

Inter Sessional Meeting held from 19 to 30 January, 1998

An intersessional meeting was held at the initiative of the Chairman of the Preparatory Committee Mr. Adriaan Bos in Zutphen, the Netherlands, from 19 to 30 January, 1998. The purpose of the meeting was to facilitate the work of the last session of the Preparatory Committee from 16 March to 3 April, 1998, by performing the following tasks :

- (a) considering the structure of the Statute and the placement of the articles;
- (b) identifying relationships between articles, including possible overlaps and inconsistencies; and
- (c) considering the required degree of detail in the articles and whether some articles or their more detailed versions could be placed in an instrument other than the Statute.

The Group participating in this intersessional meeting included the members of the Bureau, Chairs of different Working Groups, Coordinators and the Secretariat. The Group found it useful to place before the last session of the Preparatory Committee a complete set of articles so as to provide an overview of the Statute as a whole, as also to identify more easily the relationship between the articles. This document also contains proposals on articles which have not been discussed in the Preparatory Committee in 1997 in an attempt to present a practical working document for the discussions in March/April, 1998, session.

The substance of the articles has not been changed. In some places, the wording of the texts has been slightly modified for the purposes of consistency or of reflecting discussions in the PREPCOM.

The Group has suggested that the Statute be entitled 'Statute for the International Criminal Court' and be divided as follows : Preamble. Part 1 (Establishment of the Court). Part 2 (Jurisdiction, admissibility and applicable law). Part 3 (General principles of criminal law). Part 4 (Composition and

administration of the Court). Part 5 (Investigation and Prosecution). Part 6 (The Trial). Part 7 (Penalties). Part 8 (Appeal and review). Part 9 (International cooperation and judicial assistance). Part 10 (Enforcement). Part 11 (Final clauses).

The Group was of the view that it would be useful to attempt, to the extent possible, to have a balanced Statute in terms of the level of detail in the articles of various parts. The Group believes that in a number of articles, the Principles of the issues with which they deal should be placed in the Statute, while details could more usefully be addressed elsewhere such as in the Rules.

In the working document for the March-April, 1998, session, the articles have been renumbered and the text and the footnotes adjusted accordingly. Throughout the text, the Previous numbers of the parts and articles appear in square brackets next to the new number.

For ease of reference, the report also includes a draft final act and a draft resolution for the establishment of a Preparatory Committee contained in document A/AC.249/1998/L.11 for consideration by the Preparatory Committee.

PrepCom to be held from 16 March to 3 April, 1998 : Issues proposed to be discussed

(a) Financing the Court

This subject covers the following issues : States parties, the United Nations, others, voluntary funding: States, individuals and other entities.

(b) Organizational matters

This subject covers the following issues : (A) Relationship of the Court with the United Nations : Possible alternatives ; matters to be addressed. (B) Privileges and immunities (C) States Parties meetings and their organizations. (D) Preparatory Commission. (E) Oversight mechanisms for dealing with administrative and financial matters. (F) Headquarters Agreement. (G)

Representation at the United States. (H) Matters pertaining to personnel (staff regulations, Pension, appeals).

The documents relating to the aforesaid meeting of the PREPCOM were not available to the AALCC Secretariat. As soon as the relevant documents became available the Secretariat would circulate an addendum explaining the documents *

Assessment and Conclusion of AALCC Secretariat

The AALCC Secretariat is of the view that the establishment of an independent judicial body at the international level to try Well-defined international crimes is very crucial for the members of the Afro-Asian Community. The AALCC Secretariat notes with some sense of success that Prepcoms in 1997-98 had come to sufficient agreement to be able to call a Conference of Plenipotentiaries in June, 1998. The March-April Session of the Prepcom was expected to have a determining impact on the convening and success of such diplomatic conference, and, therefore, must necessarily be goal-oriented. A genuine and disciplined drafting effort was necessary in 1997-98 in order to fully exploit the opportunities offered by the General Assembly's positive mandate to PrepCom.

The AALCC Secretariat is also of the view that the Working Draft produced at the Intersessional Meeting held from 19 to 30 January, 1998, was a positive step to meet this agenda, though open-ended multiple Working Groups were still likely to hinder a successful drafting of the Statute which meets the satisfaction of all Member-States. There was still no consolidated text produced at the intersessional session. The report, however, consolidated the proposals as narrowly as it could, in the circumstances, possible. Indeed, it has endeavoured to place before the last session of the Prepcom a complete set of articles so as to provide an overview of the Statute as a whole, as also to identify more easily the relationship between the articles. It was earnestly hoped that, at the March-April session, the participating Member-States Make a positive and genuine drafting effort to consolidate various proposals complied into the working draft at the intersessional meeting.

* The Addendum has since been issued by the secretariat

In any event, the AALCC Secretariat has found it encouraging that most of the Member-States by now had become fully aware of the issues involved in the creation of an international criminal court. The lack of adequate representation, more particularly from the less developed countries due to obvious reasons, the most prominent being lack of sufficient personnel and costs of attending Prepcom, notwithstanding.

The AALCC Secretariat hopes, that with this brief of documents and the useful deliberations during the 37th session, all Members States would be fully acquainted with the importance of the establishment of a fully independent international criminal court, and would have their respective positions *vis-a-vis* all the pending issues in full light of their interests on the eve of the International Diplomatic Conference of Plenipotentiaries, to be held in Rome in June 1998.

V. REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

(i) Introduction

The International Law Commission (ILC) established by General Assembly 174 (III) of 21st September 1947 is the principal organ to promote the progressive development and codification of international law. The Commission held its forty-ninth session in Geneva from May 12 to July 18, 1997. There were four substantive topics on the agenda of the aforementioned Session of the Commission:

(I) State Responsibility;

(II) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law;

(III) Reservations to Treaties; and

(IV) State Succession and its Impact on the Nationality of Natural and Legal Persons.

The General Assembly at its 51st Session had by operative paragraph 4 of its resolution 51/160 of December 16, 1996, recommended, inter alia that the International Law Commission continue its work on the topics in its current programme.

By its operative paragraph 13 of Resolution 51/160 the General Assembly had invited the Commission to further examine the topics "Diplomatic Protection" and "Unilateral Acts of States" and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee on the report and any written comments that Governments may wish to submit. The Planning Group established by the Commission at its current session deemed it desirable that a work plan and detailed outline be prepared by Working Groups on the topic

of Diplomatic Protection and of Unilateral Acts of States.

The Commission at its Forty ninth Session considered all the above mentioned items and some notes and comments on these topics may be found in the latter part of this Chapter.

As regards State Responsibility the Assembly had drawn the attention of the Governments to the importance, for the International Law Commission, of having their views on the draft articles on State Responsibility adopted on first reading by the Commission, and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission. The Commission at its Forty ninth session decided to establish a Working Group. The Working Group on State Responsibility, *inter alia*, proposed that the Commission appoint a Special Rapporteur for the topic and the Commission accordingly appointed Mr. James Richard Crawford, Special Rapporteur for the topic. The Report of the Working Group and the Commission's future programme of work on this subject is given in Part III of this Chapter.

The Commission at its 48th Session had decided to transmit the report of the Working Group on "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", consisting of a set of 23 draft articles. The General Assembly at its fifty first session had urged Governments to provide their comments and observations in writing on the report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International law annexed to the report of the International Law Commission in order that the Commission may, in the light of the report of the Working Group and such comments and observations as may be made by Governments and those that have been made in the Sixth Committee, consider at its forty-ninth session how to proceed with its work on the topic and make early recommendations thereon. The Commission at its forty ninth session resumed its work in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm and established a Working Group which *inter alia* recommended that the Commission appoint a Special Rapporteur. The Commission accordingly appointed Dr. P. S Rao, Special Rapporteur, for

"Prevention of Transboundary Damage from Hazardous Activities" Details of the Report of the Working Group and the decision of the Commission at its current Session is given in this Chapter.

On the question of the Reservations to Treaties the General Assembly had invited States and International Organizations, particularly those that are depositaries, to answer the questionnaire concerning reservations to treaties prepared by the Special Rapporteur on the topic. It may be recalled that the Commission at its forty eighth session had had to defer consideration of the Second Report of the Special Rapporteur. At its forty ninth Session the Commission considered the second report of the Special Rapporteur, Mr. Alain Pellet. The Commission at its forty ninth Session adopted a Resolution on "Reservations To Normative Multilateral Treaties Including Human Rights Treaties".

Notes and comments on the Second Report of the Special Rapporteur and the Resolution on Reservations to Treaties adopted by the Commission at its forty ninth session are also set out in Part III of this Chapter.

As regards the subject of State Succession and its Impact on the Nationality of Natural and Legal Persons, it will be recalled that General Assembly Resolution 51/160, had taken note of the completion of the preliminary study of the topic "State Succession and its impact on the nationality of natural and legal persons", and requested the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States". The Assembly had also invited Governments to submit comments on the practical problems raised by Succession of States affecting nationality of legal persons. The Planning Group established for the forty ninth session had recommended that the Commission endeavour to complete its first reading of the draft articles on the topic. At its forty ninth session the Commission considered the Third Report of the Special Rapporteur, Mr. Vaclav Mikulka, which contained a set of draft articles together with commentaries thereto. After considering the Third Report of the Special Rapporteur the Commission adopted on first reading, a draft preamble and a set of 26 draft articles on "Nationality of Natural Persons in Relation to the Succession of States." The Commission decided to transmit the draft articles to Governments for comments

and observations. Details of the draft articles as adopted in first reading by the ILC are given in part III of this Chapter.

Apropos Diplomatic Protection it had been suggested that work on this topic would complement the Commission's work on State Responsibility and would be of interest to all the Member States. The Commission at its forty ninth Session established a Working Group composed of Mr. M. Bennouna (Chairman); Mr. J. Crawford; Mr. N. Elaraby; Mr. R. Goco; Mr. G. Hafner; Mr. M. Herdocia Sacasa; Mr. J. Kateka; Mr. I. Lukashuk; Mr. T. Melescanu; Mr. G. Pambou-Tchivounda; Mr. B. Sepulveda; Mr. R. Rosenstock; Mr. B. Simma; and Mr. Z. Galicki (ex-officio member). On the recommendation of the Working Group the Commission at its forty ninth session appointed Mr. M. Bennouna Special Rapporteur for the topic Diplomatic Protection. Mr. Bennouna is to submit, at the Commission's fiftieth session, a preliminary study based on the outline of the scope and content of the topic as approved by the Commission. Some notes and comments on the item on the work programme of the ILC are given in Part III of this Chapter.

The Commission had considered the "Unilateral Acts of States" appropriate for immediate consideration as it is a well delimited topic and has been the subject of several doctrinal works but has not yet been studied by an international body. Although it has been touched by several judgments of the ICJ, especially the Nuclear Test Cases, the celebrated dicta leave room for questions and uncertainties. Another reason is that States have abundant recourse to unilateral acts and their practice can be studied with a view to drawing general legal principles. Finally, it had been felt that although the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts of States could be approached.

At its forty ninth session recalling the mandate given to it by the General Assembly the Commission established a working Group comprised of Mr. E. Candioti (Chairman); Mr. J. Baena Soares; Mr. J. Dugard; Mr. C. Economides; Mr. L. Ferrari Bravo; Mr. N. Elaraby; Mr. G. Hafner; Mr. Qizhi He; Mr. I. Lukashuk; Mr. V. Rodriguez Cedeno; Mr. B. Sepulveda and Mr. Z. Galicki

(ex-officio member). On the recommendation of the Working Group the Commission at its forty ninth Session appointed Mr. V. Rodriguez Cadeno Special Rapporteur for the topic "Unilateral Acts of States" who, in 1998, is to submit an initial report for discussion by the Commission. Some notes and comments on the Working Group are also given in the latter part of this Chapter.

Long-term Programme of Work of the Commission

A Planning Group established by the Commission for the current Session considered the Work Programme of the Commission for the present quinquennium. The Planning Group, composed of Mr. J. Baeba Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. L. Illueca, Mr. J. Kataka, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Operti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepulveda, Mr. B. Simma, Mr. D. Thlam and Mr. Z. Galicki (ex-officio member) took the view that substantial progress should be made on those topics on which substantive work had already been undertaken and that it would be desirable to complete the first or the second reading, as the case may be, of those topics within the present quinquennium. It invited the Working Groups on the respective topics to consider the matter and to make recommendations.

The Planning Group established a Working Group on the Long Term Programme Of Work to consider the topics which may be taken up by the Commission beyond the present quinquennium. The Working Group on the long term programme of work was composed of Mr. I. V. Lakashuk (Chairman); Mr. J. Baena Soares; Mr. Ian Brownlie; Mr. C. Dugard; Mr. L. Ferrari Bravo; Mr. R. Goco; Mr. Qizhi He; Mr. A. Pellet; Mr. B. Simma; Mr. Chusei Yamada and Mr. Z. Galicki (ex officio member). The Working Group while emphasizing the role of the General Assembly in the selection of topics recommended that the selection of topics particularly within the Commission should be guided by the following criteria:-

- (a) that- the topic should reflect the requirements of States in respect of the progressive development and codification of international law;
- (b) that the topic is sufficiently advanced in stages in terms of State practice to permit progressive development and codification;
- (c) that the topic is concrete and feasible for progressive