also listed in draft articles 12 and 13 proposed by the Special Rapporteur in his fourth report. Thus the existence of a damage is certainly a condition for lawful recourse to countermeasures provided that the term 'damage' is understood in the broad sense encompassing legal or moral injury.

The fifth element was to be found in the words "not to comply with one or more of its obligations towards the said State", which stressed the fact that a distinction should be made in principle between the so-called measures of reciprocity on the one hand and other countermeasures on the other. A different position of principle had been taken by the previous Special Rapporteur, Mr. Riphagen, in his draft articles 8 and 9.

The sixth element in articles 11 was his tentative proposal to eliminate the wording contained in earlier drafts; "in order to protect its legal rights" or "in order to obtain cessation and/or reparation". He had eliminated that form of language. As explained in the third report, an effort should be made to learn more from State practice, but, as indicated in the present report that practice did not reveal enough with regard to the finality and purpose of compensation, and in particular whether any punitive element was present. In his view, although the punitive intent was likely to be present in the mind of the State organs which decided resort to counter-measures against a wrongdoing State, it was not appropriate to recognize a corresponding right on the part of the injured State to chastise. On the other hand, it would be equally inappropriate to intimate expressly that no such intent could be pursued. The matter should be left simply to the practice of States, subject of course to the general rule of proportionality. The application of counter measures was fraught with the likelihood of abuse, largely because of power disparities among States. This element received ample attention.

The issue of countermeasures that an injured State could take in response to an internationally wrongful act was important as it involved not merely differences of view on technicalities but also on substantial matters.

In the opinion of one member of the Commission countermeasures were a controversial issue because they were simply power relationships in disguise and did not reflect generally recognised rules of international law. They were, therefore, not suitable for codification or progressive development of international law. In its resolution 46/54, the General Assembly had requested the Commission to indicate those specific issues on which expression of views by governments would be of particular interest. The Commission should consider referring to the General Assembly the question of the suitability of including articles on countermeasures and the settlement of disputes in the draft now being formulated.

In the second Chapter entitled "*The impact of Dispute Settlement*

Obligations" the Special Rapporteur had dealt with such matters as (a) State Practice before the first World War; (b) State Practice During the Inter-war period; (c) Principles and Rules emerging After the Second World War; and (d) State practice since the Second World War. After the survey he concluded that the following inference could be drawn (from the practice) in terms of *lex lata:*

"(i) In the first place an injured State must refrain from unilateral measures that may jeopardize an amicable solution as long as it is not clear that the means of settlement other than negotiation at their disposal have not brought about or are not apt to bring about any concrete result;

(ii) Secondly whenever a settlement procedure susceptible of a binding decision is on the way before an international body, an injured State must refrain from any unilateral measure other than interim measures of protection until the said body has reached its decision and the law-breaking State does not comply therewith. Where the international body in question is endowed with the power to indicate or order interim measures of protection, the injured state must refrain from unilaterally adopting any such measures until the body in question has pronounced itself on its request for interim measures.

(iii) It is instead doubtful whether the injured State is to refrain from unilateral measures also by the fact that it is legally entitled to resort to unilaterally to a (binding or not binding) third party settlement procedure."

The Special Rapporteur pointed out that according to draft article 10 proposed by the former Special Rapporteur Mr. Riphagen, it would be unlawful for the Injured State to resort to reprisals (as distinguished from reciprocity "until it has exhausted the international procedures for peaceful settlement of the disputes available to it". That prohibition excluded "interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedures for peaceful settlement of disputes, has decided on the admissibility of such interim measures of protection" as well as the "measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal". Pointing out that the Commission's reaction had varied the Special Rapporteur stated that in light of the analysis of the practice the Commission may prefer to render the relevant provisions more articulate.

Introducing draft article 12 entitled "*Conditions of* Resort to Countermeasures" the Special Rapporteur said that it could be divided into four closely connected but quite distinguishable parts. The first concerned the question of prior communication in general and was reflected in paragraph 1 (b), which was intended to define, albeit in general terms, a requirement implicit in the wording "demand under articles 6 and 10", in article 11, when there was no "adequate response". Appropriate and timely communication of the injured State's intentions had been considered indispensable not only by Mr. Riphagen but also by the Commission during the debate on Part Three of the draft proposed by Mr. Riphagen. Two points arose in that connection. The requirement of an appropriate and timely communication is an important condition in the context of countermeasures to be included in Part Two instead of being included in Part Three, which was to govern the further problem of the new general obligation relating to the settlement of disputes concerning the interpretation and application of the rules contained in the draft.

The next and most important point was in paragraphs 1 (a) and 2 (a), which dealt with prior exhaustion by the injured State of dispute settlement procedures. The matter had been covered in paragraph 1 of his predecessor's article 10, which provided that "No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6."

The first main difference between that formulation and the one proposed now was the criterion of availability. In the older proposal, a reference was made solely to the purpose of the international settlement procedure, namely "in order to ensure the performance of the obligations mentioned in article 6". In the draft now proposed, the sources of availability were much broader, namely "general international law, the United Nations Charter, or any other dispute settlement instrument to which it is a party". Under the older proposal, *availability was understood to cover, in principle, only third party settlement procedures which could be set in motion by unilateral application. In the new text, availability would expressly include all the procedures listed in Article 33 of the Charter,* from the most simple negotiation to the most stringent forms of judicial settlement before the International Court of Justice. In that way, maximum restraint was imposed on the injured State to prevent it from resorting to reprisals prematurely.

Unlike the older formulations, draft article 12 mentions expressly—in favour of the injured State—the factor represented by the way in which the wrongdoing State reacted to any dispute settlement attempts made by the

injured State via one of the available procedures. Paragraph 2 (a) stipulates that the condition set forth in paragraph 1 (a), namely prior exhaustion of "all the amicable settlement procedures available" did not apply "where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures".

The proposed provision needs to bring some balance into the relationship between the injured State and the wrongdoer in the evaluation of the existence or otherwise of that essential condition for the lawfulness of an act of reprisal, namely the exhaustion of available peaceful settlement procedures. Since the scope of availability had been broadened, it is obviously essential to place some burden upon the wrongdoing State. The condition set forth in paragraph 1 (a) was described as the cornerstone of the concept of countermeasures and of their role in the system devised to redress the situation created by an internationally wrongful act. It was emphasized in the Commission that, in order to prevent the injured State being given too much latitude to act as a judge in a case to which it was a party and in the absence of an adequate institutional framework, it was important to establish that available amicable settlement procedures must be exhausted as a prerequisite to the application of countermeasures. This was especially so in view of the great inequality revealed among States in the exercise of their *faculte* to apply countermeasures and the advantage enjoyed in that respect by powerful States in the absence of adequate third party settlement commitments.

Some members commented on the question of compliance with dispute settlement obligations as a condition of the lawfulness of resort to countermeasures. In this connection, it was said that while the task of enhancing the role and broadening the spectrum of peaceful means for the settlement of disputes would be tackled by the Commission in considering Part Three of the draft, it ought to be kept in mind even during the examination of the conditions of admissibility of unilateral countermeasures. Several members referred in this context to Article 2, paragraph 3 and Article 33 of the United Nations Charter and to regional systems whose members were under an obligation to exhaust all available means for the peaceful settlement of disputes before taking any step that might involve the violation of a rule of international Law. Reference was also made to the 1934 resolution of the International Law Institute which stated, *inter alia* that, where machinery existed for the settlement of disputes, there could be no reason for resorting to reprisals.

The view was also expressed that the obligations concerning the peaceful

settlement of disputes were not the only ones to be taken into consideration and that there was a limitation on the unilateral use of countermeasures in the provisions of Chapter VII of the Charter of the United Nations, in the sense that States were no longer free to resort to countermeasures once the Security Council had decided on sanctions in accordance with Articles 41 and 42 of the Charter.

At the outset of Chapter IV of the Fourth Report dealing with the issue of 'Proportionality of Countermeasures' the Special Rapporteur expressed the view that although the relevance of proportionality in the regime of countermeasures is widely accepted in both doctrine and jurisprudence nonetheless clarification was necessary with regard to the precise content of the principle with regard to its strictness or flexibility and with regard to the criterion on the basis of which proportionality should be assessed.

With regard to the first point viz. the strictness or flexibility of proportionality, the Special Rapporteur was of the view that, in the context of inter-state practice, reference should be made either by the reacting State or by the State against which measures are being taken to equivalence or proportionality in a narrow sense. Given that the function of the principle is to avoid the possible inequitable result of the use of countermeasures it is understandable that a rigid notion of proportionality should have appeared unsuitable. The Special Rapporteur therefore *preferred the negative formulations* of the *Naulilaa* and *Air Service* awards. In this he appears to have changed his stance as compared to the views expressed in the Third Report.

Turning to the question of criterion on which proportionality should be based the Special Rapporteur said that proportionality should be assessed taking into account not only the purely quantitative element of damage caused but also to the qualitative factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach.

Introducing draft article 13 entitled *Proportionality* the Special Rapporteur stated that for the abovementioned reasons that he had deliberately opted for a negative rather than a positive formulation. Although the text did not specify the extent to which countermeasures might be disproportionate nor did it require that they should be manifestly disproportionate, it however provided that, in determining whether counter- measures were not disproportionate, account should be taken of the gravity not only of the internationally wrongful act, but also of its effects.

The opinion on the text of the draft article was, however, divided. Some members held that the principle of proportionality provided an effective guarantee in as much as countermeasures that were out of proportion to the

nature of the wrongful act could give rise to responsibility on the part of the State using such measures. Other members stressed that the principle was difficult to apply in practice.

While some members concurred with the Special Rapporteur that the rule on proportionality should be formulated in negative terms, others expressed preference for a positive formulation of the rule in order to limit the area of subjective assessment. In that respect, it was emphasized that the principle of proportionality should also cover measures of restortion and measures of reciprocity and operate in the strictest possible way to ensure that powerful States could not take advantage of their position to the detriment of weaker States. The view was on the other hand expressed that it was with the grossly disproportionate reactions that the Commission should concern itself.

Several member were of the opinion that a more precise definition of the scope and content of proportionality would be desirable. The criterion of equity for example was viewed as too vague and uncertain since it generally depended on the definition of equity established during a dispute settlement procedure. The AALCC Secretariat subscribes to this view for when lawyers leave too much room for argument there is much room for injustice.

In introducing Chapter V of the Report dealing with *Prohibited Countermeasures* the Special Rapporteur stated that the main issues relating to countermeasures arose from the following viz: (a) the prohibition of the use of force; (b) respect for human rights; (c) diplomatic law; and (d) peremptory and *erga omnes* provision and (e) respect for the right of third parties. He observed that although some of the issues under items (a), (b) or (c) above are covered by imperative or *erga omnes* rules it was preferable to continue to deal with them separately in view of the importance acquired by the prohibition of the use of the force and the protection of human rights.

As regards the prohibition of the use of force he emphasised that the prohibition of armed countermeasures under Article 2, paragraph 4, of the Charter of the United Nations, as elaborated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States and in other United Nations and other instruments, should be expressly provided for in the draft articles, first, because the special character of the relationship between the injured State and the offending State made it advisable to affirm the continued validity of certain general restrictions to the freedom of State and, secondly, because States were particularly tempted to evade their obligations whenever the law was not sufficiently explicit

and exhaustive.

The text of draft article 14 on *Prohibited Countermeasures* as proposed by the Special Rapporteur incorporates all the five principles. Draft article 14 incorporated in Chapter VI of the Report reads as under :-

Article 14

Prohibited countermeasures

1. An injured State shall not resort, by way of countermeasures, to :
   a) the threat or use of force (in contravention of article 2, paragraph 4 of the United Nations charter);
   b) any conduct which :
      (i) is not in conformity with the rules of international law on the protection of fundamental human rights;
      (ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;
      (iii) is contrary to a peremptory norm of general international law;
      (iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.
2. The prohibition set forth in paragraph 1(a) includes not only armed force but also any extreme measures of political economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.

The members of the Commission recognised that the Commission could not admit derogation from the prohibition of armed reprisalss implied in Article 2 paragraph 4 of the United Nations Charter. The members of the Commission also agreed with the restrictions based on respect for human rights. As regards the restrictions, on the recourse to counter- measures, deriving from the inviolability of diplomats and specially protected persons although members of the Commission accepted the provision of draft article 14 paragraph 1 sub-paragraph (b) (ii) the view was expressed that since the purpose of a regime of countermeasures was to resolve and not to aggravate it was important to leave open the normal channels of diplomacy. The norms and rules of diplomatic law, it was stated, had sufficient political basis and purpose so as to place them beyond the regime of the scope of countermeasures. Some members questioned the need for a provision relating

to rules of *jus cogens* on the ground that such rules, as defined in Article 53 of the Vienna Convention on Law of Treaties were by definition peremptory norms from which no departure was allowed. It was pointed out, however, that the concept of *jus cogens* varied over time. Several members felt that the concept of *jus cogens* and obligations *erga omnes* were largely similar in scope and reference was made in this regard to the Convention on the Law of Treaties and to the judgment of the International Court of Justice in the *Barcelona Traction case*. It was stated that in the *Barcelona Traction case* the Court's categorisation was based on the value of the interest concerned, the idea being that when basic interests of the international community were at stake, all States were duty-bound to respect them.

In Chapter VII of the Report the Special Rapporteur had dealt with the "so-called self-contained regimes". In the view of the Special Rapporteur the so-called self-contained regimes were charterized by the fact that the substantive obligations they set forth were accompanied by special rules concerning the consequences of their violation.

> "The question to be addressed," in his view, "was, whether the rules constituting those regimes affected—and, if so, in what way—the right of States parties to resort to the countermeasures provided for under general international law. Although the Luxembourg Court of Justice had confirmed the principle that States members of the European Economic Community did not have the right to resort to unilateral measures under general international law, scholarly opinion was divided. Specialists in Community Law Considered that the system of the European Economic Community constituted a self-contained regime, whereas scholars of public international law argued that the treaties concerned did not really differ from other treaties and that the choice of the contracting States to be members of a "community" could not, at the present stage, be regarded as irreversible."

In the view of the Special Rapporteur, the claim that it would be legally impossible, as a last resort, for States members of the European Economic Community to fall back on the measures afforded by general international law did not seem to be fully justified, at any rate not from the point of view of general international law. As far as human rights were concerned, the Special Rapporteur, relying on both the literature and recent practice, expressed the opinion that neither the system established by the International Covenant on Civil and Political Rights nor the regime embodied in the

1950 European Convention on Human Rights prevented the States concerned from resorting to the remedies afforded by general international law and that no self-contained regime existed in the field of Human Rights. He came to the same conclusion as regards the General Agreement on Tariffs and Trade and also in respect to diplomatic law, a sphere in which restrictions on countermeasures seemed to derive not from any "speciality" of diplomatic law, but from the normal application, in that particular area, of the general rules and principles constituting the regime of countermeasures. The Special Rapporteur expressed doubts as to the admissibility, even in *abstracto*, of the very concept of self-contained regimes as subsystems of the law of State responsibility or, to use the expression employed by the previous Special Rapporteur, "closed legal circuit(s)".

In the opinion of the Special Rapporteur, the exercise of the *facultes* (faculties), unilateral reaction provided for under general international law was and must remain possible, namely in the case in which the State injured by a violation of the self-contained system resorted to the conventional institutional and secured from them a favourable decision, but was not able to obtain reparation through the system's procedures. Similarly in the case in which the internationally wrongful act was an on-going violation of the regime, the injured State would have the right, if the wrongdoing State persisted in its unlawful conduct while conventional procedures were in progress, to resort simultaneously to "external" measures calculated to protect its primary or secondary rights without jeopardizing a "just" settlement of the dispute through the procedures provided for under the system.

The Special Rapporteur explained that article 2 of Part Two as adopted by the Commission was questionable in relation to both customary rules and special rules governing treaties. He pointed out that the aim pursued by States in embodying within a treaty special rules governing the consequences of its violation was not to exclude, in the relations between those States, the mutual guarantees deriving from the normal operation of the general rules on States responsibility but to strengthen the normal, in-organic and not always satisfactory guarantees of general law by making them more dependable, without renouncing the possibility of "falling back" on less developed, "natural" guarantees. He therefore suggested that the article should specify, first, that the derogation from the general rules set forth in the draft derived from contractual instruments and not from unwritten customary rules and, second, that, for a real derogation from the general rules to take effect, the parties to the instruments should not confine themselves to envisaging the consequences of the violation of the regime

but expressly indicate that, by entering the agreement, they were excluding the application of the general rules of international law on the consequences of internationally wrongful acts. He also suggested that in the commentary to the article, it should be made clear that a derogation provided for under a contractual instrument would not prevail in the case of a violation which was of such gravity and magnitude as to justify, as a proportionate measure against the law-breaking State, the suspension of termination of the system as a whole.

Several members took the view that the Commission did not have to pronounce on the question of self-contained regimes because the matter was one of treaty interpretation, more specifically of determining whether the treaty involved a renunciation, on the part of the States concerned, of the right to take countermeasures under general international law, assuming that the measures provided for under the treaty were inadequate. It should be recalled that in the *Hostages case* the International Court of Justice had not considered the 1961 Convention as a self-contained regime but had taken account of the body international law relating to diplomatic immunities, emphasising its customary nature. As regards the particular case of a regime based on customary rules, the remark was made that it had to be determined whether some or all of the rules on which such a regime was based were of a *jus cogens* character, in which case there could be no derogation from them. Doubts were expressed on the appropriateness of trying to provide a general answer to those questions by resorting to the notion of self-contained regimes, in as much as each case would have to be determined on its own merits.

Finally, the Report had dealt with the problem of a plurality of equally or unequally injured States.

The Special Rapporteur observed that, according to the definition of an injured State in article 5, of Part Two of the draft articles, an internationally wrongful act might consist not only in conduct giving rise to unjust material damage but also, more broadly, to conduct resulting in the infringement of a right, such infringement constituting, with or without damage, the injury. He said that although most international rules continued to set forth obligations the violation of which affected only the rights of one or more States, that bilateral pattern did not hold for the rules of the general or collective interest that must be complied with in the interests of all the States to which the rules applied. The violation of obligations arising, for example, under rules concerning disarmament, promotion of and respect for human rights and environmental protection, termed *"erga omnes obligations"*, simultaneously injured the subjective rights of all the States

bound by the norm, whether or not they were specifically affected, with the exception, of course, of the subjective right of the State that had committed the violation. In the view of the Special Rapporteur, it was now necessary to establish the consequences of the fact that *erga omnes* obligations had corresponding *omnium* rights and to determine, for example, whether the violation of an *erga omnes* obligation placed all the injured States in the same situation and whether it placed them in the same situation as the violation of a different kind of obligation. In his opinion, the notions of a "third State" and an "indirectly injured State" should both be rejected. Citing an example from the Law of the Sea, he said that the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas, a decision which would affect:

(i) the interests of any State whose ships had been on the point of entering the canal when it was closed to navigation'

(ii) the interests of any State whose ships had been sailing towards the canal in order to cross it; and

(iii) the interests of all other States, because, according to the Law of the Sea, all States were entitled to the free use of the canal.

Since all States *were entitled* to the free use of the canal, they were all legally injured by the decision of State A, even though there might be some difference between them in respect of the extent of the damage sustained or feared. The Special Rapporteur therefore arrived at the conclusion that the distinction between "directly" and "indirectly" injured States did not hold water and that the differing situations were distinguished by the nature or the extent of the injury. The fact remained that the breach of an *erga omnes* obligation injured a plurality of States, which were not necessarily injured in the same way or to the same degree. It must therefore be determined to what extent each of those States was; on the other hand, entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition, and, on the other hand, entitled to resort to sanctions or countermeasures.

In the light of the above, the Special Rapporteur suggested a very tentative draft of a possible article 5 *bis* reading as follows:

"Article 5 bis"

"Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles".

Emphasis was first placed on the need to distinguish between the question

of a plurality of injured States and the question of *erga omnes* obligations. The remark was made in this connection that *erga omnes* obligations were part of *jus cogens* and consequently related to international crimes, whereas the problom of a plurality of injured States arose in connection with any regime of international obligations . Attention was drawn in this context to the distinction made by the Special Rapporteur between obligations *erga omnes* and obligation *erga omnes partes*.

Some members agreed that the question of non-directly affected States was worthy of further consideration. The Special Rapporteur's objections to the concepts of non-directly injured, specially affected and third States were viewed as persuasive particularly in the case of a right to cessation and the general entitlement to reparation. Two separate categories of problems were mentioned in this context. The first related to the balance between reactions by various injured States in a situation where there was more than one such State under the terms of article 5. Assuming that no coordinated, collective ("horizontal") action was undertaken by those States, it was likely that each injured State would be predominantly concerned with its own relationship with the State which had committed the wrongful act. Taken alone, that conduct might seem reasonable. But what if, collectively, the conduct of all the injured States amounted to a disproportionate response? A provision to the effect that each state should respond with due regard to the responses of other injured States was viewed as too vague. The second and more serious category of difficulties lay in the fact that, although all injured States were equal within the meaning of Article 5, one or several States would, in some situations, suffer unquestionably more damage than others. The Special Rapporteur's approach, based not on the direct or indirect character of the injury but on the nature and degree of the damage suffered, was considered by some members as having the advantage of placing the problem on the firmer ground of damage, but as preserving uncertainties about the position of the various injured States towards which there were obligations that had been violated, and about the substantive or instrumental consequences of the wrongful act according to the nature and degree of the damage suffered.

In this connection, disagreement was expressed with the attempt of the Special Rapporteur to show that in the case of a violation of a multilateral obligation concerning human rights or the environment, all States were in the same position. It was pointed out that although, under the Charter, the prohibition of aggression constituted a general rule binding on all States in their mutual relationship, it was the direct victim of aggression which had the primary right of self-defence and that, even though other States could be involved in collective self-defence, the International Court of Justice, in the case concerning *Military and Paramilitary Activities in and against*

Nicaragua, had clearly stated that there existed a difference in legal status between the actual victim of aggression and other States, which, in a somewhat artificial sense, could be said to be "legally affected".

It was stated that draft Article 5 *bis* was welcome on three counts¾for the fact that the notion of an "injured State" did not *ipso facto* imply egalitarian treatment of injured States, for replying on the definition *stricto sensu* of an internationally wrongful act in order to identify the injured State or States, and for establishing, on the basis of that definition along, the rights or *facultes* (faculties) enjoyed by each State. Some members raised the question whether this new provision was really necessary; it was suggested instead to indicate either in the draft articles themselves or in the commentary, first, that the capacity of differently injured States to take countermeasures should be proportional to the degree of injury suffered by the State taking the measures and, second, that if the most affected States disclaimed *restitutio in integrum*, no other State should be able to claim it. Other members believed that, instead of conferring a right of response on indirectly injured States, a better course would be to provide that the violation of an *erga omnes* rule should first and foremost give rise to a collective reaction or to action within the framework of institutional mechanisms".

Three other issues were raised in the present context namely the problem of a plurality of wrongdoing States, the question of collective counter measures, i.e. the case where the most affected State might seek assistance from others, and the question of non-recognition and abstaining from rendering assistance were a particularly appropriate consequence in the case of a plurality of injured States and the question was asked whether the corresponding duties should not find their way into the instrument consequences.

The AALCC Secretariat refrains at this stage, in keeping with its past practice, to comment at length on the draft articles proposed by the Special Rapporteur. The Secretariat will comment on them at length once the Commission has adopted them. Nevertheless we deem it necessary to underscore our conviction that the whole concept of codifying — or progressively developing—the concept of countermeasures is one which should be dealt with utmost caution. It is a facility reserved almost exclusively for the powerful States over the weaker ones and it is fraught with the dangers inherent in unilateral and subjective application. The preliminary issue really is whether such a provision should be the subject of priority consideration by the Commission. This is in no way a reflection of the scholarly work undertaken by the Special Rapporteur and his predecessor.

VIII. Environmental Law
The United Nations Conference on Environment and Development, 1992

(i) Introduction

The United Nations General Assembly, decided to convene the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in June 1992, by a resolution 44/228 of 22 December 1989.

The UNCED mandate as formulated by the above resolution covered the following wide range of major environmental and developmental issues, which had actual or potential legal implications:

(a) Protection of the atmosphere by combating climate change, depletion of the ozone layer and transboundary pollution;

(b) Protection of the quality and supply of freshwater resources;

(c) Protection of the oceans and all kinds of seas, including enclosed and semi-enclosed seas, and of coastal areas and the protection, rational use and development of their living resources;

(d) Protection and management of land resources by *inter alia*, combating deforestation, desertification and drought;

(e) Conservation of biological diversity;

(f) Environmentally sound management of biotechnology;

(g) Environmentally sound management of wastes, particularly hazardous wastes, and of toxic chemicals, as well as prevention of illegal international traffic in toxic and dangerous products and wastes;

(h) Improvement of the living and working environment of the poor in urban slums and rural areas, through eradicating poverty, *inter alia*, by implementing integrated rural and urban development

programmes as well as taking other appropriate measures at all levels necessary to stem the degradation of the environment;

(i) Protection of human health conditions and improvement of the quality of life.

The specific objective of the UNCED was to promote further development of international environmental law, and to examine in this context the feasibility of elaborating general rights and obligations of states, as appropriate, in the field of the environment.

The six major outcomes expected to be brought about from the conference were as follows :

(a) an agreed statement of environment and development principles to govern the conduct of nations and people (Earth Charter);

(b) an agreed programme of work by the international community addressing major environmental and developmental priorities for the initial period 1993-2000 and leading into the 21st century (Agenda 21);

(c) agreement on the financial resources required for implementing the programme;

(d) agreement on access to environmentally sound technologies for developing countries;

(e) agreement on measures to strengthen and supplement existing international institutions and institutional processes; and

(f) specific legal instruments on climate change and biological diversity.

Pursuant to the G.A. Resolution, 44/228, a Preparatory Committee (Prepcom) for the UNCED had been established which held an organizational session and four regular sessions during its preparatory process from March 1990 to April 1992. The Prepcom had created three Working Groups to address the major substantial issues of these, Working Group I had concentrated on the issues concerning the protection of the atmosphere, land resources and conservation of biodiversity. Working Group II had primarily dealt with the protection of the oceans and all kind of seas, freshwater resources and environmentally sound management of wastes. The legal, institutional and related matters had been allocated to Working Group III.

Along with the extensive preparations of the Prepcom for UNCED, the Intergovernmental Negotiating Committee (INC) for a Framework Convention on Climate Change and for a Convention on Biological Diversity had been established respectively, with a view to preparing the draft texts of such Conventions and submitting them to UNCED for signature.

After more than two years of arduous preparation, the United Nations Conference on Environment and Development (UNCED) was eventually held at a high level in Rio de Janeiro from 3 to 14 June 1992. The Summit segment took place on 12 and 13 June 1992. Delegations from over 160 States participated at the Conference. A large number of UN agencies, intergovernmental organizations and non-governmental organizations were also represented. More significantly, the Heads of State and government from about 120 countries personally attended the first-ever Earth Summit.

The main outcomes of the Rio Conference include the adoption of the Rio Declaration on Environment and Development, Agenda 21, including provisions on implementation, financial resources and mechanisms, transfer of environmentally sound technology, cooperation and capacity building as well as international institutional arrangements and the adoption of a statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests. The signature by 153 countries on the Framework Convention on Climate Change and on the Convention on Biological Diversity is another great achievement of the Conference.

Involvement of the AALCC in Preparation for UNCED and its Follow-Up

For long, the AALCC has been addressing the environmental issues from the points of legal perspective. As early as its Tokyo Session held in 1974, the item "Environmental Protection"was included in the agenda of the Session, and since then, the topic has been under active consideration by the Committee.

After the adoption by UN General Assembly of Resolution 44/228, the Committee at its 29the Session in Beijing (1990) recommended *inter alia* that the AALCC should be actively involved in the preparation for the UNCED and render useful assistance to its member States in this regard.

The Committee's work programme on this subject, included : (1) Promotion of ratification of the 1982 United Nations Convention on the Law of the Sea and its subsequent implementation; (2) Transboundary movement of hazardous wastes and their disposal; (3) Consideration of the issues before the UNCED Prepcom, particularly Working Group III dealing with legal and institutional matters; (4) Assistance in the preparation of the Framework Conventions on Climate Change and Biodiversity; and