crime came could not be selected, not could a judge from a State on whose territory the crime was committed. The President himself would be elected either by all the judges sitting in plenary or by a committee appointed either by the United Nations General Assembly or by the General Assembly of Judges, which shall constitute the Bureau of the Court and shall take all decisions concerning the administrative and financial functioning of the Court. A larger Committee could also be established whose members would be elected by representatives of the State parties. This Committee would then elect the President and Vice-President (s). It would be authorized to oversee the administrative and financial management of the Court and, in particular, to approve the draft budget of the Court before its submission to the General Assembly. Such a larger committee, in the view of the Special Rapporteur, would however be too cumbersome and better suited to an inter-State court.

Court's procedure

The proposed Court's procedure followed various stages, including referral of a case to the Court, investigation, and the trial stage. A case would be brought before the Court only by means of a complaint made by a State. In this connection, reference may be made to the draft articles for and indication of the way in which a complaint should be drafted.

System of investigation

There are two main systems of investigation. One is the inquisitorial system, in which the investigation is entrusted to one person, the examining magistrate, who had excessive powers and his investigation is surrounded with secrecy. The other system is the adversarial system, under which the investigation is carried out openly and publicly by the court itself. In the case of the proposed Court, the simplest course was that the investigation should be carried out publicly by the Court. That did not, however, mean that, where circumstances required or in cases of some complexity, the President of the Court could not appoint some of the members to form a commission of investigation. As a general rule, however, the investigation procedure should be conducted by the trial court.

The trial stage would commence only when the indictment had been drawn up. Under some legal systems, after the investigation, the Procurator General in charge of the prosecution draws up an indictment which is then notified to the accused and any interested parties and, on the basis of the indictment, the trial process takes place. For the International Criminal Court, it has been proposed that a more flexible system—the majority in the Commission favouring a small and flexible body—should be adpopted, whereby the State bringing a complaint before the Court would assume responsibility for conducting the prosecution.

That procedure would preclude the need for a Prosecution Department, with all the attendant legal staff. Such a procedure entails a lengthy process. If responsibility for the prosecution is however placed on the State bringing the complaint, and that State has to assemble the evidence and produce it before the Court, the result, in the final analysis, would be virtually the same. What mattered most in the opinion of the Special Rapporteur, was for the Court to arrive at the truth by whatever means it could be established.

PART - II

Summary of Discussions held in the Commission

The members while initiating the discussion in the Commission were unanimous in thanking Mr. Thiam for his Report. Some members had dealt elaborately with issue of 'Status of the Tribunal'. The general approval of the members was for the Court to be an organ of the UN or at least a body set up and functioning within its framework. In this regard, among other examples, a recent report by the European Parliament on the establishment of an international criminal court for war crimes was cited and it was proposed under the UN system with emphasis being placed on the need to move towards universality. However, some members expressed the view that ".....a desire for concrete results had led to unsystematic treatment of certain issues. A rewording of some of the provisions on the applicable law, the competence of the court and the procedures to be used within the court, for example, might serve to highlight better, including for the benefit of the General Assembly, the position of the Criminal Court within the UN system as a whole."

Majority of the members, however, agreed with the Special Rapporteur's general approach as reflected in the statement in paragraph 4 of the report that the aim should be to establish "an organ with structure that are adaptable, not permanent and of a modest cost." They found this to be somewhat an idealistic solution; but it signified the general direction in which the Commission should move.

As regards the procedure for the appointment of judges (article 12) some members pointed out that it may "result in a veritable armada of judges"and , for that reason, members suggested to "provide from the outset for modest structure". Further it was also suggested that in appointing judges, the traditional principles should be observed, including those relating to representation of the different legal systems and different regions and also the principles that more than one national from the same State could not sit on any organ which tried the accused.

Significantly, as regards the penalities, some members favoured the application

of penalities provided for in the criminal law of the State on whose territory the crime had bneen committed. It was generally agreed by members that concurrence on matters of essentially technical and procedural nature should be relatively simple. It was also noted by them that provisions relating to technical and procedural aspects would account for 70 to 80 per cent of the provisions of the draft statute under consideration, while the remainder 20 to 30 per cent were the difficult residual questions on which much work still has to be done as these consituted the substantive aspects of the draft statute.

Some members referred to the difficulties existing in the process of harmonizing jurisdictional issues. Formulation of article 5 was stated to be little confusing as it dealt with both jurisdiction *ratione personae* and with jurisdiction *ratione materiae*. It would be difficult to accept that States could by special treaties or unilateral instruments, indicate what offences should be included within the jurisdiction of the Court. Accordingly, it was pointed out by the members that the effectiveness of the Court depended on the existence of substantive criminal legal aspects without which it would be vey difficult indeed for the court to function at all.

The Special Rapporteur while summing up the discussion wished to focus on three main points : the relationship between the Court and the United Nations; jurisdiction and the applicable law, and the functioning of the Court. He noted that there was general agreement on the need for a link between the Court and the UN. He also did not favour rigid codification of principles relating to applicable law, especially in an area which is constantly changing. Accordingly, he favoured that the applicable law should not be limited to agreements or conventions, but should also include the general principles of law, custom and even in some cases, national law. Accordingly to him jurisdiction could be dependent on acceptance by the State in whose territory the accused was found, for if the Court were to try to judge the accused without such acceptance, it would constantly be judging by default.

In conclusion, the AALCC Secretariat concurs with general approach of comments provided by the Working Group. Further, for the effective operation of the Court, technical and procedural aspects as applies in different legal systems should be harmoniously adapted. Even at this stage, the AALCC Secretariat is of the view that the issues relating to jurisdiction and appicable law would pose difficulties. One way to overcome this uncertainty is to provide a measure of flexibility to the Court itself while deciding these matters. The AALCC Secretariat notes carefully that this is an area which is constantly experiencing rapid transformation in the light of new political and economic developments. Because of these the responsibility and the manner of effective functioning of the Court assumes greater significance.

PART III

Report of the Working Group on a Draft Statute for an International Criminal Court

The Working Group on a Draft Statute for an International Criminal Court met between 17 May and 16 July 1993 pursuant to a decision taken by the International Law Commission. The mandate given by the Commission to the Working Group was in accordance with General Assembly resolution 47/33 of 25 November 1992 which *inter alia* was devoted to the question of the possible establishment of an international criminal jurisdiction and sought comments on the report of the Working Group concerning this topic. The resolution had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Commitee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

The Working Group had before it the following documents : (a) the report of the last year's Working Group (A/47/10, Annex) : (b) eleventh report of the Special Rapporteur (A/CN.4/449) : the comments of governments on the report of the Working Group (A/CN.4/452 and Add.1); Chapter B of the topical summary of the discussion held in the Sixth Commitee of the General Assembly during the forty-seventh session; the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704) and a compilation prepared by the Secretariat of draft statutes for an intenational criminal court elaborated in the past either in the framework of UN organs or by other public or private entities.

After generally considering series of draft provisions, the Working Group decided to create three subgroups dealing, respectively and primarily with the following subject-matters:[1] (1) Jurisdiction and Applicable Law (2) Investigation and Prosecution (3) Cooperation and Judicial Assistance. The preliminary consolidated text elaborated by the Working Group is divided into seven main parts : Part1 deals with the establishment and composition of the Court; Part 2 is on jurisdiction and applicable law; Part 3 is on investigation and commencement of prosecution; Part 4 deals with the trial; Part 5 is on appeal and review; Part 6

1. Revised Report of the Working Group on the Draft Statute for an International Criminal Court, A/CN.4/L/490, 19 July 1993.

is on international cooperation and judicial assistance, and; Part 7 is on enforcement of sentences.[2] The draft is termed as "Draft Statute for an International Criminal Tribunal. This is justified by the Working Group on the argument that the three organs contemplated in the draft, namely the "Court"or judicial organ, the "Registry" or administrative organ and the "Procuracy" or prosecutional organ had, for conceptual logistical and other reasons, have to be considered in the draft statute as constituting an international judicial system as a whole. In its report Working Group has more clearly specified various provisions with commentaries for the effective functioning of the Court. It may be recalled here that last year's report had three parts dealing essentially with (a) jurisdiction of the Court and applicable law; (b) organization and functioning, and (c) Procedure.

The Working Group while examining Part 1 of the draft statute (which deals with the establishment and composition of the Tribunal) opts to deal with it in several groupings according to their subject-matter. Accordingly, Articles 1 to 4 refer to aspects closely linked to the nature of the Tribunal and deal with its establishment (article 1), its relationship with the United Nations (article 2), its seat (article 3)and its status. The divergent positions as regards the Tribunal's relationship with UN still remain—should it become an organ of the UN or should it have a link with the UN through treaty of cooperation? Both the options have been provided in the draft within brackets for final resolution.

Article 5 specifies the various organs of the Tribunal, namely, "The Registry"and "The Procuracy". Subsequent provisions relating to qualifications, elections and independence of judges did not present any difficulties. As to the relatively long period of 12 years for the term of office of the judges provided for in paragraph 6 of article 7, it was agreed in the Working Group that this should be considered as a sort of trade-off for the prohibition of their re-election. As regards the 'independence of judges' the Working Group took into account the fact that the Court would not be a full-time body. This is why article 9, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in article 17) also endeavoured to define the criteria concerning activities which might compromise the independence of the judges and from the exercise of which the latter should abstain. It is pointed out that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government. The AALCC Secretariat is of the view that the issues relating to independence of judges in relation to an internal function of State needs to be examined carefully. Because in certain states functions performed by an Executive and a judicial branch are bordered on a very thin line of difference. Although it

2. Ibid., p.4; It is to be noted that some of the provisions are still between square brackets either because the Working Group could not yet find general agreement either on the contents of the proposed provision or on its formulation, or in order to receive guidance from the General Assembly.

is stated by the Working Group that in case of doubt the Court should decide this matter, the ramifications of dealing with an essentially domestic matter *vis-a-vis* Court and its independence needs careful consideration.

Article 12 on election and functions of the Registrar and article 13 on the Composition, functions and powers of the Procuracy deal with the two other organs which compose the international judicial system to be established. The Registrar is the principal administrative officer of the court and is, unlike the judges, eligible for re-election. Similar regulations are applicable to Procuracy also whose main functions will be the investigation of the crime and the prosecution of the accused. The AALCC Secretariat positively concur with the views enunciated by the Working Group to preserve the Prosecution's independence by providing that he should not act in relation to complaint involving a person of his/her nationality.

Articles 14 to 18 deal with aspects related to the beginning and end of the judge's functions, and to the work of the judges and the Court and the performing of their functions. The AALCC Secretariat notes that the provisions relating to "Loss of Office" (Article 15) requires the concurrence of two-thirds of judges of the Court and this provision differed from the corresponding article of the Statute of the International Court of Justice (article 18). According to the latter a judge only accepted dismissal if, in the unanimous opinion of the other members of the Court he had ceased to fulfill the required conditions. The AALCC Secretariat supports a provision relating to Review of the Statute (Article 21). The commentaries provided in the Report of the Working Group however affirm that the place of Article 21 on "Review of the Statute" is still provisional.

The Part 2 deals with the very crucial aspects of "Jurisdiction and Applicable Law." The Working Group terms this part as "the central core of the draft statute". From the point of view of the crimes which may give rise to the court's jurisdiction, articles 22 to 26 lay down, basically, two strands of jurisdiction, which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaties is the International Convention against the taking of Hostages of 17 December 1979. Examples of the second category of treaties are the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircarft (14 September 1963) as well as all treaties dealing with the combating of drug-related crimes, including the 1988 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988). The AALCC Secretariat concurs with this categorization and it further suggests that the Court itself may be given an option to rule on the desirability of

including or excluding a treaty or convention for exercising jurisdiction. This should be, however, subject to principles enunciated in the Statute itself.

Article 23 deals with the ways and modalities in which States may accept the Court's jurisdiction. The Working Group presents three alternatives. Alternative A which is termed as "opting in" system, does not confer jurisdiction over certain crimes automatically on the Court by the sole fact of becoming a part to the Statute but, in addition, a special declaration is needed to that effect.Similarly Alternatives B and C were possible formulations discussed in the Working Group. The AALCC Secretariat is of the view that the basic principle underlying these alternatives should reflect the consensual basis of the Court's jurisdiction. Article 24 spells out the conditions for States which have to accept the Court's jurisdiction in a given case under article 22 for the Court to have jurisdiction and Article 25 provides for the "cases referred to the Court by the Security Council. The Working Group felt that provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc. Article 26 lays down the second strand of jurisdiction, allowing States concerned to confer jurisdiction on the Court in respect of other international crime not covered by article 22. It is further pointed out that article 26 refers to "crimes under general international law"and defines this category probably for the first time in connection with individual responsibility, as "crimes under a norm of international law accepted and recognized by the international community of States as a whole as being of such fundamental character that its violation gives rise to the criminal responsibility of individuals."This paragraph is intended to cover international crimes which have their basis in customary international law and which would otherwise not fall within the Court's jurisdiction, such as aggression, which is not defined by treaty but by the UN Declaration on Aggression, genocide, in the case of States not parties to the Genocide Convention, or other crimes against humanity not covered by the 1949 Geneva Convention. The Working Group noted with regard to its inclusion that it seemed inconceivable that at the present stage of development of international law, the international community would move to create an international criminal court without including these crimes under the Court's jurisdiction. The other category of crimes contemplated by Article 26 related to the distinctions between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. Article 28 deals with "Applicable Law" sources of which are Stated to be this statute and applicable treaties.

The Parts 3, 4, and 5 of the draft statute deal with the procedural aspects of— investigation and commencement of prosecution, the trial and matters relating to appeal and review respectively. The Working Group noted that "the interests of

the international community in providing a universal mechanism for prosecuting, punishing and determining international crimes wherever they occur weighed in favour of making this particular treaty institution available to all States."

The AALCC is of the view of that while embodying these procedural aspects regard must be had to the different legal mechanisms prevailing in different States. It would be necessary in the interest of community of States to harmonize these criminal law mechanisms relating to procedural aspects. In this regard, Parts 6 and 7 of the draft statute constitute an important component of the whole. These articles deal with matters relating to "International Cooperation and Judicial Assistance" and "Enforcement of Sentences" respectively. The AALCC Secretariat concurs with this procedural mechanism and endorses the commentaries provided by the Working Group in Parts 3, 4, 5, 6 and 7.

C. The Law of the Non-Navigational Uses of International Watercourses

At its Forty-third Session the Commission adopted on First Reading an entire set of draft articles on the topic which was transmitted through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1993. At its Forty-fifth Session the Commission had before it the Special Rapporteur's first report before commencing second reading of the draft articles. The Commission also had before it the comments and observations on the draft articles received from few Governments.

The Special Rapporteur's report analyses written comments and observations received from Governments. The report raises, *inter alia* two issues of a general character, whether the eventual form of the articles should be a Convention or Model Rules, and the question of dispute settlement procedure. The report also examines articles 1 to 10 of Parts I and II of the topic.

While analysing the draft text the Special Rapporteur, made a reference to developments since the Commission's completion of First Reading. The particular references were made to the result of the United Natoins Conference on Environment and Development (UNCED), the Convention on the Protection and Use of Transboundary Watercourses and International lakes signed at Helsinki on 17 March 1992, and the Convention on Enviornmental Impact Assessment in a Transboundary Context signed at Espoo, Finland, on 25 February 1991. He, however, observed that nothing in the abovementioned instruments required fundmental change in the text of the draft as it stands after completion of the First Reading.

The report briefly deals with the question of what form the draft text should take i.e. whether as Framework Convention or Model Rules. According to views expressed by the Special Rapporteur, "the utility of the Framework Convention approach is a function, in large measure, of the width and breadth of its ratification, the utility of the model rules approach largely a function of the strength and depth of the endorsement of the rules that the Commission is prepared to recommend and the General Assembly is likely to endorse".[1] The views expressed by the Special Rapporteur, however, did not express a preference for either of these approaches. Advocating of Framework Convention approach, as the report points out, to a certain extent forecloses "some expectation of widespread acceptance. This is however, subject to "a willingness to support a recommendation for very strong endorsement of the work product by the General Assembly." Model Law, on the other hand, would facilitate inclusion of more specific guidance."[2] The report leaves this qustion at this stage and attempts to highlight objectively the possible preferences between the two approaches.

The views expressed by few countries on this question in their comments and observations could be briefly assessed. Germany supports the idea of framework agreement as this approach does not deny contracting parties the opportunity to deal with the specific characteristics and use of a certain international watercourse by means of bilateral and multilateral agreements, it supplies them with general principles and thus establishes a minimum standard. Turkey also supports this view on account of the variety of geographical locations, hydrological constructions, demographical qualities and characteristics of international watercourses. The 'United States in its comments proposes the structure of the draft as a framework document in order to guide watercourse states in developing management practices tailored to their circumstances. We see that there is some kind of unanimity in accepting draft text as a Framework Convention'. The approach of the Swiss Government, though similar at the outset, defines this question more succinctly. It assumes that "most of the substantive rules contained in the draft are supposed to reflect customary law, while procedural rules, by their very nature, fall in the catrgory of the progressive development of international law."[3]

In the discussions at the Commission the majority of members favoured a Convention rather than Model Rules. According to many of them importance of the matter warranted the conclusion of a multilateral treaty. Ambassador Koroma expressed the view that the ultimate decision would depend on the

1. First Report on the Law of the Non-Navigational Uses of International Watercourses by Mr. Robert Rosenstock, Special Rapporteur (A/CN.4/451 20 April 1993)
2. Ibid.
3. Comments and observations received from States (A/CN.4/447, 3 March 1993), p.44

quality of the Commission's work. According to him if the draft articles were balanced these would inevitably recommend themselves to the international community. Professor Tomuschat expressed his clear preference for a draft Convention rather than Model Rules. According to him many of the provisions dealt with procedural mechanisms which could become fully effective only within the framework of a treaty; draft articles, he argued, could realize their full potential only if they were embodied in an instrument having binding force. While accepting the reasoning put forward by the Special Rapporteur, Mr. Idris favoured the form a framework agreement or convention which would guide States in the drafting of specific agreements on common watercourses.

The Special Rapporteur makes a reference relating to "dispute settlement" in his report. Specifically, he draws the attention of the Commission to the fact that a number of Governments have urged the Commission to address further the question of including dispute settlement provisions. While sharing in full the views of his predecessor, Professor McCaffrey points out that it would be an important contribution for the Commission to recommend a set of provisions on fact-finding and dispute settlement in the event the Commission decides to recommend a draft treaty. The majority of members in their comments outlined practical problems involved in introducing such a measure relating to fact-finding. It may be recalled here that dispute settlement clauses providing for mandatory conciliation had been included by the precious Special Rapporteur in his sixth report (1991) and had not been pursued further because of want of time. The current report had indicated that as the needs of populations increased and water resources became scarce, disputes on the use of international watercourses were likely to proliferate and might assume serious proportions if they were not resolved at the technical level.

Many members of the Commission observed that water courses were diverse and a specific dispute settlement machinery might be required in each case. In the context it was observed that the means of dispute settlement noted in Article 33 of the Charter would always be available to the parties concerned and disputes relating to the uses of watercourses under consideration. It was also argued that such disputes could more effectively be resolved by political means, rather than by adjudication.

Some of the members who were of the view that dispute settltement clauses should be included in the draft articles considered that the Commission should first complete its work on the draft articles before turning to the question of dispute settlement. References were also made to the establishment of river-basin committees and other similar bodies, such as Niger Basin Authority, the Gambia River Basin Development Organisation and the International Commission for the

Protection of the Rhine against Pollution, and the machinery in the Danube basin. The AALCC Secretariat is of the view that a dispute settlement machinery whatever form it takes, is very desirable.

The report of the Special Rapporteur mainly considered articles 1 to 10 of the draft text. The Special Rapporteur on the basis of comments by Governments, saw no reason for any change in article 1. However, some Governments in their comments, had reopened the question of the appropriateness of the term "Watercourses". In the light of the fact that the term was the result of a compromise, the Special Rapporteur was of the view that it would not be prudent to change the term. A suggestion that the term "transboundary waters" be used because of its use in a recent convention namely, Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992 (International Legal Materials, Vol.XXXI, p.1312) was referred to. In the course of the discussion it was suggested in the Commission that article 1 did not reflect a proper balance in the relationship between navigation and other uses of international watercourses. Further, the point was made that the concept of integrated water resources management, as recognised in paragraphs 18.8 and 18.9 of Agenda 21 of the Rio Conference, should be incorporated in article 1, paragraph 1.

As regards article 2 (use of terms) the Special Rapporteur raised two crucial issues. Firstly, he recommended that the phrase, "flowing into a common terminus"in subparagraph (b) be deleted. In his view that notion of "common terminus" did not seem to add anything to what was already covered by the rest of the subparagraph and could be confusing. If retained, the phrase risked the creation of artificial barriers to the scope of the draft articles. Secondly, he proposed in his report that he was inclined to include "unrelated confined groundwaters" if the Commission agreed.

As to the reference to "flowing into a Common terminus" in paragraph (b) of article 2, several members disagreed with the Special Rapporteur's proposal for its deletion. While expressing their views the members felt that this requirement had been included to introduce certain limitation upon the geographic scope of the articles, the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purposes of articles. It was further pointed out that in a State where most of its rivers were connected by canals, the absence of the requirement of common terminus would turn all those rivers into a single system and would create an artificial unity between watercourses. A common terminus criterion would, also help to distinguish between two watercourses flowing alongside each other. In view of this few members reserved their positions pending further careful examination of the issue by the Special Rapporteur. The AALCC Secretariat considers that the phrase in question is significant and should be retained.

Many members also did not favour the inclusion of "unrelated confined groundwaters".They did not see how "unrelated groundwaters" could be envisaged as part of a system of waters which constituted "by virture of their physical relationship a unitary whole". And if there was no physical relationship, how could such waters be part of a unitary whole? The Commission's attention was drawn to the fact that the issues of confined groundwater evolved quite recently. Moreover, the law relating to groundwaters was more akin to that governing the exploitation of natural resources, especially oil and natural gas. Another reason mentioned by few members for not including proposals relating to groundwaters in the draft was that such an inclusion would require considerable redrafting of article, delaying in the process Commission's goal of completing the second reading of the articles by next year. Accordingly, several members of the Commision reserved their position until such time as they had been able to consider , next year, the further study to be undertaken by the Special Rapporteur. Whether or not confined groundwaters should be included in the topic is an issue which requires careful consideration. The AALCC would recommend reservation of decision until further study is presented.

The observations relating to modifications in article 3 concerned two issues —replacement of the adjective "appreciable" with "significant" and the question of how to deal with existing watercourse agreements. Regarding this change two different views were expressed. One view, supported by many members, was that, in all cases adverse effects or harm went beyond the mere possibility of "appreciation" or "measurement, and it was clear that what was really meant was "significant" in the sense of something that was not negligible but which yet did not necessarily rise to the level of "substantial"or "important". "Appreciable" according to the commentary provided for the first reading, contained two elements—the possibility of objective appreciation, detection or measurement, and a certain degree of importance, ranging somewhere between the negligible and the substantial. It has been pointed out that in most cases, "appreciable" could be taken to mean "not negligible" and did not designate the point at which the line should be drawn. That line was crossed when significant harm was caused—harm exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. In view of this, members agreed with the Special Rapporteur's proposal to replace "appreciable" with "significant". The AALCC Secretariat considered that this would be a positive improvement of the text.

The members who did not concur with this interpretation felt that such a change went further than the necessary distinction between inconsequential harm

that could not be even measured, on the one hand, and consequential harm, on the other. According to these members of the Commission, the subjectivity inherent in the term "significant" would leave the potential victim State defenceless, contrary not only to its interests but to protection of the watercourse itself. The result would be to ignore the cumulative effects of lesser harm, which could be substantial especially in combination with other elements. It was further pointed out that the change took no account of the particular conditions of each watercourse, and the history of its use, which could mean different degrees of tolerance and vulnerability to harm. Keeping apart translation issues of this change, the view was also expressed that the word "appreciable" denoted something that could be established by objective evidence and also conveyed the notion of "significant"and "substantial". However, it was felt necessary that the Commission should consider, once again, the relative merits of the two words before taking a final decision.

The Special Rapporteur considered article 4 (which deals with the question of "who could be parties to the watercourse agreements") as acceptable. On the other hand, views were also expressed in the Commission to the effect that it should be re-examined. According to the argument, the entitlement of a watercourse State to become a party to agreements, whether those agreements applied to the whole or only part of the watercourse, was an exception to the fundamental principle whereby States enjoyed freedom to choose their treaty partners. That exception was sought to be narrowly construed. A further reason advanced for reviewing article 4 was that article 30, which had been adopted after article 4, contemplated a situation in which the obligations of cooperation provided for in the draft articles could be fulfilled only through indirect channels. It was also stated that, article 4, would not presumably, apply to cases in which a watercourse State entered into an agreement with a non-watercourse State, or with an international financial institution, with a view to initiating , new work on the watercourse.

The Special Rapporteur recommended no changes in article 5, which could be termed as constituting an important element in the law relating to international watercourses by defining the principle of "equitable and reasonable utilization and participation". However, some members felt that the relationship between articles 5 and 7 was unclear. Some comments had shown a preference for eliminating article 7 or subordinating that article to article 5 and making "equitable and reasonable" virtually the sole criteria for use. (Article 7 obligates watercouse States not to cause appreciable harm). The ambiguity between articles 5 and 7 was explained in the following way—on the one hand, those who believed that "equitable and reasonable" use, as provided for in article 5, should be the main consideration, implicit in which might be the right to cause some

harm, and, on the other those who gave predominance to harm on the ground that no use could be regarded as "equitable and reasonable" if it resulted in harm to another State.

Pursuant to these comments the Special Rapporteur reformulated article 7, by imposing on States only an obligation to "exercise due diligence", not an obligation to "exercise due diligence", not an obligation not to cause appreciable or significant harm. It was further pointed out that "where the use was equitable and reasonable, some harm would be allowable, with the result that equitable and reasonable would become the overriding consideration".

This was not acceptable to many members on the ground that it would upset the delicate balance built into the draft text. They pointed out that "by way of an exception to the general principle, only harm resulting from pollution would render a use inequitable and unreasonable , although, even then, the harm might be permitted if there was no imminent threat to human health and safety". Although the concept of equitable and reasonable utilization was supported by many authorities and appeared in many international instruments, some members felt that it did not make a good substitute for the basic principle that the overriding consideration was the duty not to cause significant harm to other States. Accordingly, some members expressed the view that article 7 could be deleted. In their view the content of the principles of equitable and reasonable utilization set out in articles 5 and 6, would be determined by States. It would be helpful, therefore, if article 5 were to propose model forms of utilization, for example, a watercourse among States, for that would facilitate the settlement of disputes. Members pointed out that article 7 laid down a standard, already reflected in a number of articles and designed to trigger various procedures such as those relating to notifications, consultations and negotiations. Accordingly, it was stated that the requirement contained in article 7 could be placed in article 5 and article 7 could be deleted.

It was pointed out that list of factors embodied in article 6 though not exhaustive, all six categories were found pertinent. So, it was felt that this article should be retained without any change. The Special Rapporteur in his report had referred to the changes suggested by some Governments but found them unnecessary on the ground that these proposed changes were accommodated within the text itself. The Special Rapporteur noted that, at the present time, he did not propose to initiate changes in articles 8, 9 and 10. He noted views expressed by some Governments in the comments submitted by them about the generality of article 8 which *inter alia* incorporates the "general obligation to cooperate". On the other hand, in regard to the possibility of making the text more precise, view was expressed to the effect that any more precision of the article might be at the cost of sacrificing its general nature.

The subject of "Law of International Rivers has been on the agenda of Asian-African Legal Consultative Committee (AALCC) since its Ninth Session held in New Delhi in 1967. The progress of work concerning this topic was slow initially due to the diversion of Committee's attention to other topical areas, particularly Law of the Sea. In 1983 (Tokyo Session) this topic received full-scale attention and since then it is being considered in such a way as to complement the work of ILC. Accordingly, the Committee at its Islamabad Session (1992) had recommended its Member States to utilize the study on the ILC draft articles contained in Doc.No. AALCC/XXXII/Islamabad/92/5 in the preparation of their comments and observations for the second reading of the draft articles by the ILC. In view of the importance of the topic, after due deliberations at the Islamabad Session (1992) the Committee had directed the Secretariat to initiate preliminary study on the practice in the arena of user agreements and examine the modalities employed in the sharing of waters of watercourse. Pursuant to this, the Secretariat study for the 1993 Kampala Session examined three key areas relating to international rivers in the Asian-African context, namely—(a) Definition of "International Watercourse" (b) Equitable and Reasonable Utilization and Participation, and (c) Protection and Preservation of Ecosystems within the context of institutional and legal aspects of the river system agreements in the Asian-African region.

This study was considered at the Thirty-second Session of the AALCC held in Kampala from 1 to 6 February 1993. While stressing the need for finalizing the work of ILC on this topic, the delegate of Syrian Arab Republic drew the attention of the Committee to the lack of clear legal norms or regulations that would define the duties and rights of countries towards each other and towards international watercourses, which they share. The delegate of Iraq spoke, albeit briefly on the utility of ILC's work. The delegates at this session were given a brief outline of the ILC's work completed on this topic by ILC Chairman H.E. Christian Tomuschat. In view of the significance attached to this topic, members of AALCC directed the Secretariat to continue to study the topic, taking into account regional system agreements. The Committee also urged its member States to furnish the Secretariat with necessary details so as to facilitate more concrete study on this topic.

In conclusion, it is pertinent to record the current ILC's efforts with respect to the second reading of these draft articles. The Drafting Committee, upon a reference by ILC recommended the adoption of following articles namely—article 1 (Scope of the present articles)article 2 (Use of terms) article 3(Watercourse agreements) article 4 (Parties to watercourse agreement) article 5 (Equitable and Reasonable Utilization and Participation) article 6 (Factors relevent to equitable and reasonable utilization) article 8 (general obligation to cooperate) article 9

(regular exchange of data and information) article10 (relationship between different kinds of uses). It was also noted that the study the Special Rapporteur has been requested to undertake concerning unrelated groundwaters may require reconsideration of some of the aspects of the articles. The Commission did not adopt articles as these were not accompanied by commentaries. In view, of this, the Commission merely took note of the report of the Drafting Committee.

D. International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law

At its Forty-fifth Session the Commission had before it the Ninth Report of the Special Rapporteur[1] Mr. Julio Barboza. The Report was devoted entirely to the issues relating to the prevention of transboundary harm of activities. Introducing his Ninth Report the Special Rapporteur stated that while several aspects of the question of prevention of transboundary harm had been dealt with in the last four reports[2] that he had submitted to the Commission during its last four sessions, the present report divided into three parts, described the nature and content of the concept of prevention and contained the text of eleven draft articles dealing with the matter.

The Introduction to the Ninth Report addressed itself to two issues viz. the mandate of the Special Rapporteur and the nature of obligation of prevention. Referring to the debate during the Forty fourth Session of the Commission the Rapporteur stated that the Commission had mandated him to confine his study to activities involving risk viz. activities that may cause transboundary harm as a result of accidents due to loss of control, and to commence with the formulation of draft articles on obligations of prevention. The question of activities "having harmful effects" or activities which caused transboundary harm in their normal operations would be considered after the completion of the work on activities involving risk.

The latter part of the Introduction to the Ninth Report dealt with the main features of obligations of prevention. The Special Rapporteur observed in this regard that the obligations of prevention constitute what are called 'due diligence' obligations, which are deemed to be unfulfilled where no reasonable effort is made to fulfil them.[3] In other words, States must make an effort in good faith to prevent any transboundary harm. A State would be said to have fulfilled or complied with its obligation of vigilance if it had applied or taken reasonable

1. See A/CN.4/450
2. See the Fifth Report A/CN.4/423; the Sixth Report A/CN.4/428 and Add.1; the Seventh Report A/CN.4/437 and the Eighth Report A/CN.4/443 and Corr. 1.
3. See A/CN.4/450 para 7.