Draft Article 15 addressed to "*Notification and Information*" provides that should the risk assessment of an activity, undertaken in accordance with draft Article 12, reveal the possibility of significant transboundary harm, the State of origin should inform the State or States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required. Paragraph 2 further stipulates that where it subsequently comes to the knowledge of the State of origin that there are other States which are likley to be affected, it should notify them accordingly. The ninth report of the Special Rapporteur had, in this regard, referred to three recent legal instruments on the environment which contain similar provisions viz. the Convention on Environmental Impact Assessment in a Transboundary Context; the Convention on the Transboundary Effects of Industrial Accidents and Principle 19 of the Rio Declaration on Environment and Development.

Draft article 16 addresses itself to facilitating preventive measures, and provides for timely *Exchange of Information* between the States concerned, relevant to preventing or minimizing the risk causing significant transboundary harm and deals with steps to be taken after an activity has been undertaken. It is aimed at preventing or minimizing the risk of causing harm.

Draft article 16 *bis* on *Information to the Public* is inspired by new trends in international law, in general, and environmental law in particular, of seeking to involve in the decision making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard. It requires that States provide their own public with information, whenever possible, relating to the risk and harm that may result from an activity subject to authorization and to ascertain their views thereon. The twofold requirements of this provision are: (i) that States provide information to their public regarding the activity and the risk and the harm it involves; and (ii) that States ascertain the view of the public. The purpose of providing information to the public is to ascertain their views. Without the latter i.e. the ascertainment of the views of the public the purpose of the provision would be defeated. As to the content of the information to be furnished to the public it is understood that such information includes basic information about the activity and the nature and scope of the risk and harm it may entail.

The Special Rapporteur explained the need for an article on "*National Security and Industrial Secrets*" to ensure the legitimate concerns of a State in protecting its national security as well as industrial secrets which

may be of considerable economic value. This interest of the State of origin, in the view of the Special Rapporteur, would have to be brought into balance with the interest of the potentially affected State through the principle of "good faith". The Draft principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and harmonious Utilization of Natural Resources Shared by Two or More States attempted to maintain a reasonable balance between the interests of the States involved by requiring the State of origin that refuses to provide information on the basis of national security and industrial secrets, to cooperate with the potentially affected State in good faith and on the basis of the principle of good-neighbourliness to find a satisfactory solution.

Draft article 17 purports to introduce an exception to the obligation of States to furnish information in accordance with the provisions of draft articles 15, 16 and 16 *bis*. It recognizes the need for striking a balance between the interests of the State of origin and the State that are likely to be affected. Therefore it requires the State of origin that is withholding information on the grounds of national security or industrial secrecy to cooperate in good faith with other State in providing as much information as can, under the circumstances be furnished.

Draft article 18 provides for *Consultations on Preventive Measures* between the States concerned, that is the State of origin and the States that are likely to be affected. In the view of the Special Rapporteur, consultations were necessary to complete the process of participation by the affected State and to take into account its views and concerns about an activity with a potential for significant harm to it. During the debate, it may be recalled, this article was criticized particularly because of the use of the phrase "mutually acceptable solutions" which it was said might have harmful consequences. The Secretariat of the AALCC had concurred with that view since while it is desirable that State should be obliged to consult, it is far-fetched to require them to reach an agreement.

Draft article 19 on "*Rights of the State likely to be affected* is designed to deal with situations where for some reason the potentially affected State was not notified of the conduct of an activity with a risk of potential transboundary harm, as provided for in the above articles. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it, or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of the activity of which the latter was not aware. In such cases, the potentially affected State may

request the State of origin to enter into consultations with it. That request should be accompanied by technical explanation setting forth the reasons for consultations. If the activity is found to be one of those covered by these articles, the State requiring consultations may claim an equitable share of the cost of the assignment from the State of origin. This provision is aimed at protecting the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity and enable them to request consultations. It also imposes a coordinate obligation on the State of origin to accede to that request.

It will be recalled that while introducing his ninth report at the Forty-fifth Session, the Special Rapporteur had stated that one of the goals of these articles is to provide for a system or a regime in which the parties could balance their interests. In addition to procedures which allow States to negotiate and arrive at such a balance of interests, there are principles of extent to such an exercise. He had then proposed a set of factors involved in an equitable balance of interests.

The proposed formulation had referred both to equitable principles and to scientific data and most of the members had found it useful particularly as the articles were to become a framework convention whose provisions were meant not to be binding but to act as guidelines for States.

Draft article 20 provides that in order to achieve an equitable balance of interests the States concerned shall take into account all relevant factors and circumstances and goes on to furnish a non-exhaustive list of such factors and circumstances. The wide range of diversity of the types of activities which is proposed to be covered by these articles, coupled with the different situations and circumstances in which they will be conducted make it impossible to compile an exhaustive list of factors relevant to all individual cases.

STATE RESPONSIBILITY

At its forty-sixth session, the International Law Commission had before it the second chapter of the Fifth Report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, addressed to the consequences of the acts characterized as international crimes under Article 19 of Part One of the draft articles[1] which although presented at the previous session, the

1. See A/CN.4/453 Add 2 and 3. Also see *Notes and Comments on some Selected Items on the Agenda of the Forty-eighth Session of the General Assembly of the United Nations*. Doc. No. AALCC/UNGA/XLVIII/93/1 p.59 at pp.73-90.

Commission had, owing to lack of time, been unable to consider last year. The Commission also had before it the Sixth Report of the Special Rapporteur.[2] The Sixth Report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, was of the nature of an appraisal or overview of the pre-counter measures settlement provisions envisaged thus far for the draft articles. The third chapter of the Sixth Report had presented to the Commission, in the form of an questionnaire, the different issues raised by the distinction between crimes and delicts.

In the course of consideration of these issues the Members of the Commission emphasized the complexity of the problems which called for a reflection on the delicate and crucial notions of "international community, inter-State systems, fault and criminal responsibility of States, as well as the functions and powers of the United Nations organs. The debate in the Commission was on two main issues, viz. (i) the distinction between crimes and delicts as embodied in Article 19 of Part One of the draft articles;[3] and (ii) the issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes.

In considering the distinction between crimes and delicts as embodied in Article 19, members of the Commission expressed divergent views with regards to such issues as (i) the concept of crime; (ii) the question of the legal and political basis of the concept of crime; (iii) the type of responsibility entailed by breaches characterized as crimes in Article 19;

2. See A/CN.4/461 and Add 1 and 2.

3. Article 19 of the Part One of the draft articles as adopted in 1980 reads:

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

(iv) the need for the concept of crime; and (v) the definition contained in Article 19. As regards the first issue, viz. the concept of a crime, some members of the Commission expressed the view that the concept of crime posed to conceptual difficulties as the distinction between crimes and delicts reflected a qualitative difference between basic infringements of the international public order and ordinary delicts which did not threaten the fundamental premise upon which the international society was based viz. the co-existence of sovereign States. Other members, however, questioned the tenability of a concept of State crimes. It was argued in this regard that the many internationally wrongful acts which could be attributed to a State varied in magnitude depending on the subject-matter of the obligation breached, the significance the international community attached to the obligation, the scope of the obligation in question and the circumstances under which the breach of the obligation occurred.

As to the question of the legal and political basis of the concept of crime, while some members held the view that the concept of crime was rooted in positive law and described as falling within *lex lata* in as much as such acts as aggression, apartheid and genocide were regarded by the international community as a whole as violating its human rights and were characterized as criminal acts in international conventions. In addition, it was argued, the components of an international crime emerged from jurisprudence, State practice and the judgments of international tribunals established at Nurembourg and Tokyo as well as the judgement of the International Court of Justice in the *Barcelona Traction, Light and Power Company case*.[4] In this regard attention was drawn to the differences between a crime and a violation of an obligation *erga omnes* and that the ICJ had not confined itself to speaking of obligations *erga omnes* but had emphasized the significance of the rights involved thereby signifying that it (the court) had in mind particularly serious violations and not ordinary delicts. However, other members argued that the concept of crimes was not *lex lata* because there was no instrument making it an obligation for States to accept it. Some members while sharing the view that the concept of State crimes did not exist in *lex lata* expressed their willingness with certain reservations, to acknowledge that certain acts which could be committed only by States should be characterized as crimes.

The question whether a State could incur criminal responsibility or the type of responsibility entailed by breaches characterized as crime in Article 19 of Part One of the draft articles also brought forth divergent

4. ICJ Reports 1970, p.32.

opinions. For some members the notion of State responsibility for crimes posed no conceptual difficulties as it was feasible to envisage a concept equivalent to *mens rea* in the case of acts imputable to States. It was argued in this regard that while criminal responsibility was primarily individual, however, it could be collective and that the *recognition of the criminal responsibility of a legal person* in certain conditions and circumstances is a step forward in the development and codification of law. It was also argued that since a State could cause such a damage to the international community as a whole, a society should not be allowed to shift the responsibility for crimes committed in its name on to mere individuals and that the concept of a State crime should therefore be accepted even if the collective sanctions against the State in question may well be prejudicial to its entire population and not only to its leaders. History, it was pointed out, was replete with examples of criminal States. On the other hand, it was argued that criminalization of States should be abandoned since a State could not be placed on the same footing as its Government or a handful of persons who might be in charge of its affairs. The proponents of this view emphasized that crimes were committed by individuals who used the territory of the State and its resources to commit international delinquencies for their own criminal purposes. With regard to the element of *mens rea*, it was pointed out that it was not feasible to attribute the mens rea of one individual to a legal entity such as a State. Reference was also made to the *maxim societas delinquere non potest* (a State including its people as a whole cannot be subject of criminal law) and the view expressed that it was a moot point whether an administrative organ, as a legal person, could be regarded as a subject of criminal law. Those speaking against the concept of State responsibility also relied on such maxims as *nullum crimen nulla peone sine lege and inter alia* argued that in the absence of a legal organ to try and punish States, the attribution of a criminal responsibility to a State is inconceivable.

It may be stated that the Commission had in 1976 not sought to establish the criminal responsibility of the State and therefore the use of the term "crime" should not in any way prejudge the question of the content of the responsibility for an international crime. State responsibility in international law, it may be recalled, is neither criminal nor civil and it is very simply international, specific and different. The specificity of State responsibility is clear *inter alia* in that some internationally wrongful acts apart from entailing the responsibility of the State concerned entail also the individual responsibility of the perpetrators of the internationally wrongful acts and the perpetrators could not hide behind their functional immunities.

Apropos the incorporation of the need for the concept of crime in the proposed draft articles it was *inter alia* argued that the concept of crime served a fundamental purpose i.e. of freeing the rules relating to State responsibility from the strait jacket of bilateralism and, in the event of particularly serious wrongful acts, enabling the international community acting within the framework of international institutions or through individual States to intervene in order to defend the rights and interests of victim States. It was pointed out that the comity of States as a distinct legal person was the victim of an international crime and that therefore the concept of an international crime would assist in the promotion in the international community to the status of a quasi public legal authority. On the other hand, however, it was argued that the delict-crime distinction was neither appropriate nor necessary in the proposed draft articles on State Responsibility the main objective of which was to require States to pay compensation for the damage that they may cause and not to punish them. It was emphasized that the concept of an international crime was neither necessary nor sufficient to free the international community from the yoke of bilateralism. It was unnecessary because there was little or no justification for going so far as the punitive measures that were inevitably linked with the notion of a crime. Nor was it deemed sufficient since it failed to settle the issue of the category of *erga omnes* violations as a whole. Consideration, in the opinion of the secretariat of the Asian-African Legal Consultative Committee, would require next to be given to the question whether the concept of State crimes have not lost much of their relevance in the face of the retreat of apartheid and colonialism in the post-cold war scenario. The univerasIly shared concern of environment and sustainable development, climate change and the principle of common heritage of mankind all have contributed to the adding a new dimension not only to inter-State relations but also to the question of State responsibility.

It will be recalled that during the Forty-fifth Session of the Commission the Special Rapporteur, Mr. Gaetano Arangio-Ruiz had pointed out that the list of internationally wrongful acts constituting international crimes incorporated in Article 19 dated back to 1946 and had asked the Commission whether those acts were still the best examples of the wrongful acts which the international community as a whole considered as crimes of States or whether that list should be updated. He had also pointed out then that the formulation of the general notion of international crime in Article 19 with wordings characterized by certain elements rendered it rather difficult to classify a breach as a crime or a delict and hence to ascertain which unlawful acts now came or should come under a regime of "aggravated" responsibility.

When the definition embodied in Article 19 was considered at the Forty-sixth Session, some members of the Commission expressed the view that the said provision was unsatisfactory in that it was too general and did not really propose a definition of crimes but rather stressed the degree of gravity of the act which was characterized as a crime without defining the threshold of gravity at which a delict became a crime. It was pointed out that the definition took no account of the wilful intent or of the concept of fault even though that element was inseparable from the concept of crime. Some members expressed concern that in view of its legislative history Article 19 as it stood now implied that a State had to continue to suffer the legal consequences of an international crime committed earlier even if the political, social or human circumstances in which that crime had been committed had long ceased to exist. On the other hand, it was pointed out that Article 19 adequately expressed the underlying intention and made it clear that while most breaches could be dealt with bilaterally there were other breaches of such a gravity that affected the entire international community. Some members expressed the view in this regard that the article had rightly been drafted in general terms in view of the fact that the concept of international crime was evolutive in nature and a flexible formulation adaptable to possible enlargement of the category of crimes was desirable.

Apropos the issues deemed by the Special Rapportuer Mr. Ruiz, as relevant to the elaboration of a regime of State responsibility the consideration in main was on the following aspects viz. (a) the mechanism for determining that a crime has been committed; (b) the possible consequences of a determination of a crime; (c) the punitive implications of the concept of crime; (d) the role of the United Nations in determining the existence and the consequences of a crime; (e) the possible exclusion of crimes from the scope of application of the provisions in circumstances precluding wrongfulness; (f) the general obligation of non-recognition of the consequences of a crime; (g) the general obligation not to aid a criminal State. Divergent views were expressed on these issues and the debate on the subject may be deemed to have been inconclusive owing largely due to lack of time.

It may however be recalled that in his fifth report the Special Rapporteur had *inter alia* considered the extent to which the functions and competence of the United Nations organs were or should be made legally suitable for the implementation of the consequences of an international crime. The three specific questions dealt with in this regard were: (i) whether the existing powers of General Assembly, the Security Council and the International Court of Justice included the determination of the existence,

attribution and the consequences of wrongful acts contemplated in draft Article 19 of part one of the draft articles; (ii) *de lege ferenda* whether and in what sense the existing powers of those organs should be legally adapted to the specific tasks; and (iii) to what extent the powers of the UN organs affected or should affect the faculte right or obligation of States to react to the internationally wrongful acts either in the sense of substituting for individual reaction or in the sense of legitimizing coordination, informing or otherwise conditioning such individual reaction.

It may be recalled that at the Commission's Forty-fifth Session the Drafting Committee had adopted the text of draft Articles 11, 12, 13 and 14 which had been presented to the Commission but the latter had not acted on them pending the submission of the commentaries to the draft articles. In his sixth report, the Special Rapporteur Mr. Gaetano Arangio Ruiz, presented at the current session of the Commission had proposed reformulation of draft Article 11 (countermeasures by an injured State) and draft Article 12 (conditions relating to resort to counter-measures) and the Commission had agreed to refer to his proposals to the Drafting Committee. The Commission at its forty-sixth session *inter alia* provisionally adopted the text of draft Article 11 (counter-measures by an injured State); draft Article 13 (proportionality) and draft Article 14 (prohibited counter-measures) for inclusion in Part Two of the proposed draft Aticles. The Commission deferred taking action on draft Article 12. It may be mentioned that the Commission agreed that draft Article 11 may require to be reviewed in the light of the text that may eventually be adopted for draft Article 12. The complete set of the draft articles on counter-measures will be formally submitted to the General Assembly next year.

In his Sixth Report the Special Rapporteur had among other things observed that the concept of adequate response must find a place in the proposed formulation relating to counter-measures by an injured State in order to strike a proper balance between the injured State and the wrong-doing State. The Special Rapporteur was of the view that the effect of omission of the notion of adequate response would be to allow the injured State a lot of scope to use counter-measures in order to compel both cessation and reparation. In the case of cessation, the injured State would be allowed to apply counter-measures without affording the alleged wrong doing State any opportunity to explain that the wrongful act was not attributable to it or that there was no wrongful act. In the case of reparation on the other hand, the State may well continue to be the target of counter-measures even after it had admitted its responsibility and even though it was in the process of providing reparation and/or satisfaction.

The Chairman of the Drafting Committee pointed out in this regard that the text of draft Article 11 adopted by the Commission in 1993, had by making the right of the injured State to resort to counter-measures subject to the conditions and restrictions set forth in subsequent articles, provided a safeguard against abuse. It was pointed out that the requirement of proportionality met in part the concerns of the Special Rapporteur. It was also emphasized that the phrase "as necessary to induce (the wrongdoing State) to comply with its obligations under Articles 6 to 19 *bis*" implied that there were cases where resort or continued resort or counter-measures might not be necessary. Further, it was pointed out that the phrase "as necessary" made it clear that counter-measures might be applied only as a last resort where other means available to an injured State such as negotiation, diplomatic protests or measures of retortion might be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicated that the decision of the injured Sate to resort to counter-measures was to be made reasonably and in good faith and its own risk.

For easy reference, the texts of draft Articles 11, 13 and 14 as adopted are reproduced herewith.

Counter-measures by an Injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under Articles 6 to 10 *bis*, the injured State is entitled, subject to the conditions and restrictions set forth in Articles..., not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under Articles 6 to 10 bis.
2. Where a counter-measure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 13

Proportionality

Any counter-measure taken by an inuured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14

Prohibited countermeasures

An injured State shall not resort, by way of counter-measures, to:

(a) use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

B. INTERNATIONAL CRIMINAL COURT: AN UPDATE

I. Background

The Draft Statute of the International Criminal Court was adopted by the International Law Commission (ILC) during the course of its forty-sixth session held from May to July 1994. The ILC adopted the draft statute consisting of 60 articles with commentaries. This topic was also discussed at the AALCC's Legal Advisers' Meeting held in New York in October 1994. The AALCC Secretariat had prepared a summary of the discussions together with brief commentaries which took place at the ILC and in its Working Group to facilitate substantive discussion in the Sixth Committee. These Secretariat commentaries have been reproduced in the Secretariat study relating to the "International Law Commission prepared for Doha Session in this Chapter. The Sixth Committee considered this topic in the background of the recommendation made by the ILC that the General Assembly convene an international conference to study the draft statute and conclude a convention on the establishment of an international criminal court.

Accordingly, the Sixth Committee noting this recommendation decided to establish an *ad hoc* Committee open to all States Members of the United Nations or its Specialized Agencies to review the major substantive and administrative issues arising out of the draft statute.

II. Views from the Sixth Committee (General Assembly, U.N.)

The Chairman of the International Law Commission Mr. Vladlen Vereshchetin, while introducing the Report of the Commission on the Work of its forty-sixth session, noted the substantive aspects of the intensive work carried out by the Commission. While concluding his summary presentation, he pointed out that the establishment of an international

criminal court would be a major contribution to the rule of law in international affairs and would crown efforts initiated by the United Nations almost half a century ago. In his summary presentation he outlined the scheme of the draft statute as adopted by the ILC.

The Chairman made a particular reference to the inter-relationship between the draft Code and the statute of an international Criminal Court. While noting the emphasis laid by a large number of members on the need to ensure the necessary coordination between the provisions of the two instruments, he pointed out that there was a widespread feeling in the Commission that, although the two exercises should not be rigidly linked and while the adoption of one of the instruments should not be contingent on the adoption of the others. According to him there were inevitable provisions and problems common to the two drafts and care should be taken to avoid contradictions between them.

A. Relationship with the United Nations:

The views expressed in the Sixth Committee did not differ substantially on the question of establishment of the Court. There were also issues concerning the mode of establishment such as—whether it should be through a treaty or by way of a resolution of the General Assembly; and what should be the relationship of the Court with the UN. The delegate of Japan, for example, said that the consent of States was indispensable if an international criminal court was to be effective. He also pointed out that the present draft statute made it clear that a court would complement national criminal justice systems and that it would be established by a treaty and not by a UN resolution. The view that the Court should be established through a treaty received wider acceptance. The delegate of the Republic of Korea did not favour the creation of the Court as a UN organ as it would cause a number of difficult legal problems. He, however, did not elaborate these probable legal problems. On the other hand, he favoured the creation of the Court by a multilateral treaty and linking it with the UN by an agreement.

According to the delegate of Egypt the ideal form of relationship between the Court and the UN would be through a convention; one similar to that between the Tribunal on the Law of the Sea and the UN. The delegate of Algeria did not favour treaty as the most appropriate mode for the Court's creation. In his view, it could be set up as an organ of the UN. That, according to him, would give it the moral authority and universal character of the UN without affecting its independence and autonomy.

B. Jurisdiction of the Court

The issue of jurisdiction was the most debated clause in the draft statute. States however have widely differed in their perception of the extent and scope of the jurisdiction of the Court. One view was that the Court should have jurisdiction over a very limited number of very serious crimes, as only in exceptional cases where states prepared to waive sovereignty in the criminal law field to international supervisory mechanisms. Based on certain criteria, the only crimes, according to some States, which should fall within the Court's jurisdiction were genocide, aggression, serious war crimes and systematic and large-scale violations of human rights. According to the delegate of China, although there was no doubt that genocide was a serious international offence which should be presented and punished, should that necessarily give the court jurisdiction over that category of crimes.

While referring to the jurisdictional aspects, the delegate of India noted that the statute incorporated a balanced approach and conformed to the principles "of making haste slowly" towards the establishment of an international criminal justice system and a permanent international criminal court. He also noted that by focussing on the national criminal jurisdiction and by requiring the consent of States concerned, priority had been given to the establishment of international criminal jurisdiction only in principle, and the matter of prosecution of the case was subject to States' consent.

According to the delegate of the Republic of Korea the jurisdiction of the court was the core of the draft statute. In his view it was still open to dispute that the crimes provided for in article 20 were well-defined enough to meet the standard of *nullum crimen sine lege*. However, considering that the draft statute was a procedural instrument, and did not intend to define or codify crimes, the present formulation was a basis for further discussion. As to the modalities in which States might accept the Court's jurisdiction over crimes in question, his Government was pleased that the draft adopted the so-called "opting-in" system as a general rule. However, he noted, the rigid consensual basis of jurisdiction as implied in that system should not frustrate the objective of establishing the Court. Further, according to him it was appropriate to qualify the requirement of the acceptance of the Court's jurisdiction by the custodial and territorial state with two important objections, namely, the concept of inherent jurisdiction over the crime of genocide and the waiver of requirement in the case of a recourse to the Court initiated by the Security Council.

The delegate of the Islamic Republic of Iran noted that the jurisdiction

of the Court should be limited to most serious crimes and should not call into question the jurisdiction of national criminal court. Expressing his views, the delegate of Egypt stated that the court must exercise its jurisdiction free of political pressure in order not to lose credibility. In the view of the delegate of Pakistan, the jurisdiction of the court should be confined to individuals and should not involve states as it would be contrary to the principle of sovereignty and the sovereign equality of states. The delegate of Sri Lanka also called for a thorough review of the jurisdictional aspects.

C. Security Council and the Court

The relationship between the Court and the Security Council was another crucial aspect which was outlined by many delegates. The delegate from China addressed this issue. He had questions on the soundness of paragraph 1 of article 23—on action by the Council—and whether it was a correct interpretation of the Charter. According to him some States had reservations about whether the Security Council was authorized under Chapter VII of the Charter to set up compulsory juridical jurisdiction. He was not against the Council making use of the Court to investigate and prosecute serious international crime, but it should do so only in ways which were incompatible with the character and status of the court and with the principle of voluntary acceptance of states. The delegate from India referred to the special power conferred on the Security Council to refer crimes to the Court under Chapter VII of the charter as a novel one.

One view was that the Security Council should have the sole authority to submit complaints to the court. On the other hand, it was also noted by some states that since the Security Council was a political body and not a judicial organ, its involvement in the prosecution of individuals should not be considered. According to the delegate of Iran only the Security Council could decide when an act of aggression had occurred; to prohibit prosecution before the court because the Security Council was considering threats to international peace and security would compromise the authority of the court. According to him the Council had, in recent years, been using a sweeping definition of threats to peace and security.

D. Procedural Issues and Future Course:

The debate in the Sixth Committee addressed issues which were essentially procedural in nature. There was a widespread support among members to establish a permanent international criminal court. While outlining the need for an accurate procedural law for investigation and public trials, the delegate of Japan expressed concern that since crimes in many cases may be committed in the context of political turmoil,

judicial proceedings might be abused for political ends particularly through perjury. Accordingly, he laid emphasis on the need for adequate safeguards. So, he also proposed further examination in informal consultations in the Sixth Committee.

There were views in the Sixth Committee supporting the convening of a preparatory conference before the statute entered into force. Such a conference, it was pointed out, should finalize the text of the statute. In one view the draft statute was silent on the restitution of property illegally acquired. The Indian delegate stated that his government was not in favour of rushing adoption of the statute, considering that the court could by itself not be effective in deferring serious crimes being committed in the context of threats to or breaches of international peace and security. Its various provisions, he noted, deserved careful study. Further, he preferred a general debate without reopening the delicate balance contained in the proposed statute, within and outside the UN, before formal decisions to hold a diplomatic conference to adopt the statute could be taken.

On behalf of the AALCC the Secretary-General delivered a brief statement reviewing the AALCC's work programme in relation to the ILC. In view of the importance of the topic relating to the Draft Statute of the International Criminal Court, the AALCC Secretariat held a Seminar in New Delhi to facilitate further discussion. The report of the Seminar is annexed to this chapter as Annex B.

ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Report A/49/738
A/RES/49/53
9.12.94

The General Assembly

Recalling its resolution 47/33 of 25 November 1992, in which it requested the International Law Commission to undertake the elaboration of a draft statute for an international criminal court,

Recalling also its resolution 48/31 of 9 December 1993, in which it requested the International Law Commission to continue its work on the question of the draft statute for an international criminal court, with a view to elaborating a draft statute for such a court, if possible at the Commission's forty-sixth session in 1994,

Noting that the International Law Commission adopted a draft statute for an international criminal court at its forty-sixth session and decided to recommend that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court,

Expressing deep appreciation for the offer of the Government of Italy to host a conference on the establishment of an international criminal court,

1. *Welcomes* the report of the International Law Commission on the work of its forty-sixth session, including the recommendations contained therein;

2. *Decides* to establish an *ad hoc* committee open to all States Members of the United Nations or members of specialized agencies to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries;

3. *Also decides* that the *ad hoc* committee will meet from 3 to 13 April 1995 and, if it so decides, from 14 to 25 August, and submit its report to the General Assembly at the beginning of its fiftieth session, and requests the Secretary-General to provide the *ad hoc* committee with the necessary facilities for the performance of its work;

4. *Invites* States to submit to the Secretary-General, before 15 March 1995, written comments on the draft statute for an international criminal court, and requests the Secretary-General to invite such comments from relevant international organs;

5. *Requests* the Secretary-General to submit to the *ad hoc* committee a preliminary report with provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court;

6. *Decides* to include in the provisional agenda of its fiftieth session an item entitled "Establishment of an International Criminal Court", in order to study the report of the *ad hoc* committee and the written comments submitted by States and to decide on the convening of an international conference of plenipotentiaries to conclude a convention on the establishment of an international criminal court, including on the timing and duration of the conference.

REPORT ON THE SEMINAR ON "INTERNATIONAL CRIMINAL COURT" ORGANIZED BY THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE IN COLLABORATION WITH THE INDIAN SOCIETY OF INTERNATIONAL LAW ON 12TH JANUARY 1995.

The Secretariat of the Asian-African Legal Consultative Committee in collaboration with the Indian Society of International Law (ISIL) organized a Seminar on the proposed "International Criminal Court", in New Delhi on 12 January 1995. The one day Seminar had for its objective the consideration of the draft statute of the International Criminal Court as adopted by the International Law Commission during the course of its forty-sixth Session held during May to July 1994. The Seminar was informal in nature wherein all the participants spoke in their individual capacities and no formal conclusions were drawn or resolution adopted.

The morning session of the Seminar was chaired by Mr. Chusei Yamada, the President of the AALCC and the afternoon session by Dr. Najeeb Al-Nauimi the Vice President of the AALCC. The Seminar was attended by participants from 16 member-States of the AALCC viz. Bangladesh, the People's Republic of China, Cyprus, Ghana, India, Iraq, Japan, Kenya, Mongolia, Myanmar, Nigeria, Oman, Palestine, Philippines, Qatar, Sri Lanka, Thailand, Uganda, and Republic of Yeman. The representatives of two non-member states of the AALCC viz. Angola and Ethiopia and the former Secretary-General of the AALCC, Mr. B. Sen, the officials of the International Committee of the Red Cross; the Members of the Executive Council of the Indian Society of International Law; academics from the Jawaharlal Nehru University and several eminent members of the Supreme Court Bar of India also participated in the Seminar.

Professor R.P. Anand, Secretary-General of the Indian Society of International Law (ISIL) while welcoming the participants on behalf of the Executive Council of the ISIL highlighted the significance and topicality of the subject of the Seminar. Mr. Tang Chengyuan, the Secretary-General of the AALCC in his introductory remarks *inter alia*, welcomed the participants on behalf of the AALCC. Emphasizing the importance of the subject he stated that the matter had been the subject of intense debate both within the Sixth Committee of the United Nations as well as the meeting of the Legal Advisors of Member-States of the Asian-African