the assistance of the Advisory Services provided by the ICRC aimed at rendering assistance to States in this important task.

Professor N.L. Mitra, in his presentation on "The competence of the National Tribunals and ,international Criminal Courts facing the repressions of International Humanitarian Law" made a comprehensive analysis on various issues, viz., role of national courts in international armed conflicts, complementarity in the ILC Draft Statute, and cooperation between national and international jurisdictions. At the outset, he elaborated on the specific obligations that arise for States, in the context of the four Geneva Conventions on International Humanitarian Law. Acknowled that the difficulties of implementation under national legal systems arise due to lack of procedural and evidential rules of enquiry he proposed the stipulation under national legislation of higher standards of processual and evidential norms than that exist under the Humanitarian Conventions.

Discussing the issue of complementarity as reflected in the preambular text of the Draft Statute of ICC, he was of the view that the reference to ineffectiveness of trial procedures in trial national systems, was too ambiguous a criterion for determining its transfer to the jurisdiction of an international tribunal.

On the issue of, the appropriate authority which would have competence to decide on the effectiveness of the domestic legal system, he was of the view that though there existed a fragile consensus that the ICC should have the capacity to determine whether its jurisdiction survives a concurrent prosecution by a State, a general dissatisfaction prevailed on the failure of the ILC draft to clarify the standard that the proposed ICC must apply in resolving challenges, the appropriate time as to when the challenges may be heard, and who should bear the burden of proof.

He elaborated on the phrase 'co-operation between the court and national jurisdiction' as provided under the ILC Statute. Analyzing the procedural aspects of such co-operation concerning investigation, arrest and pre-trial detention; prosecution, recognition and enforcement

of judgements, he raised important conceptual and procedural issues to be considered at the future meetings of the Preparatory Committee.

Given the basic premise that the lack of effective institutional arrangements and absence of a complete procedural system for implementation constitutes the fundamental inadequacies of the humanitarian law regime, he expressed preference for the establishment of a permanent international criminal court, so as to ensure certainty and effectiveness in the administration of humanitarian laws.

The presentations of the panelists revealed a general consensus for the establishment of an independent and permanent International Criminal Court, with a material jurisdiction broader in scope than what had hitherto been envisaged.

GENERAL DISCUSSION:

Following the presentations by the panelists, the floor was left open for discussion. The Delegates of 11 Member Countries- Syria, Sudan, India, China, Ghana, Islamic Republic of Iran, Japan, Qatar, Tanzania, Singapore and Arab Republic of Egypt made statements on their respective country positions and also addressed certain queries to the panelists. More than 20 interventions were made by the delegates and this section seeks to provide an overview of the discussion that ensued.

In his response to a suggestion made by a delegate, on the need to provide for reparation compensation to victims of violation of International Humanitarian Law Prof Sandoz drew distinction between reparation for 'violations of IHL' and towards damage ensuing from the conflict itself Conceeding the wider jurisprudential questions involved and given the fact that the subject of reparation has only in recent years been the subject of debate, it would be premature to pronounce with any finality, on this question.

In connection with the question as to whether the ICRC had submitted a brief before the ICJ on the issue of the legality of use and possession of nuclear weapons, Mr. Sandoz was of the view that the

ICRC's mandate was limited to the humanitarian issues and the legality of the possession of nuclear weapons was a political question falling within the domain of disarmament a matter to be decided by States.

As regards the clarification sought by a delegate on whether the four Geneva Conventions of 1949 the two protocols of 1977 have attained the status of universality, Dr. Sandoz responded by drawing a distinction between customary international law and rules not having reached the status of customary, international law. He was of the view that the evolution of a rule into a customary principle was a matter to be decided by States, and hence incapable of being decided in abstract. He also informed that the ICRC is undertaking a study on identifying such customary principles within the framework of international humanitarian law.

In the light of the views of the Preparatory Committee that international humanitarian law applies to peace time situations (e.g. crimes against humanity), one of the Delegates had raised the question whether international humanitarian law extends to peace time situations. Responding to this query Mr. Sandoz made a distinction between the concepts of "crimes against humanity" and "war crimes", and stated that the principles of international humanitarian law by its inherent character was applicable only in times of armed conflict, and not in peace time situations.

In response to the query of the Deputy Secretary General, Ambassador Dr. W.Z. Kamil as to the necessity of establishing a permanent international court, as opposed to trial by adhoc tribunals.Prof Abi-Saab, referred to the allegations generally encountered, that the Security Council was 'selective' in constituting adhoc tribunals. On the contrary such accusation may not arise if a permanent ICC is constituted. Moreover, a single institution like the ICC could in the long run, effectively develop an international criminal jurisdiction. Uniformity in developing the law cannot be guaranteed by different adhoc tribunals.

Responding to the same query Prof N.L. Mitra stated that "a 'principle' of law when clarified and elaborated upon, qualifies to be termed as a 'rule'. Based on this premise, that an ad hoc tribunal (which

follows its own procedures) can innovate and deal with principles, notwithstanding the absence of concrete rules. On the other hand, a permanent criminal Court is a rule-oriented institution (as witnessed in the Draft Statute on the ICC). Such a rule oriented model, though may be imperfect, would in the long run lend stability and contribute to the normative development of international criminal jurisprudence.

Elaborating on the element of 'selectivity' involved in the establishment of adhoc tribunals or the arrangement for a referral by the Security Council under the proposed statute for ICC, he was of the view that 'selectivity' was inherent in all domestic systems and cannot be avoided. Given the options available so far either the State, the Security Council or the Prosecutor are the three agencies available to invoke the trigger mechanism. Granted that selectivity could only be reduced he urged the need for a community - oriented model wherein an agency, conscious of the public interest, could perform that task.

Prof. Georges Abi-Saab acknowledged the need to strike a compromise on the issue of jurisdiction *ratione materiae* of the proposed ICC. Towards this end, he suggested that the ICC should have jurisdiction only on the hard core crimes, capable of being invoked by the trigger mechanism as the core crimes have obtained a status of universality, such an arrangement would not be contested. The crime of aggression, may perhaps be formulated as a special case wherein jurisdiction can be conferred by referral of the Security Council. Drawing on the analogy of the successful working of the ICJ, he stated that as far as the independence of the proposed ICC in its functions is ensured, the fear of selectivity by the Security Council would be effectively countered.

To a query on the role of ICRC in formulating a code of conduct to regulate the activities of proliferating humanitarian organizations, Mr. Sandoz stated that given the different mandates of numerous humanitarian organizations, ICRC could not formulate a unified framework governing all humanitarian actors. Despite this, the ICRC, he informed had already embarked on a preliminary study on this subject.

Responding to a query as to the criteria for distinguishing 'grave breaches' and other breaches of IHL, Prof. Abi-Saab described the

category of core crimes as reflected in the draft statute of ICC was distilled from the cumulative development occasioned by (i) the resolutions of the General Assembly; (ii) the jurisprudence of Nuremberg, Tokyo and other adhoc tribunals and (iii) other multilateral treaties in the field of humanitarian law. Given the differences between the common law/civil law approach towards defining crimes he broadly identified two criteria to define serious violations: (a) where an act is so outrageous irrespective of the quantity of persons effected and (b) act which in fact is focussed on a quantitatively larger group.

Prof. Momtaz was of the view that the common Article 3 to the 1949 Geneva Conventions could be taken as a criteria for making a distinction between the grave breaches and other lesser crimes.

TRENDS EMERGING FROM THE DELIBERATIONS:

Following is the summary of trends discernible from the statements of delegates, on the various issues relating to the establishment of the ICC:-

A. Mode of Establishment

The delegations unanimously favoured the establishment of an independent and impartial international criminal Court, free from political pressures and tendencies. The delegates largely favoured the establishment of the ICC through a multilateral treaty.

B. The Priniciple of Complementarity

A clear definition of the principle of complementarity was sought by several delegations. The mere reference to the principle in the preambular paragraphs of the draft statute prepared by ILC, 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.

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 regimes governing extradition and mutual criminal assistance. The achievement of balance in the principle would command the widespread acceptance of States which was essential to the draft statute's effectiveness. Majority of the delegations favoured a consensual approach towards the application of the principle of complementarity. This principle was crucial and only under exceptional circumstances, where no alternative could be found, would an ICC be called upon to fill the gap.

C. Issues pertaining to Jurisdiction and Applicable Law.

The need for precision in the definition of the ICC's jurisdiction *ratione materiae* was felt extremely for effective operation of the Court as well as upholding the principle *"nullum crimen sine lege"*. 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 crimes themselves. Majority agreed that the jurisdiction of the court could be invited to the most serious crimes of international concern, notably genocide, serious violation of the laws and customs applicable to armed conflicts and crimes against humanity. One of the panelists noted that there was a danger of over-burdening the court with too many crimes on its list, the list should be such so that the court can work effectively. In the light of the elaboration of the generic core crimes in the Draft Code of Crimes, some delegates called for drawing up a priority list to ensure prospects of effective prosecution more viable.

Majority of the delegates expressed doubts as to the feasibisity of including the crime of aggression within the scope of ICC. Highlighting the difficulty of prosecuting individuals for aggression, it was felt that confining the Jurisdiction of the proposed Court to the hard core crimes, would expedite the consensus required for the establishment of the ICC. One delegate also pointed out the necessity to formalize an organic link between the ICC and the Draft Code of Crimes.

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 Draft Statute) would cloud the objectivity and independence of the ICC and hence, not in the interest of developing a uniform, non-discrimnatory, and impartial international criminal justice system. The need to preserve the autonomy of ICC was stressed in the light of the fact that -

(a) the cou·t had to deal with individuals, and

(b) the subject-matter of its jurisdiction were crimes.

Given the judical character of its mandate any role for the Security Council would introduce a political element, which would result in undermining the assiduously crafted trigger mechanism which is based on the consent of States. This, in his view would run counter to the basic philosophy of complementarity, devised to preserve the jurisdiction of national legal systems.

E. Procedural issues

According to many delegates, procedural issues were fundamental to ensuring fairness of the court's proceedings and the adequacy of the protection accorded to the accused. Delegations pointed out that the role of a Prosecutor, surrender of the accused by States, waiving of national jurisdiction were crucial issues and therefore, needed to be settled on the basis of a broad consensus. Some delegations also sought that extensive rules on pre-trial investigations be left to the courts of the complainant State. More clarity was needed with regard to the relationship between investigations, arrest and pre-trial detention by the court and by a State party rendering judicial assistance. In the view of one delegation the personnel of ICRC required adequate protection to carry out their humanitarian duties, and hence should be exempted from having to testify before the court on events they might have witnessed while discharging their humanitarian functions.

As to the implementation of international humanitarian law, unanimity prevailed as to the following two objectives, (i) the wider dissemination of international humanitarian law in schools and among civic and military authorities at the national level, and (ii) enactment of national legislations for the prevention and punishment of violations of IHL. Views were expressed on the necessity to see the institutions of International Humanitarian Law independent, neutral and apolitical and to urge them to watch NGO's trying to use their special status for purposes other than humanitarian assistance.

Apart from the above said substantive issues, all delegates were agreed upon the need to actively participate in the proceedings of the PREPCOM to ensure the articulation of the common interests of the Afro-Asian States, in the drafting of the Convention leading to the establishment of an International Criminal Court.

The proceedings of the Special Meeting, were presented in the form of a report by the Rapporteur Mr. Mahmoud Allam, to the seventh plenary of the thirty sixth session. Drawing on the proposal advanced by the representative of a Member State that the AALCC Secretariat consider convening an inter-sessional meeting of a group of experts to debate the issues relating to the establishment of an independent ICC as a part of its Work Programme he said that the Committee may wish to consider this proposal and reflect it in a resolution\decision that it may adopt. It may also wish to consider continue to monitoring the progress of work at the PREPCOM for the ICC and to be represented at the meetings thereof. He concluded on an optimistic note that the pace of work in the PREPCOM and the debates in the present meeting were indicative of the fact that the international community is well on its way towards establishing an international criminal jurisdiction which would also have competence over violations of the principles of International Humanitarian Law.

It may be stated that in his brief address the Under Secretary General and Legal Counsel of the United Nations, Mr. Hans Corell informed the Special Meeting that, the Diplomatic Conference for the final negotiation of the ICC was expected to be convened in Rome on 15th June 1998. Recalling the contribution of AALCC to codification

conferences in the past and in particular to the Convention on the Law of the Sea, he expressed appreciation for the initiative taken by the Committee to discuss the subject of the proposed ICC during its 35th and 36th Sessions. He urged the Member Countries of Asia and Africa to be fully represented in the remaining three meetings of the PREPCOM and at the diplomatic Conference, to establish a court which will serve the real purpose of its establishment.

At its seventh plenary meeting, the committee adopted a resolution which, *inter alia*, urged the Member States to take part actively in the forthcoming Preparatory Committee Meeting on the establishment of an International Criminal Court. It also urged the member States to take effective measures towards implementation of International Humanitarian Law at the national levels and directed the AALCC Secretariat to monitor the outcome of the Preparatory Committee meetings to the Thirty-seventh Session.

(ii) Decision on the "Inter-Related aspects Between International Criminal Court and International Humanitarian Law"

(Adopted on 7.5.1997)

The Asian-African Legal Consultative Committee At Its Thirty-Sixth Session

Having considered Doc No. AALCC/XXXVI/Tehran/97/SP. 15 on the Special Meeting on Inter-Related Aspects Between International Criminal Court and International Humanitarian Law;

Having heard the comprehensive statement made by the Deputy Secretary General.

Having heard also the statement of the Representative of the International Committee of the Red Cross;

Expresses its appreciation to the Government of the Islamic Republic of Iran for hosting the Special Meeting on the Inter-Related Aspects between the International Criminal Court and International Humanitarian Law with excellent arrangements;

Urges the Member States to take part actively in the forthcoming Preparatory Committee Meetings on the establishment of an International Criminal Court.

Urges the Member States to take effective measures towards implementation of International Humanitarian Law at the national levels;

Directs the AALCC Secretariat to monitor the outcome of the Preparatory Committee meetings to be held in New York and to report to the Thirty-Seventh Session.

(iii) Secretariat Study

Inter Related Aspects between International Criminal Court and International Humanitarian Law

The Asian African Legal Consultative Committee (AALCC) with the co-operation of the International Committee of the Red Cross (ICRC) organised a one day Special Meeting on the inter-related aspects between International Criminal Court and International Humanitarian Law. This Special Meeting was held within the framework of the 36th Session of the AALCC. The objective of the meeting was to take stock of the recent developments concerning the establishment of an International Criminal Court and consider some of the major issues associated with the implementation of International Humanitarian Law. More specifically, the Special Meeting examined the measures to promote implementation at the national level and examine recent developments concerning the repression of war crimes, from the view point of Member States of the AALCC.

Aspects of Humanitarian Law

Humanitarian Law is the law of humanity. It is that portion of international law which is inspired by a feeling for humanity and is centered on the protection of the individual in time of war. International Humanitarian Law, the most human of laws, is humane law, belonging to every place and period, and comprises the totality of the international legal provisions which ensure respect and fulfillment for the human person. The expression international humanitarian law applicable in armed conflict means international rules, whether customary or codified, which are specfically intended to resolve humanitarian problems arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression is often abbreviated to "international humanitarian law" or "humanitarian law"

Clearly, international humanitarian law deals with the prevention of war crimes and is principally codified in the 1949 Geneva Conventions and the two Additional Protocols of 1977. It is now generally accepted by all concerned that the protection of human rights standards and the protection of humanitarian norms are not separate efforts but joint and concerted goals and concerns. It may be mentioned that Article 3 of the Geneva Convention constitutes a minimum standard which is to be respected equally under all circumstances by all who are involved in the conflict. This minimum standard containing fundamental rules of humanity should be restated and reenforced. It is of prime importance that the basic human rights and humanitarian standards be observed. In this connection, it may be noted that the United Nations Decade of International Law has underlined the importance of promotmg respect for the principles of international law and encouraged states to become parties to existing multilateral treaties.

Humanitarian Law is a Protective Law

Humanitarian law is, like the law of human rights, a protective, conciliatory law. It comprises rules applicable to all elements of society: States, individuals and public or private entities. It constitutes the most complete expression of the joint and several responsibility of all States to ensure that it is respected, since States must not only apply its rules but also ensure their application. This law inspired by compassion, therefore, becomes, upon implementation, a very strict law of universal justice

Humanitarian law has many roots

It is now increasingly realized that international humanitarian law has many roots and its connections go far beyond human rights and the law of Warfare and that there exists a close relationship, between IHL and the law of disarmament or arms control.[1] While defining the purposes of arms control four aspects have been pointed out, viz. (i)

[1] F. Kalshoven, "Arms, Armaments and International Law", 191 Recueil des cours 11, 187 (1985); F. Kalshoven, Constraints on the waging of war (1987)

reducing the likelihood of war,(ii) reducing the suffering and damage in the event of war; (iii) reducing expenditure on armaments; and (iv) contributing to conflict management by providing a framework for negotiation between opposite sides, by reducing suspicion and by generally contributing to an atmosphere conducive to relaxation of tenions.[2]

Humanitarian Law propose and ensures humane treatment

The guiding spirit in all the Conventions is the directive that the defenseless should receive humane treatment, the wording in each case being adapted to the specific categories of persons covered by the Convention Article 12, of the First Convention reads:

> They shall be treated humanely and cared for by the party to the conflict in whose power they may be, without any adverse distinction founded on race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited, in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiment; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered. Women shall be treated with all consideration due to their sex".

Article 12 of the Second Convention, relating to war at sea, Article 13 of the Third Convention, relating to prisoners of war, and Article 27 of the Fourth Convention, relating to civilians, are similarly worded. Additional Protpcol I contains an extensive provision on the treatment of persons in the power of a party to the conflict. Article 75 of Section III entitled "Fundamental Guarantees", reads like a condensed version of the Declaration of Human Rights, framed for the special purpose

[2] D. Frei," International Humanitarian Law and Arms Control", 28 International Review of the Red Cross (1 988), 491-492

of war. Under Article 75 of Additional Protocol 1, which imposes a comprehensive ban on discrimination, all persons in the power of one of the parties to the conflict 'shall be treated humanely in all circumstances'. They must enjoy the protection described in the article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria". Under Article 75, for instance, it is prohibited to commit violence to the life, health or physical or mental well-being of persons, in particular murder,' with special emphasis on the ban on torture of all kinds, whether physical or mental. Torture is without exception forbidden by each of the four Geneva Conventions.

Applicability of Humanitarian Law

Humanitarian law is applicable in the circumstance of an armed Conflict.[3] The Conventions apply as soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners of war or have actual control over a part of the territory of the enemy State, then they must comply with the relevant Convention. The number of wounded prisoners, the size of the territory occupied are of no account, since the requirement of protection does not depend on quantitative considerations.[4] IHL ceases to have any effect when the armed conflict is over, that is to say, the individual Convention ceases to be applicable once there are no pending issues relating to its subject matter and all the humanitarian problems it encompasses have been resolved. In practical terms, this means that all prisoners of war have been repatriated, all civilian internees set free and all occupied territories liberated.

[3] First, Second and Third Conventions, Article 5;
Fourth Convention, Article 6.

[4] cf in particular the Geneva Conventions of 12 August 1949, commentary published under the general editorship of Jean Pictet, Article 2 Common to all Geneva Conventions.

The best guarantee that IHL will be applied clearly lies in the respect shown by States for the basic maxim pacta sunt servanda. By formally accepting the Geneva Conventions and in the case of some, by acceding to their Additional Protocols, States have undertaken to ensure that these instruments are respected by everyone under their authority, irrespective of any express ruling on the subject in the Conventions themselves.

Article 1, which is common to all Conventions, states: The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Branches of International Humanitarian Law

International humanitarian law has two branches, the law of Geneva, or humanitarian law properly so called and the law of Hague, or the law of war. The former tends to safeguard military personnel rendered 'hors de combat'[5] persons not taking part in hostilities. The latter i.e. the law of war determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm. The two systems are close - but distinct - and they are mutually complementary. Together, they may be called 'humane law'.

Principal International Humanitarian Law Treaties

The principal IHL treaties are:

(1) Geneva Convention for the Amelioration of the Condition of the wounded and sick in Armed Forces in the Field (Convention I) of 12 August 1949.

(2) Geneva Convention for the Amelioration of the Condition of the wounded, sick and shipwrecked members of Armed Forces at Sea (Convention II) of 12 August 1949;

[5] According to paragraph 2 of Article 41 of Protocol 1, a person will be in the position of a hors de combat if (a) he is in the power of an adverse party; (b) he clearly expresses an intention to surrender; or (c) he had been rendered unconscious or is otherwise incapacitated by wounds or sickness, and, therefore, is incapable of defending himself, provided that in any of these cases, he abstains from any hostile act and does not attempt to escape.