various aspects of international situations relating to international crime and violence that the relationship between the International Criminal Court and the United Nations should be carefully looked at and discussed by the AALCC. He indicated that his delegation was concerned with the international recognition of municipal trials of offences of an international nature which are also cognisable by the ICC. He referred in this respect to the applicability of the double jeopardy principle by the ICC in relation to crimes already handled by national courts. He observed that there appeared to be severe differences of opinion on the jurisdiction of the ICC and urged the Committee to come out with a common and consensual stand which all members of the AALCC could support at the world forum or conference to discuss the treaty or statute for the establishment of the ICC. Consequently he suggested that the Committee and the AALCC Secretariat should look into these aspects more critically. Referring to the issue of intervention, the delegate requested the Committee to consider interventions by regional or sub-regional organizations in circumstances in which there was absolute breakdown of Central Government and mass suffering and deaths of the civil population. It was his view the Committee should give general guidelines on what constitutes legitimate intervention. It was his hope that the Committee and the AALCC Secretariat would come out with a consensus position for member countries.

The *Delegate of India* noted that the draft code of crimes was equally important as the International Criminal Court. He also stressed the necessity to accord and respect the primacy of the national jurisdiction. In his view the *sui generis* system as envisaged needed careful consideration. While dealing with the issue of international liability, the delegate noted that it was an extremely important topic which directly linked itself with the survival of the mankind itself. While outlining norms for liability, the delegate pointed out that the experience of highly integrated societies such as Europe might not always be useful. He also referred briefly to the issues concerning settlement of disputes and Convention countermeasures. As regards the draft on international rivers, he observed that his government was examining the issue with all seriousness and would respond in due course.

The *Delegate of Pakistan* noted the divergent views expressed by the ILC Members on the question of the establishment of the International Criminal Court. In his view, many complex and difficult issues remained unsolved, such as the jurisdiction—whether the court should have compulsory or optional jurisdiction, whether the jurisdiction should be exclusive, concurrent or of review character and whether it should be linked with code or not. He also referred to the questions concerning complaint, who

could bring it before the Court and the State consent required for that complaint to be entertained.

Referring to the basic principle of Criminal Law, the delegate noted the requirement to define the offences clearly and punishment provided for. Investigation, he pointed out, would be under the local laws of States. He proposed a Code of Criminal Procedure to try the alleged perpetrators of Criminal offences providing the following: registration of crimes, arrest of the accused, interrogation of the accused\suspects, recording of statement of witnesses, recovery of articles used in the commission of crime, collection of expert evidence when required, confession, recording of pretrial statements of witnesses. He also referred to the powers and functions of the prosecutor and the investigating officers and wanted these to be clearly defined. He also noted the need for States to amend their existing laws to accommodate the proposed Court. This, he noted, might not be acceptable to many countries.

To ensure a fair trial of the accused, the delegate sought the codification of law of evidence so as to draw a line between admissible and inadmissible evidence at the time of trial. He also sought the safeguards to preserve the rights of the accused such as place of the trial, services of a competent lawyer and the language of the Court etc. He also referred to the question of appeal and sought the creation of an appellate authority with necessary time limits for appealing.

The *Delegate of Sudan* viewed the draft statute of the ICC as very crucial to all states. He particularly referred to two main areas, namely, the issue of jurisdiction and the consequent encroachment of sovereignty. In order to outline an effective and objective draft concerning international criminal court, he stressed on the need to build a trust in the operation of the international system itself. He also proposed a discussion of these areas in a seminar.

The *President* drew the attention of the delegate of Sudan to one day seminar held on the Establishment of International Criminal Court at New Delhi in collaboration with the Indian Society of International Law. He also informed the delegation that many new ideas emerged from that seminar and the report of the seminar was also before the Committee.

The *Delegation of the Republic of Korea* suggested that the categories of jurisdiction should be clearly outlined. He also referred to the need for outlining in the draft the specific offences which evoked the jurisdiction of the ICC.

The *Vice-Chairman of the ILC, (Prof. Francisco Kramer)* while

responding to the views expressed by the members noted that sanctions were very crucial and he felt that even the compensation as a method of sanction was very important. In his view trust in the implementation of the ICC should come from the detailed cooperation and coordination of the governments.

The *Delegate of Kuwait* referred to the pollution of the environment and the problems consequently created to thousands of labourers to leave the jobs and assignments and return. He noted that his government was not bound to compensate all that.

The *Representative of the Legal Counsel of the United Nations (Dr. Adede)* drew the attention of the members of the Committee to the meeting of the *Ad hoc* Working Group from August 13 to 24 to consider the draft Statute of the International Criminal Court at the UN. He requested the member governments of the AALCC to make use of this forum to effect necessary changes in the draft statute. In his view the process was only in the early stages and there was a political and legal choice for the Governments to effect necessary changes.

(ii) Decision on the "Work of the International Law Commission"

(Adopted on April 22, 1995)

The Asian-African Legal Consultative Committee at its Thirty-fourth Session:

Having taken note with appreciation the report of the Secretary-General on the work of the International Law Commission at its Forty-sixth Session (Doc. No. AALCC\XXXIV\Doha\95\1) and 1A;

Having heard the comprehensive statement of Ambassador Francisco V. Kramer, the Vice Chairman of the International Law Commission;

1. *Expresses* its felicitations to the International Law Commission on the achievements of its Forty-sixth Session;

2. *Acknowledges* and appreciates the contributions of the Chairman of the International Law Commission Hon'ble Judge V.S. Vereshchetin, and the Vice-Chairman, Ambassador Francisco V. Kramer and thanks them for the lucid and succinct report that has been presented by the Vice-Chairman on behalf of the Commission's Chairman.

3. *Expresses* its appreciation to the Secretary-General for his report on the work of the International Law Commission at its Forty-sixth Session, and particularly the progress made on the question of the Establishment of an International Criminal Court,

4. *Requests* the Secretary-General to bring to the attention of the International Law Commission the views expressed on different items on its agenda during the Thirty-fourth Session of the AALCC; and

Also request the Secretary-General to convey to the International Law Commission the Committee's appreciation on the completion of its work on the Non-Navigational Uses of International Watercourses and the Statute of an International Criminal Court.

Decides to inscribe on the agenda of the Thirty-fifth Session of the Committee an item entitled "The Report on the work of the International Law Commission at its Forty-seventh Session."

(iii) Secretariat Brief

A. Report on the Work of the International Law Commission (ILC)

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

I Background

The work programme of the International Law Commission (ILC) had accorded priority to the topic "Draft Code of Crimes Against the Peace and Security of Mankind". This was necessitated on account of paragraph 6 of the General Assembly resolution 48/31, which had requested the ILC to continue its work "as a matter of priority" on the question of the draft statute for an international criminal court with a view to elaborating a draft statute, if possible at the forty-sixth session. Considering this the enlarged Bureau had recommended that the first week of the Session should be devoted to a discussion of that subject in the plenary. The discussion of this topic in the plenary had been reflected beiefly in this note along with the comments provided by the AALCC Secretariat. In other words, there is no separate section providing a summary of these discussions. This was found essential as there could be some changes in the view points of the Members after the completion of the work by the Working Group.

For reasons of clarity, it would be appropriate to briefly examine first the Twelfth Report on the Draft Code of Crimes Against the Peace and Security of Mankind provided by the Special Rapporteur Mr. Doudou Thiam. While presenting this report, the Special Rapporteur had outlined

Crimes Against the Peace and Security of Mankind will focus, this year, on the general part of the draft-definition, characterization and general principles". And he had also informed that Part II of the Draft Code, concerning the crimes themselves, would be dealt with in next year's report." While terming the twelfth report as the shortest, the Special Rapporteur briefly noted the reasons for this. The concepts it dealt with had already been discussed at considerable length both in the Commission and in the Sixth Committee, and he had therefore decided to take the course of simply reproducing the text of each draft article as adopted on first reading, without reverting to the discussion on it, except in those cases where no clear view had emerged in the Commission.

It would be too simplistic to say that this report merely reproduced articles as the Special Rapporteur further clarifies that this report on Part I of the draft is presented in such a way that it reproduces, article by article, each draft adopted on first reading, followed by comments from Governments, then by the Special Rapporteur's opinions and conclusions. The observations of Governments are presented sometimes in full, and sometime partially, depending on their significance; more often than not, they are presented in full. With one or two exceptions, all the observations are reflected. When they are not, that is because, the questions raised in the observations of Governments have already been dealt with at length in the Special Rapporteur's earlier reports and in discussion in plenary meetings.

The Chairman, while recalling the agreement reached pointed out that the consideration of the topic would be broken down into two parts, beginning with a general discussion that would take only one meeting and followed by an examination of the individual articles, some of which dealt with questions also treated in the Working Group on a Draft Statute for an International Criminal Court. In order to avoid excessively fragmenting the second part of the debate he proposed taking up five clusters of articles successively, namely Articles 1, 2, 3 and 4 first, followed by Articles 5, 6 and 7, Articles 8, 9 and 10, Articles 11, 12 and 13, and lastly Articles 14 and 15.

II. Draft Code of Crimes Against the Peace and Security of Mankind

A. Articles 1 to 4

Although the Members addressed specifically each of the Articles in the general discussion, the emphasis was limited primarily to the few conceptual questions. As regards the definitional part one Member found

some problems with the idea of combining a conceptual definition with an enumerative one. There was a fundamental issue of the adequacy of the title itself of the Code of Crimes Against the Peace and Security of Mankind. It was pointed out that the title was appropriate for certain crimes, such as aggression, but was much more debatable for others, such as genocide or crimes against humanity, that did not come under the peace and security of mankind unless the concept was given a very broad meaning. The AALCC Secretariat seeks to consider the view that the definition of the crimes by the Code should be very specific and definite so that any wide discretion on the interpretation and the application of the Code by the Court could be minimized.

The other crucial problem dealt with by a few Members concerned the relationship between the Code and the Statute for the Court, which affected less the drafting of the Code, that was perfectly viable with or without the Court, than it did the establishment of the Statute for the Court, for which it was still uncertain whether it would have jurisdiction for applying the Code. Accordingly, it was stressed by some Members that the Working Group should take the draft Code fully into account for the drafting of the Statute and, assuming that the Code was to be adopted on second reading prior to the completion of the draft Statute, the Working Group must use the wording of the Code.

There were other Members who did not specifically agree with this viewpoint. Some of them requisitioned clarifications as regards the interrelationship between the Code and Court, particularly in areas where national jurisdictions were involved. This question was discussed by some Members from the point of relationship between international law and internal law. In their view Article 2 affirmed the primacy of the international law over the internal law, and that was clearly essential if the Code was to be properly implemented. Some other Members attempted to build a harmonious approach. It was suggested that the Commission should adopt exactly the same wording in both instruments for the provisions on the indispensable judicial guarantees in order to ensure minimal standards of protection of the individual. Some Members, while in favour of retaining draft Article 2, considered that the Commission should avoid suggesting that there was a conflict between international law and internal law. The crimes that the Commission had chosen were punishable in the internal law of all civilized States and, as such, were not completely independent of internal law. Nevertheless, it was pointed out that the characterization provided for in the draft Code was independent of the characterization in the internal law of any given State.

In his twelfth report, the Special Rapporteur indicated that draft Article 3 set forth the principle of international criminal responsibility of the individual, a principle which has been accepted in international criminal law since the judgment of the Nuremberg Tribunal. Regarding this Article some Members had problems, particularly concerning certain terminologies. In view of this, they preferred the original version. Many Members of the Commission supported the Special Rapporteur's proposal that draft Article 4 should be deleted. The reasons for this could be briefly summarized. It was pointed out by some Members that a distinction was usually drawn between motive and intent, or *mens rea*, with motive not forming part of the elements making up the offence. Thus, the characterization of motive was not very useful, because it came into play only in determining the degree of responsibility. Political motives usually worked to reduce the penalty normally assigned, for example, by preventing the death penalty from being imposed in criminal justice systems where it still existed. However, some other Members while considering Article 4 did not believe that motives could be incorporated in extenuating circumstances or in the category of exceptions. In their view, persons who committed crimes against the peace and security of mankind should not be able to argue that they had done so for political reasons and therefore should not be punished, or that their crime was political in nature.

B. Articles 5 to 7

Members were generally in agreement with draft Article 5 as adopted on first reading. It was pointed out by some of them that the Article embodied the very sensible and fundamental principle that the international criminal responsibility of the individual should not *ipso facto* exclude the international responsibility of the State for a crime against the peace and security of mankind. It was also recalled that the principle had been enshrined in treaties, including Article IX of the 1948 Convention on Genocide. Some Members, although agreed with the underlying principle of draft Article 5, found that its wording was not very appropriate. As regards draft Article 6 on the "obligation to try or extradite", although there was no disagreement, governments were concerned about its applicability. With regard to draft Article 7 on the non-applicability of statutory limitations, the Special Rapporteur had pointed out in his twelfth report the written comments received from Governments had demonstrated that the rule of the non-applicability of statutory limitations was not universally accepted by States. There were other practical difficulties also. Some Members had pointed out that the rule of the non-applicability of statutory limitations could not be applied to all the crimes covered in

the Code and that Article 7 dealt with a question that basically had to be decided by Governments in view of the various elements that they had to take into account when making general policy decision. Further, it was also pointed out that an absolute rule of the non-applicability of statutory limitations could in certain cases, hamper reconciliation between two communities that might have been at odds in the past or even hamper amnesty granted by a Government with the democratically expressed consent of a national community with a view to the definitive restoration of internal peace. It had been asked whether there was any point in bringing to justice the perpetrator of a crime against the peace and security of mankind 30 or 40 years after the crime had been committed. In view of the AALCC Secretariat, the questions relating to statutory limitation need careful consideration. It would be essential to consider long statutory limitation period in view of the recent tendency of national reconciliation and the amnesty of the crimes implemented by some countries.

C. Articles 8 to 10

Article 8 had received broad consensus, especially since it merely conformed to the provisions of the Universal Declaration of Human Rights and the International Convenant on Civil and Political Rights. In the view of many Members Article 8 set forth the minimum guarantees to which any accused person must be entitled and which constituted one of the fundamental rules of international law and of human rights instruments. Nevertheless, it was also remarked that a balance should be maintained between the judicial guarantees offered to the accused and the security of the international community. There were, however, diverse opinions regarding Article 9 (*non-bis in idem*). It had provided that no one should be tried or punished twice for a crime under the Code for which he had already been finally convicted or acquitted by an international criminal court. The Special Rapporteur justified the applicability of this provision on the ground that it would destroy the authority of the international court if national courts had jurisdiction over cases already tried under the international jurisdiction. Some Members welcomed the possibility of exclusion of States having a case tried by their own courts where it had already been tried by an international court. While expressing reservations, some Members considered that it would be difficult to apply the *non bis in idem* principle at the international level. Since States were generally reluctant to accept the jurisdiction of an international court except in cases, where, in view of the seriousness of the crimes committed, exclusive jurisdiction should be conferred on an international court. As regards draft Article 10, concerning non-retro-activity, the Special Rapporteur pointed out that there was no disagreement.

D. Articles 11 to 13

As regards draft Article 11, "Order of a Government or a Superior", the Special Rapporteur observed in his twelfth report that the principle embodied in this draft provision had already been affirmed in the "principles of international law recognized in the Charter and Judgement of the Nuremberg Tribunal". In his opinion this principle should not be called into question without good reason and he therefore proposed that the draft Article should be retained. Some Members, however, made suggestions for improving its wording. Similar opinions were expressed as regards draft Article 12 which concerned "Responsibility of the Superior". There were two major suggestions, namely, (a) the concept of presumption of responsibility referred to by the Special Rapporteur in his twelfth report warranted further considerations, bearing in mind the rule stated in Article 8 concerning the presumption of innocence; and (b) the Commission should consider the sources of the draft Article. With regard to draft Article 13 concerning "Official position and responsibility", the Special Rapporteur was of the view that although it was difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted, what could be said was that whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted. The proposal to retain Article 13 unchanged was generally welcomed in the Commission. It was pointed out that the draft Article was based directly on Principle III of the Principles of international law recognized in the Charter of the Nuremberg Tribunal.

E. Articles 14 and 15

The draft Article 14 concerning "Defences and extenuating circumstances" consisted of two paragraphs on first reading. The first paragraph had provided that the competent court should determine the admissibility of defences under the general principles of law in the light of the character of each crime. The second paragraph provided that the court, where appropriate, take account of extenuating circumstances. The Special Rapporteur, expressed his agreement with those Governments which, in their written responses, had considered that the concept of defences and that of extenuating circumstances should be dealt with separately. The criticism, however, was centred around the question of self-defence. It was said that the new text was an oversimplification of the previous text and was likely to give rise to a regrettable confusion between self-defence in the case of an individual and that provided for in Article 51 of the Charter. In the view of the Special Rapporteur "extenuating circumstances" as found in new draft Article 15, was generally

admitted in criminal law that any court hearing a criminal case was entitled to examine the circumstances in which an offence had been committed and to determine whether there were any circumstances that diminished the responsibility of the accused. At the conclusion of the discussion, the Special Rapporteur summarized the main ideas that had emerged during the debate and gave his opinion on some of the issues.

III. Draft Statute for an International Criminal Court

In order to expedite its work on the subject, the Commission took a decision to reconvene the Working Group on a Draft Statute for an International Criminal Court. It held 25 meetings between 10 May and 7 July 1994.

In its 'introductory note' the Report of the Working Group had listed the documents which were before it to perform the mandate assigned. It, *inter alia*, included the followintg: the Report of the Working Group on the Question of an International Criminal Jurisdiction (A/47/10, Annex), the Report of the Working Group on a Draft Statute for an international criminal court (A/43/10, Annex): the eleventh report on the topic "Draft Code of Crimes Against the Peace and Security of Mankind" presented by Special Rapporteur, Mr. Doudou Thiam; the Comments of Governments on the Report of the Working Group; Chapter B of the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during the forty-eighth Session; the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704); the Rules of Procedure and Evidence adopted by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (document IT/32 of 14 March 1994) as well as the following informal documents prepared by the Secretariat of the Working Group: (a) a compilation of draft statutes for an international criminal court elaborated in the past either within the framework of United Nations or by other public or private entities; (b) a compilation of conventions or relevant provisions of conventions relative to the possible subject matter jurisdiction of an international criminal court; and (c) a study on possible ways whereby an international criminal court might enter into relationship with the United Nations.

The Working Group, while considering the Draft Statute for an International Criminal Court, took into account, *inter alia*, (a) the need

to streamline and simplify the articles concerning the subject matter jurisdiction of the Court, while better determining the extent of such jurisdiction; (b) the fact that the Court's system should be conceived as complementary to national systems which function on the basis of existing mechanism for international cooperation and judicial assistane, and (c) the need for coordinating the common articles to be found in the Draft Statute for an International Criminal Court and in the Draft Code of Crimes Against the Peace and Security of Mankind. The draft Statute prepared by the Working Group is divided into eight main parts: Part 1 on establishment of the Court; Part 2 on composition and administration of the Court; Part 3 on Jurisdiction of the Court; Part 4 on investigation and prosecution; Part 5 on the trail; Part 6 on appeal and review; Part 7 on international cooperation and judicial assistance; and Part 8 on enforcement.

Before examining the overall structure of the Draft Statute, it may be worthwhile to note the clarification provided by the Working Group in drafting the Statute. It, *inter alia*, stated, "the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions". The Working Group also took careful note of the various provisions regulating the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. Furthermore, the objective of the Working Group in conceiving the Statute for an International Criminal Court was to be "as an attachment to a future international convention on the matter" and accordingly, the Commission drafted the Statute's provisions.

A. Preamble

The Preamble to any statute sets out the main purpose intended to be achieved. The draft Statute, keeping this in view, intends further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of certain persons accused of crimes of significant international concern. Significantly, the Court envisaged does not purport to run parallel to the national criminal justice systems. Instead, it intends to be complementary to the national systems, particularly in cases where such trial procedures maynot be available or may be ineffective. It is clarified in the Commentaries that

it does not affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.

The purpose set out in the Preamable, the Commentaries provide, is intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by Article 35. Article 35, it may be noted, deals with the substantive aspects of admissibility. In other words, it allows the Court to decide, having regard to certain specified factors, whether a particular case is admissible. This is different from exercising jurisdiction *per se*. The Court, it is pointed out, should exercise jurisdiction only over the most serious crimes, such as crimes of concern to the international community as a whole.

B. Establishment of the Court

The establishment of the Court and its subsequent operation has certain implications. The crucial issue concerning this is the "relationship of the Court to the United Nations. There were divergent opinions between the Members of the Commission in this regard. Some favoured the Court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others had strongly preferred that it be created as an organ of the United Nations by amendment to the Charter. Those who did not agree with these two arrangements advocated another kind of link such as a relationship agreement along the lines of that concluded between the United Nations and the International Atomic Energy Agency. However, the Working Group concluded that it would be extremely difficult to establish the Court by resolution of a UN body, without the support of a treaty. It is further pointed out that the General Assembly resolution did not impose binding legal obligations on States in relation to conduct external to the functioning of the UN itself. In view of this, the obligation of a State, for instance, to transfer an accused person from its own custody to the custody of the Court which would be essential to the Court's functioning could not be imposed by a resolution. A treaty commitment, the Working Group felt, would be essential for this purpose. More importantly, a treaty accepted by a State pursuant to its constitutional procedure would normally have the force of law within that State—unlike a resolution and that may be necessary if that State needed to take action *vis-a-vis* individuals within its jurisdiction pursuant to the Statute. The Working Group also noted that the resolutions could be readily amended or even revoked, that would scarcely be consistent with the concept of a permanent judicial body. Accordingly, the relationship agreement proposed by the Working Group would be concluded between