State through the application of the principle of *jus sanguinis* and residing in the particular successor State; (c) persons naturalized in the predecessor State and residing in the particular successor State; and (d) persons having the secondary nationality of an entity that became part of that particular successor State and residing in that successor State or in a third State.

The Working Group considered that a successor State should have no obligation to grant its nationality to a person under categories (a) and (d) above who resided in a third State and also had the nationality of a third State. Moreover, a successor State should not be entitled to impose its nationality on such an individual against his/her will.

(ii) Obligation of the successor States to grant right of option

The Working Group concluded that the successor States should grant a right of option to the following categories of persons: (a) persons born in what became the territory of successor State A and residing in successor State B; and (b) persons having the secondary nationality of an entity that became part of successor State A and residing in successor State B: and, unless they had the nationality of a third State; (c) persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of *jus sanguinis* and residing in a third State; and (d) persons naturalized in the predecessor State and residing in a third State.

The Working Group considered that once the right of option had been exercised, the State for the nationality of which an individual had opted should have the obligation to grant such nationality.

Right of option

The Working Group agreed that, at this preliminary stage, the term "right of option" was used in a broad sense, covering both the possibility of "opting in"—i.e. making a positive choice—and "opting out"—i.e. renouncing a nationality acquired *ex lege*. The expression of the will of the individual was a consideration which, with the development of human rights law, had become paramount. States should, therefore, not be able, as in the past, to attribute nationality by agreement *inter se* against an individual's will.

The Working Group stressed the fact that the States concerned should grant an effective right of option. They should, therefore, have the obligation to provide individuals concerned with all relevant information on the benefits and drawbacks attaching to the exercise of a particular option—including information relating to the right of residence and social security benefits—so that these persons would be able to make an informed choice.

Other criteria applicable to the withdrawal and grant of nationality

The Working Group considered the question whether, in addition to the criteria mentioned above, there were other criteria that played a role with respect to the withdrawal or granting of nationality.

The Working Group agreed, on the one hand, that a predecessor State should be prohibited from withdrawing its nationality on the basis of ethnic, linguistic, religious, cultural or other similar criteria, since this would amount to discrimination. Similarly, the successor State should be prohibited from refusing to grant its nationality—which it would otherwise have the obligation to grant—on the basis of such criteria.

The Working Group considered, on the other hand, that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria.

Consequences of non-compliance by States with the principles applicable to the withdrawal or the grant of nationality

The Working Group concluded that a number of hypotheses merited further study. First, that a third State should be entitled to consider an individual as a national of a predecessor State when that State had withdrawn its nationality from such individual in violation of the above principles and the individual has become stateless as a result of such withdrawal; second, that a third State should not have the obligation to give effect to the grant by a successor State of its nationality in violation of the above principles, unless the refusal to give effect would result in treating the individual concerned as a *de facto* stateless person; and finally, that a third State should be entitled to consider an individual as a national of a successor State with which he has effective links when that State has failed to grant its nationality to such individual in violation of the above principles and the individual has become stateless as a result of such failure. Thus, for example, a third State would be entitled to accord to an individual the rights or status he/she would enjoy in the territory of the third State by virtue of being a national of a predecessor or a successor State, as the case may be, despite the fact that the predecessor State has withdrawn, or the successor State has refused to grant its nationality.

The Working Group agreed that further study was necessary in order to clarify the question of the international responsibility of a predecessor or a successor State for its failure to comply with the above principles, or, as the case may be, with its obligations deriving from an international agreement with other States concerned.

Continuity of nationality

The Working Group considered the question whether the rule of continuity of nationality as a pre-condition for the exercise of diplomatic protection should apply in the context of State succession, and if so, to what extent. For this purpose, it distinguished the following three situations: (a) *ex lege* change of nationality; (b) change of nationality resulting from the exercise of the right of option between the nationalities of two successor States; and (c) change of nationality resulting from the exercise of the right of option between the nationalities of the predecessor and successor States.

Bearing in mind that the purpose of the role of continuity was to prevent the abuse of diplomatic protection by individuals acquiring a new nationality in the hope of strengthening their claim thereby, the Working Group agreed that this rule should not apply when the change of nationality was the result of State succession in any of the above situations.

IV. Establishment of an International Criminal Court (ICC)

(i) Introduction

In view of the importance of the topic for the member states of the AALCC it had earlier been considered by the AALCC on two occasions. The first occasion was a Seminar convened by the AALCC Secretariat in New Delhi in January 1995 and the second occasion was the annual session held in Doha in April 1995. During the Doha Session, the Head of Delegation of Sudan had proposed that the AALCC Secretariat organize one or more Seminars on the topic of the ICC.

At the 246th Meeting of the Liaison Officers held on 28th of September 1995, the Liaison Officer for Japan submitted a formal proposal by his Government that the AALCC Secretariat convene another Seminar on the ICC on the occasion of the annual session in Manila (Philippines). The Japanese proposal was supported by the Liaison Officers of Myanmar, Pakistan and the Republic of Korea. Further, at the 248th Meeting of the Liaison Officers held on 7th of December 1995, it was agreed in principle to inscribe the item "Proposed Establishment of an International Criminal Court" in the provisional agenda of the Manila Session and to convene a Special Meeting on this topic as proposed by the Secretariat as an integral part of that Session. Accordingly, the Special Meeting was convened on 5th and 6th March during the Manila Session. To facilitate deliberations at the Special Meeting, the Secretariat prepared a brief of documents identifying the outstanding issues related to the proposed establishment of an International Criminal Court.

Thirty-Fifth Session : Discussion and Report of the Special Meeting on the Establishment of an International Criminal Court

The Special Meeting held on March 5 and 6 in three sessions convened to discuss the issues relating to establishment of an International Criminal Court (ICC). The meeting elected the following as:

Chairman	:	Mr. Raul I. Goco (The Philippines)
Vice Chairman	:	Mr. Ragga El-Araby (Arab Republic of Egypt)
Rapporteurs	:	Mr. Jun Yosihda (Japan)
		Mr. Kwabena Baah-Duodu (Ghana)

The Chairman invited the Secretary-General, Mr. Tang Chengyuan, to address the body to explain the purpose of the Special Meeting. In his statement, the Secretary-General, welcomed all the delegations and expressed his hope that the meeting would serve the purpose of harmonizing the contentious issues relating to the draft statute. He stated that he was aware that there were many bottlenecks to be handled before a consensus could be reached. He referred to the areas which needed closer consideration, such as, the mode of establishing relationship between the UN and the ICC, jurisdictional issues, definition of crimes and the procedural issues. He thanked the Ministry of Foreign Affairs, Government of Japan, for initiating the proposal to convene the Special Meeting and for providing additional documentation. Further, he requested the Chairman to invite the Deputy Secretary-General, Ambassador Dr. Wafik Zaher Kamil to introduce the theme of the Special Meeting.

Ambassador Kamil emphasized the issues which needed closer consideration such as: (a) Mode of establishment; (b) Appointment of judges; (c) the ICC's relationship with the Security Council; (d) Jurisdictional issues, particularly Article 20; (e) Principle of complementarity; and (f) Procedural issues. He made a reference to the necessity for comparing the draft statute with the Draft Code of Crimes. He suggested that in considering these issues, the study prepared by the AALCC Secretariat, entitled, "International Criminal Court: A background Note," could be utilized by the delegations as a reference material.

The Chairman invited Mr. Adriaan Bos, Legal Adviser, Government of Netherlands and also the Chairman of the Ad Hoc Committee constituted by the Sixth Committee to consider the draft Statute on the establishment of an International Criminal Court, to address the Special Meeting.

Mr. Bos discussed initially the evolutionary process of international criminal jurisdiction. He outlined the different modes of establishment of the ICC, which are: by means of a treaty, by a resolution of the UN or by amendment of the UN Charter. He pointed out that these options should be looked into in greater detail. He, however, noted that the Ad Hoc Committee had welcomed the ILC's proposal that an agreement be concluded between the UN and ICC. Concerning the subject-matter of jurisdiction, he noted that there was a strong support for an approach in which the jurisdiction would be linked to a small number of core crimes, crimes, the commission of which, shock the international community. He also noted

the problems, which might arise in defining these crimes, giving as examples crimes against humanity, war crimes and the "serious violations of the laws and customs applicable in armed conflict."

He viewed the issues relating to complementarity as lying at the very heart of the proposed ICC as it determined the cooperative relationship between the ICC and the domestic judicial bodies. He did not share the opinion that priority should always be accorded to national bodies, or to the ICC. Instead, he felt that much depended upon the specific circumstances of each particular case. He clarified the prevalent views, particularly within the Ad Hoc Committee, on the question of "inherent jurisdiction." He pointed out that inherent jurisdiction was something completely different from the Court possessing automatic jurisdiction, the latter being a concept which no State had ever supported.

Addressing the issues relating to criminal procedures, Mr. Bos noted the essential distinction between the common law and civil law procedures and to substantial statutory regulations as well. He outlined briefly the existing difficulties, particularly in applying a variety of national legal regimes. In conclusion, Mr. Bos drew the attention of the Special Meeting to the emerging consensus that the question was ripe for considerations at a Diplomatic Conference, to be convenced in the not too distant future. He felt that it was of utmost importance that as many States as possible should be represented in the Preparatory Committee.

The Chairman invited Prof. Gerhard Hafner, of Stanford University, to address the Special Meeting. Prof. Hafner in his statement addressed the following issues, namely, the Relationship between State Parties, Non-State Parties and the International Criminal Court, and General Principles, of Law. In his introductory remarks, Prof. Hafner noted that the establishment of an ICC where individuals would be judged by an international institution added a new dimension to international law and international relations. Dwelling on the need to create such a body, he noted that the crimes and atrocities committed in Europe and Africa showed that such crimes no longer were the sole concern of one State. Accordingly, he termed international crimes as those crimes which entailed individual responsibility and were internationally defined and reflected the common concern of all States. This concept, according to him entailed a set of rights and duties, namely (1) the right of any State and not only of the particularly affected one, to prosecute such crimes or at least to initiatic such proceedings, and (2) a duty to prosecute the crime and to render any assistance, wherefrom (3) a State responsibility could ensue if this duty was not complied with.

While outlining the ways and means to realize international criminal

jurisdiction, Prof. Hafner noted three models namely, (a) the least internationalized model i.e., the relevant crimes were defined by international agreement and the various States were cooperating in the prosecution of such crimes, however, only as long as their particular interests or conceptions of their national public order were not entangled; (b) a higher degree of internationalization where crimes were subject to a common definition, accompained by a duty to prosecute incumbent upon the States, what could be termed as a decentralized system of international criminal jurisdiction; and (c) a most developed system which could be a centralized system of international criminal jurisdiction where crimes were subject to a common definition and a centralized organs was competent to prosecute and try them.

Considering the individual elements of the relationship between States and the ICC, Prof. Hafner outlined two main approaches. The first approach was the communitarian approach, i.e. to deal with the issues in a community-oriented perspective. The second approach was related to the individualistic State concept, i.e. giving priority to the policies of the individual States. Within the ambit of these approaches, Prof. Hafner examined such areas as the acceptance of jurisdiction, apprehension and surrender, judicial assistance, the recognition of the judgements of the ICC, the enforcement of sentences and the mutual recognition of judgements. On the question of relations to non-State parties, four different issues were identified. These were: (a) the right of non-State parties to file a complaint before the ICC and the legal consequences thereof; (b) the concurrent obligations under different extradition treaties and under the Statute of the ICC; (c) the dependency of the jurisdiction of the ICC upon the consent of a non-State party; and (d) the need to provide ways and means to enable a general cooperation of third States.

Finally, Prof. Hafner made reference to the additional work required on the general principles of criminal law. In his view, principles relating to the following needed consideration: non-retroactivity, individual responsibility, causation, accountability for acts and omissions of others, the definition of the "guilty act" or *"actus reus"*, the effect and different degrees of intent or *"mens rea"* on liability, aggravating and attenuating circumstances and the questions relating to penalties. In conclusion, Prof. Hafner identified the three basic questions that need to be addressed, namely, (a) which law (standards and principles) should be applied, national or internationally agreed one (b) who should take the relevant decision on individual issues, the national or international organs and (c) who should be responsible for asking measures and carrying out decisions in the course of the proceedings?

The following countries presented their respective positions during the Special Meeting: Islamic Republic of Iran, Singapore, Japan, Ghana, Egypt, People's Republic of China, Sudan, Republic of Korea, Tanzania, India, Cyprus, Thailand, Qatar, Pakistan, Sri Lanka and the Philippines. Australia and Finland submitted their views as observers. Some countries made only oral presentations. The following trends were identified in the country positions presented by the different delegations:

A. Mode of Establishment

The delegations unanimously favoured the establishment of an independent and impartial international criminal court, free from political pressures and tendencies. However, they differed on the mode of establishment of the same, viz, whether it should be through a resolution of the UN General Assembly, a treaty or by an amendment of the UN Charter. The majority favoured the establishment of the Court through a treaty or by a multilateral agreement. While accepting the difficulties involved in amending the UN Charter, some delegations also noted the difficulties of getting sufficient number of accessions to the treaty proposal.

Few delegations were not inclined to keep the ICC independent from the UN to allow it to function as a completely independent judicial body. Many of the delegations generally sought the universality of the Court so as to ensure its effectiveness.

B. The Principle of Complementarity

Several delegations sought a clear definition of the principle of complementarity. The mere reference to the principle in the preambular paragraphs, according to many delegations, did not adequately ensure its clarity. Emphasis was made by some delegations on the drawing up of clear jurisdictional boundaries between the national courts and the ICC to avoid unnecessary overlapping in the administration of justice over international crimes. Therefore, delegations sought to stipulate in the main text the principle of complementarity.

The principle of complementarity is derived from the sovereignty of States. The clear expression of this principle, according to one delegation, meant working, as far as possible, within the confines of existing criminal procedures and existing regimes governing extradition and mutual criminal assistance. The said delegation further noted that the achievement of balance in the principle would command the widespread acceptance of States which was essential to the draft Statute's effectiveness. References were made to Article 42 of the ILC draft which permitted the Court to consider whether proceedings in national courts "were not impartial or independent or were

designed to shield the accused from international criminal prosecution or the case was not diligently prosecuted." This Article was understood by some delegations as an infringement of the sovereignty of States, and thus was not acceptable.

Majority of the delegations favoured a consensual approach towards the application of the principle of complementarity. According to one delegation, this principle was crucial and only under exceptional circumstances, where no appropriate alternate might be found, would an ICC be called upon to fill in the gap.

C. Issues Pertaining to Jurisdiction and Applicable Law

The precision in the definition of the ICC's jurisdiction was felt extremely essential for the effective operation of the Court as well as upholding the principle *nullum crimen sine lege*. Several delegations required a clear definition of the jurisdiction of the ICC in the Statute. The role of the Statute, it was pointed out, should be to set out the judicial mechanism for the prosecution of crimes rather than to deal with the substantive definitions of the crimes themselves. It was also suggested that the definitions of crimes under the purview of the Court could properly be made in the Statute or be dealt with by the respective multilateral treaties creating or embodying those crimes. Majority agreed that the jurisdiction of the Court could be limited to the most serious crimes of international concern, notably, genocide, serious violations of the laws and customs applicable to armed conflicts and crimes against humanity. However, there was no agreement on the precise definition of "aggression" and its determination. Therefore, its inclusion was not unanimously accepted. Several delegations, however, felt that crimes of drug trafficking, terrorism and piracy could be under the scope of the Court.

One delegation held the view that Article 20 should be amended by deleting references to the crime of aggression and crimes against humanity. It also sought in Article 20(c) specific provisions referring to the 1949 Geneva Conventions defining the serious violations of the laws applicable to armed conflicts. With respect to aggression and crimes against humanity, it was pointed out by some delegations, that these could only be dealt with upon the finalization of the draft Code of Crimes against the Peace and Security of Mankind. However, one delegation expressed the opinion that the Court should exercise jurisdiction in respect of the "hard core" crimes until the draft Code of Crimes against the Peace and Security of Mankind was completed. It was also pointed out that the concept of 'grave breaches' instead of 'serious violations' should be brought in while dealing with the crimes connected with laws and customs of war.

Considering the evolution of the PCIJ and its successor ICJ, one delegate noted that only when the system of law had matured to an advanced degree after centuries, that such institutional meachnisms were set up to settle all disputes under interanational law. So, in his view, it was doubtful whether international criminal law had developed to the same degree to warrant a permanent Court of General, International, Criminal Jurisdiction. Furthermore, he also noted the difficulties involved in determining the offences/crimes that would come within the jurisdiction of the Court and their relations with the draft Code of Crimes against Peace and Security of Mankind. For instance, he pointed out, it was not clear as to whether the crime of aggression would cover political or economic aggression or what violations of the laws of war would be "serious" and what would not be. He agreed with the assertion that individuals should have the responsibility for certain serious crimes at the international level when they enjoyed certain rights at that level. However, in his view that did not necessarily call for the mechanism of a permanent Court of General, International, Criminal Jurisdiction, and that the proposed Court could be convened as and when required, like all its predecessors.

D. ICC and its Relationship with the Security Council

Several delegations pointed out that the inherent jurisdiction envisaged for the ICC upon referral by the Security Council (Article 23 of the Draft Statute) could cloud the objectivity and independence of the ICC and hence, not in the interest of developing a uniform, non-discriminatory, and impartial international criminal justice system. One delegation was of the view that in the case of the crime of genocide, the invocation of the jurisdiction of the ICC should be only on the basis of consent of all concerned States and not as proposed under Article 25 of the draft Statute otherwise it might amount to a backdoor amendment to an existing treaty. It was the view of other delegations that the logic behind the principle of separation of powers between judicial and executive branches, as employed in domestic legal systems, had to be taken into account in the context of the relationship between the Security Council and the ICC.

Some delegations would want to give the Security Council only a limited role *vis-a-vis* the ICC. According to one delegation, although the ICC should be independent from the influence of the Security Council, it should maintain adequate respect for the decisions and resolutions of the Security Council. This was felt necessary in the interest of preserving international peace and security which was the primary responsibility of the Security Council. One delegation, referring to Article 2 which incorporates the relationship between the ICC and the UN, sought clarification on the scope of Article

2, particularly concerning the role which the Security Council was envisaged to play in the proceedings before the Court.

E. Procedural Issues

Some delegations favoured the rules of the Court in relation to *inter alia*, the conduct of investigations, procedure and the rules of evidence to be drafted together with the Statute. According to them, procedural issues were fundamental to ensuring the fairness of the Court's proceedings and the adequacy of the protection accorded to the rights of the accused. Several delegations pointed out that the role of a prosecutor and surrender to the accused by States, waiving of national jurisdiction were crucial issues and therefore, needed to be settled on the basis of broad consensus. Some delegations also sought that extensive pre-trial investigations be left to the courts of the complainant State.

One delegation sought to have more clarity with regard to the relationship between investigations, arrest and pre-trial detention by the Court and by a State party rendering judicial assistance. Some delegations found paragraph 2 of Article 45 inappropriate as it allowed decision to convict and accused of a criminal charge to be reached by a mere majority of three out of the five judges of the trial chamber. Reference was also made to the fact that the draft Statute did not require all the judges to be present continuously throughout the hearings. Some delegations sought to know what factors should be taken into account to decide the "gravity of the crime" and the "individual circumstances of the convicted person', such as (a) the aggravating as well as mitigating factors; (b) the extent and security of the damage or injury caused by the commission of the offence; and (c) the antecedents of the convicted persons. References were made by some delegations to the necessity of providing adequate and proper protection to victims and witnesses.

F. Consent and Accountability

Several delegations favoured the exercise of jurisdiction by the ICC through consensus i.e. jurisdiction to be conditional upon the acceptance by concerned States in a given case. It was also pointed out that while the consent of the custodial and territorial State was considered generally necessary, the consent of the State of nationality of the accused and the State of the victim were also emphasized as important. Some delegations, therefore, sought to invoke the Court's jurisdiction only by making an express declaration to this effect i.e. by "opting-in" procedures. However, many delegations felt that the rigid consensual basis of jurisdiction implied in the "opting-in" system should not frustrate the objective of the Court.

One delegation referreing to the principle of accountability pointed out that both the ICC and sovereign States had to be held accountable for actions taken or refusals to act. The delegation also referred to the various grounds on which the ICC could be held accountable. These were respect to human rights of the accused, judicial nature of the decision and the equal justice for all. On the other hand, it was pointed out that when a State refused to cooperate with ICC, either in the case of transfer of the accused from national jurisdiction to ICC or arresting an accused who happened to be in its territory, that State should provide ICC and the international community through the ICC the reasons for such a refusal.

The Chairman invited Mr. Chusei Yamada, Member, International Law Commission, to address the Special Meeting. In his statement Mr. Yamada referred particularly to the close coordination between the draft Code of Crimes against the Peace and Security of Mankind and the draft Statute of the ICC. Dr. P.S. Rao, Chairman, International Law Commission, noted the problems which might come in the way of effective functioning of the ICC. He said that various quasi-legal and political factors hindered the effective functioning of the ICC. He wondered whether State parties were in a position to accept international criminal jurisdiction vis-a-vis national jurisdiction. Welcoming the establishment of the Court, he made pertinent reference to the contentious issues and suggested that these aspects should be considered with utmost care. In view of this, he felt that the establishment of the Court should not be rushed through. Dr. Idris Kamil, Member, International Law Commission, in his address, appraised the Special Meeting of the work completed on the Draft Code of Crimes by the ILC until its last session.

According to one delegation, Article 6 of the draft Statute providing for the appointment of judges did not adequately reflect the necessary qualifications and experience required. Two experts, Mr. Adriaan Bos and Prof. Hafner while responding to the discussion requested all the countries to take part in the forthcoming Preparatory Committee Meeting to be held on March 25—April 12, 1996 in New York.

The Chairman in concluding the Special meeting invited the Secretary-General, AALCC, to speak. In his statement, the Secretary-General thanked all the delegations and the two experts who contributed to the debate. He thanked Japan for the required assistance in conducting the Special Meeting. The Chairman closed the Special Meeting with the hope that the discussions held in the meeting would help in harmonizing some of the views on contentious issues.

(ii) Decision of the Thirty-Fifth Session (1996) Agenda item : Establishment of an International Criminal Court

(Adopted on 8.3.96)

The Asian-African Legal Consultative Committee at its Thirty-Fifth Session

Taking note of the study prepared by AALCC Secretariat entitled "International Criminal Court: A Background Note" contained in Doc. No. AALCC/XXXV/Manila/96/6;

1. *Expresses* its appreciation to the Government of the Philippines for hosting the Special Meeting on the Establishment of an International Criminal Court with excellent arrangements;
2. *Expresses* its appreciation to the Japanese Government for taking the initiative to convene such a Meeting and for providing the necessary additional documentation.
3. *Urges* the Member States to take part actively in the forthcoming Preparatory Committee Meetings on the establishment of an International Criminal Court;
4. *Requests* the Secretary-General of the AALCC to transmit the proceedings of the Special Meeting to the Chairman of the Preparatory Committee; and
5. *Directs* the AALCC Seretariat to monitor the outcome of the Preparatory Committee Meetings to be held in New York and to report to its Thirty-sixth Session.