of the place where sentence of imprisonment will be served. The most obvious solution would be for sentences to be served in the penal institutions of the complaining state, under conditions not less favourable to the prisoner than those provided in the United Nations minimum standard Rules for treatment of prisoners.

Relationship of a court to the existing extradition system:

A state party to the statute should at least be under an obligation to give "special consideration" to trial in the international court at the request of another state party.

An International Criminal Trial Mechanism other than a court:-

General Assembly Resolution 46/54 (1992) requested the Commission to examine, *inter alia* "proposals for the establishment of an international criminal court or *other trial mechanism*. One view suggested that these additional words implied the possibility of the creation of a very flexible mechanism, albeit at the international level¾a simple mechanism, essentially voluntary in character on which affected states could call in case of need. According to this view, what was envisaged, at the level of criminal process, was something more like the Permanent Court of Arbitration than the Permanent Court of International Justice or its successor, the International Court of Justice. The Working Group also considered a very flexible system such as a legal mechanism constituted in advance of the occasion for its possible use.

The second option was to reinforce the exercise of national criminal jurisdiction. Such mechanisms night reduce the need for an international trial mechanisms or they might be supplementary or alternative. One possibility would be a mechanism which helped to ensure that a national court, in dealing with an international character, duly applied the provisions of international law. An example of such a mechanism is the reference procedure established under Article 177 of the European Economic Community Treaty.

The third option focused on some form of preliminary international procedure whereby it would be established that a state had committed a given international category a crime termed as a crime against the peace and security of mankind (e.g. aggression, intervention). After that finding

the trial of individuals for their involvement in the activity could take place at national level. The international procedure would however be a necessary prerequisite to a trial, or it could be optional.

Other suggestions included a system of international inquiry or fact finding, in some way linked to the trial of persons involved in a national court. But these options in view of the Working Group would not suffice for international criminal jurisdiction.

Recommendations of the Working Group

The basic propositions recommended by the Working Group were:

(a) Any international criminal court or other mechanism should be established by a statute in the form of a treaty agreed to by states parties;

(b) In the first phase of its operations, at least, a court or other mechanism should exercise jurisdiction only over private persons, as distinct from states;

(c) The Court's jurisdiction should be limited to specified international treaties in force defining crimes of an international character. This should include the Code of Crime against the Peace and Security of Mankind (upon its adoption and entry into force). But it should not be limited to the Code. A State should be able to become a party to the Statue without thereby becoming a party to the Code;

(d) The Court or other mechanism would be essentially a facility for states parties to its statute (and also, on defined terms, other states). It should not have compulsory jurisdiction, in the sense of a general jurisdiction which a state party to the statute is obliged to accept *ipso facto* and without further agreement; and

(e) The court or other mechanism should not be a standing full-time body. On the other hand, its constituent instrument should not be a mere draft or proposal, which would have to be agreed on before the institution could operate. Thus the statute should create an available legal mechanism which can be called into operation when and as soon as required.

The Commission adopted the recommendations of the Working Group and decided to Annex it to the Report.

The Commission concluded:

(a) that though the ninth and tenth reports of the Special Rapporteur on the topic "Draft Code of Crimes against the peace and security of

mankind"[4] and the debates thereon in the plenary, and through the report of the Working Group, it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism" entrusted to it by the General Assembly in 1989;

(b) that the more detailed study in the Working Group's Report confirmed the view, expressed earlier by the Commission, that a structure along the line of that suggested in the Working Group's report could be a workable system;

(c) that further work on the issue *required a renewed mandate* from the Assembly, and needed to take the form not of still further general on exploratory studies, but of a detailed project, in the form of a draft statute; and

(d) that it was now a matter for the Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis.

Conclusion

The idea of a court or other trial mechanism needs to be dealt with carefully from the point of view of the *AALCC member states*. There are, no doubt, various flexible forms of international juridical assistance which might help some countries, specially smaller countries with limited legal and judicial resources. These might include the secondment of experienced judges from related neighbouring legal systems; co-operative regional courts of appeal; assistance with judicial education and training.

Before the General Assembly authorizes the preparation of a Statute (as the Working Group recommended) there are certain fundamental points which need to be clarified :

i) Under the present system of universal jurisdiction which provides for trial or extradition, perpetrators do not always get punished because states are either unwilling or unable to comply with the conventional provisions which in any case are not universal. The establishment of an International Court will not overcome this problem unless there is political will to overcome this hurdle.

ii) Where would the seat of the Court be? Whether it be a permanent court or an *ad hoc* mechanism there should be some identifiable seat for such an important body.

4. It may be recalled that Part III of the Eighth Report of the Special Rapporteur considered by the Commission in 1990 was of the nature of a questionnaire dealing with the possible establishment of an international criminal court. See Doc.A/CN.4/430/Add.

iii) Certain states are reluctant to go into such a venture which in effect circumvents extradition procedures. There are often disparities in different legal systems. Some states have abolished death sentence, some others still have it. For the same crime there is also no uniformity of punishment. The principle of proportionality not withstanding, these are some reasons why certain states are reluctant to extradite and might also not be willing to hand over their nationals for trial before an International Court. If the court is to function properly the rules of its procedure should either be framed now or provisions made for giving the Court powers to make such rules and to amend them when required.

iv) While Article 38 of Statute of the International Court of Justice has largely been accepted as the source of applicable law, it is not in our view necessary to exclude writings of publicists as an additional source.

v) Last but not the least, in taking up such an important task as the preparation of a statute of the proposed Court, it is essential that political will exists at all levels. If this is missing, even if the Commission succeeds in framing a Statute which satisfied all requirements, the danger of its being just another Convention like many already existing whether in force but not abided by should not be overlooked. Therefore, before embarking upon any further activity, it is necessary first and foremost to establish that the international community is ready and willing to have an international criminal court.

Nevertheless, the Commission needs to be commended for a job well done. Its conclusions reflected in para 57 are fully supported by the AALCC Secretariat and merit careful consideration by the General Assembly.

International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law

At its Forty-fourth Session the Commission had before it the Eighth Report of the Special Rapporteur[1] Mr. Julio Barboza. The Report, of the Special Rapporteur, reviewed the status and purpose of the draft articles he had hitherto proposed and further, indicated that apart from the text of the first nine draft articles presently before the Drafting Committee the text of other draft articles that he had proposed thus far were merely explanatory. This however, he pointed out, did not apply to the text of draft article 10 on

1. See A/CN. 4/433 and Corr. 1.

the principle of non-discrimination since the principle of non-discrimination had generally been supported by the Committee.

The Eighth Report comprising four parts including an Annex (on Recommendatory Provisions of Prevention) and an Appendix (Development of Some Concepts in Draft Articles Appearing in Previous Reports) thus presented a more extensive examination of the development of the principles of prevention and included the text of nine draft articles thereon. The Appendix was an attempt to define the concept of risk and harm more clearly. The Appendix also proposed the amendments to some other terms.

Introducing the Report, the Special Rapporteur stated *inter alia* that the Chapter which the Commission needed to re-examine in light of discussions both at the Commission as well as at the Sixth Committee was one relating to prevention which was earlier to comprehend now that several international instruments on the matter had been drawn up and further there was a growing corpus of legal literature. In this regard he cited several instances which illustrated the intense legal activity in the field in several fora. He pointed out that the draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment drawn up by the Council of Europe, was perhaps one instrument which came closest to the work of the Commission since unlike most of the other Conventions it covered all kinds of dangerous activities and was not restricted in its scope of application to any one type of activity.

The main purpose of the Report, the Special Rapporteur stated, was to transform the obligation of prevention into simple guidelines for Governments. Whereas reparation had to do with risk, risk could not be linked with prevention for the simple reason that the kind of responsibility called for by activities involving risk was a form of strict liability.

Chapter I of the Eighth Report dealt with the question whether the draft articles should include obligations of prevention together with obligations of reparation. Obligations of prevention dealt with procedural obligations. As a majority in the Commission was against keeping procedural obligations in the text, the Special Rapporteur had incorporated them in an annex as guidelines for Governments.

Although some members preferred to keep unilateral measures of prevention as 'real' obligations, the Special Rapporteur believed that obligations of that kind were primary rules whose breach gave rise to state responsibility. The introduction of State Responsibility, however, made for a two-fold problem; on the one hand, Governments were extremely reluctant to become parties to instruments containing clauses on State responsibility. On the other hand, the difficulties of a procedural nature relating to the

method for the settlement of disputes and to the court competent to decide cases concerning relations between States and individuals could not be ignored. Therefore he had eliminated all obligations of prevention from the instrument.

The Special Rapporteur stated that whatever the nature of the annex to which such obligations were confined the question that needed to be addressed was whether prevention measures should be treated jointly or separately. There was only one important difference between measures relating to a particular activity; the content of the consultation. In the Rapporteur's view, all the measures could be jointly treated, Unilateral measures and legislative and administrative measures imposed on the State the same kind of burden, regardless of the type of activity concerned. Because activities with harmful effects caused transboundary harm in the course of their normal operation, they should not be permitted unless there was some form of prior consent between the affected States. Activities involving risk which had been authorised by the State of origin would not require the prior consent of the States likely to be effected provided that the State of origin was prepared to compensate them if damage occurred and to do so within the framework of a regime which recognized, in principle, the liability of the operator for damage.

An important condition for the legality of an activity which caused or created the risk of causing transboundary harm as a result of environmental interference was mentioned in the report of the Experts Group on Environmental Law of the World Commission on Environment and Development. For an activity to be lawful, the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risks must far exceed in the long run the advantage which such prevention or reduction would entail. That statement referred to activities which were not prohibited, regardless of the harm they caused or the risk they created, because they were useful or even necessary to the l life of modern societies, or if one preferred, to the balance of interests test.

Chapter II of the Eighth Report entitled '*Annex-Recommendatory Provisions of Prevention* comprised of the text of nine draft articles on the principles of prevention. Introducing Part II of his Report the Special Rapporteur said that those members of the Commission who preferred the annex approach may wish to express their views on the system proposed in this part. Draft article addressed to *Preventive Measures* sets out the first duty of the State in respect of activities that risk causing or activities causing transboundary harm, and places a State under a duty to assess the potential transboundary harm of any activity falling within the scope of the

topic. It *establishes a basic principle : viz. activities having a risk of causing or activities causing transboundary harm require the prior authorization of the State under whose jurisdiction or control they are to be carried out.*

The views of members on this draft article were divided. While one group found the draft article superfluous, the other supported its retention. In the view of the AALCC Secretariat there is considerable merit in the second approach.

According to the first view draft article 1 stated the obvious. Activities of the kind covered by the topic also posed threats to the environment, life and property in the territory of the State of origin itself. Because of these possible domestic remifications, States normally permitted undertaking such activities within their territory only with their prior authorization. Such authorization would normally be granted only after making a careful assessment of the socio-economic as well as environmental impacts of those activities. Proponents of this view found two other difficulties with draft article 1 viz. (1) the requirement of States adopting special legislative, administrative or enforcement measures interfered with the internal affairs of States; and (ii) it is not always possible to assess correctly the transboundary impact of some activities, it is therefore inappropriate to impose a well-nigh impossible task on the States.

In the view of the members of the Commission supporting the retention of draft article 1, it was only fair to require States to allow activities that had the potential of causing transboundary harm to be conducted only after reviewing their environmental impact assessment. The permit to conduct such activities should not be viewed as a wholly internal matter where it posed transboundary potential for harm.

Draft Article 2 on *Notification and Information* requires notification and information to States that might be affected by transboundary harm. The Special Rapporteur believed, that the draft provision did not impose an unreasonable burden on the States; since information did not entail an additional effort to investigate beyond what the State had already done. Where it found it difficult to discern the extent of the probable effects of that activity, the State of origin, the draft article stipulates, should seek the assistance of an international organization with competence in the area.

Divergent views were expressed about the main thrust of this draft article. According to one view draft article 2 stipulated a duty to inform those who might be harmed by the consequences of one's activities, a principle which already existed in internal law. The members who supported draft article 2 agreed, with the Special Rapporteur, that the duty to inform

was closely linked to the duty to notify and that it was reasonable to require that the notification and information procedure should be followed in cases where transboundary harm was certain or probable. The provision was applicable to both activities involving risk and those with harmful effects. This seems to us as a reasonable approach to mutual danger. However, some preferred the treatment of these two types of activities separately in respect of measures of prevention. Some members felt that the requirement of notification and information under article 2 should become mandatory.

The other view did not see any utility of draft article 2 and found it impractical and felt that if an activity had a risk of significant transboundary harm, it would be a wrongful act and the State of origin should refrain from committing it. The practicality of the provision was also doubted, as it was felt that it would be unreasonable to expect States to refrain from undertaking lawful activities because their assessment of those activities revealed a possible transboundary harm.

Divergent views were also expressed on the requirement that the State of origin should seek the assistance of competent international organization. While some members expressed the view that its practicallity was doubtful, others felt that such a requirement was most helpful. According to the latter view both regional and international organizations might, in some cases, be in a better position to supply the States, particularly the developing States, with technical and financial assistance in respect of, for example, preventive measures to be adopted. Organizations such as UNIDO, IAEA and the Indian Ocean Commission were mentioned as examples of useful international and regional organizations. It was suggested that the provision defining the role of the international organizations might well be modelled on Articles 202 and 203 of the United Nations Convention the Law of the Sea. It was also proposed that this topic should anticipate preferential treatment for developing States.

Draft article 3 dealing with *National Security and Industrial Secrete* incorporates a safeguard clause permitting the State of origin to withhold information vital to its national security or to the protection of industrial secretes. The draft article relies on the good faith cooperation by the State of origin with other States in transmitting any information that it could provide, depending on the circumstances.

This provision may prove to be useful and a positive element in the draft and might even encourage States to accept the instrument as a whole.

Draft Article 4 dealing with *activities with harmful effects; prior consultation* represents the first instance of a separate provision relating only to activities with harmful effects. The draft article is addressed to

those activities which, in their normal course of operation cause transboundary harm. Where such harm is avoidable, the State of origin is obliged to require the operator to take the necessary preventive measures. However where such harm is unavoidable, no further steps may be taken without some consultation with the affected States. Affected States may make counter-proposals regarding the conduct of the activity "with a view to establishing a legal regime for the activity in the question that is acceptable to all the parties concerned".

The members of the Commission who commented on draft article 4 found the purpose of the draft article unclear. According to one view, expressed in the Commission if the State of origin was aware that an activity was going to have harmful effects, it ought to refrain from undertaking or authorizing it. According to another view, the planned activity with harmful effects could be very important to the development of the State of origin and that State might not have any other way to reduce or minimize the transboundary harm to its neighbours. In such a situation no purpose would be-served by holding consultations between the State of origin and the affected State since such consultations are unlikely to lead to any agreed regime.

If the purpose of prior consultations in respect of activities with harmful effects, provided for not only in draft article 4 but also in draft articles 5 and 7, is to arrive at an agreed regime which would permit such activities notwithstanding their harmful effects, it should be expressly stated. It need also be indicated that such prior consultations might involve either modification of the original scheme proposed by the State authorizing the activities or possibly, even some element of compensation for the interests in other State that would be harmed by those activities. It was suggested that draft article 4 should make clear that the case of activities whose harm could be avoided, the object of the consultations was to obtain the agreement of the affected State regarding the establishment of an acceptable legal regime of prevention, since the term "consultation" was very often used in cases where there was no obligation to obtain consent. Draft Article 4 must specify the characteristics of "a legal regime" for which the consent of the affected States was requested in the case of avoidable harm. In the view of the AALCC Secretariat this draft proposal while useful might result in agreed regime and needs careful consideration.

Draft Article 5 on *Alternatives to an activity with harmful effects* is the second article dealing specifically with activities with harmful effects where it is abundantly clear that transboundary harm is unavoidable under the conditions proposed or that such harm cannot be adequately compensated.

In such cases, the potentially affected States may ask the States of origin to request from the operator to put forward alternatives which may make the activity acceptable. This article is an intermediate step between consultations and prohibition.

Some members felt that the draft article did not sufficiently protect the interest of the affected State and pointed to the ineffectiveness of the options that were open to it. They expressed the view that where transboundary harm was unavoidable or where it was established that such harm could not be adequately compensated, simply authorising the injured State to request the State of origin to review "alternatives which may make the activity acceptable" was too mild. The draft article should state that if the operator was unable to put forward acceptable alterna...es, the State of origin could not authorize the proposed activities. The Secretariat of the AALCC is of the view that a final decision of this provision would require a careful reading of the stipulations of draft Articles 4 and 7 as well.

Draft Article 6 on *'Activities involving risk consultations on a regime'* attempts to address the specific situation of activities involving risk of causing transboundary harm. This article makes clear that one of the main differences between activities with transboundary harmful effects and those with the risk of causing transboundary harm is the purpose of the duty of consultations. Under Draft Article 6, the States concerned, if necessary, are to consult in order to determine the amount of potential transboundary harm, any possible modification of the planned activity, or preventive measures or contingency plans in case of harm. Draft Article 6 also provides that liability for any transboundary harm caused will be subject to the articles of the main text of this topic, unless the parties could agree on a special regime for compensation.

Draft Article 7 on *Initiative by the Affected State* provides an opportunity for the affected State to take initiatives when it has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm of creating a risk of causing it such harm. The affected State may request the State of origin to comply with the provisions of draft Article 2 of the present Annex. Such a request would be required to be accompanied by a technical explanation, setting forth the reasons for such a belief. If the activity proves to be one of those mentioned in draft article 1 of the main text, the State of origin should pay for the cost of the study.

Views expressed on this draft article indicated general support for the idea underlying it. Several members deemed it useful to allow a State potentially affected by an activity to initiate consultations, both before or after the authorization by the State of origin, and even when the activity in