

development and codification.

It also proposed that the Commission should not restrict itself to traditional topics but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

While a process for the selection of topics within the Commission was outlined the selection of topics, on the basis of the above mentioned criteria, would be made at the fiftieth session of the Commission and the selected topics would be presented to the fifty third session of the General Assembly, in 1998, together with an indication of how the Commission intends to proceed with the study of each topic.

### Thirty Seventh Session : Discussion .

The Secretary General while introducing the item stated that the functions of the Committee include the examination of questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the Commission. The functions of the Committee include also the consideration of the Reports of the Commission and to make recommendations thereon to the Governments of the Participating States. In keeping with the Statutory requirements the Secretariat of the AALCC has monitored the progress of work of the International Law Commission at its annual sessions and submitted notes and comments thereon to each successive Session of the Committee. Over the years strong ties of cooperation have been forged between the AALCC and the ILC and it has been customary for the Chairman or Vice Chairman of the International Law Commission to represent the Commission at the Committee's Session. He said that the Secretariat had prepared a brief of documents on the report of the ILC on the work of its 49th session held in Geneva from May 6 to July 26th, 1997,

The Secretary General further stated that there were as many as seven substantive topics on the agenda of the 49th Session of the ILC. These had included : (i) State Responsibility; (ii) The Draft Code of Crimes Against the

Peace and Security of Mankind; (iii) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law; (iv) The Law and Practice Relating to Reservations to Treaties; (v) State Succession and its Impact on the Nationality of Natural and Legal Persons; (vi) Diplomatic Protection; and (vii) The Unilateral Acts of States. The Commission at its 49th Session considered all these items and brief notes and comments, on the work of the Commission at its last session, prepared by the Secretariat can be found in the brief of Document prepared for the New Delhi Session and given in this chapter.

'The Representative of the International Law Commission (Ambassador C. Yamada) speaking on behalf of the Commission presented an account of the work of the Commission at its 49th Session.

The Delegate of the Arab Republic of Egypt congratulated Ambassador : Chusei Yamada and Dr. P.S. Rao for their work in the Commission and also thanked Secretary General for his report. On the substantive matters which were before the 49th session of the ILC, he hoped that the Commission would conclude its second reading of the draft articles on State Responsibility. Recalling that the topic had been on the agenda of the Commission for the last twenty years, he expressed the view that the issue of liability and damages would also be looked into carefully. On the topic of "Nationality of Natural Persons", he felt that as the Commission has completed its first reading, AALCC Member Governments should promptly answer the ILC Questionnaire on the issue of "Reservation to Treaties" a view was expressed that Vienna regime of treaties was comprehensive and flexible. He however added that the legal competence of the monitoring bodies should be studied.

The Delegate of Republic of India thanked the Secretary General for his introductory statement on the work of ILC and expressed his appreciation for the thoughtful remarks of the representative of ILC Amb. Yamada on the topic of 'nationality of natural person'. He congratulated the work of ILC, especially that of Rapporteur Mikulka for successfully adopting 27 draft articles in a single meeting. He appreciated the flexibility of this work as it provides enough options for states to adopt the ILC draft and also lessens the rigors of



a strict private law approach to the subject. He also called upon AALCC Member Governments to provide responses on this issue. The topic on 'injurious liability', he felt the title was confusing. P. 11 the substance was very clear. Appreciating the work of Special Rapporteur, Dr. P.S. Rao on the sub-title "prevention of transboundary damage", he was of the view that issues of liability and compensation should not be overlooked. 'Diplomatic protection', the other topic before the ILC, the delegate felt should be limited to international wrongful acts, as suggested by Amb. Chusei Yamada. Furthermore on the topic 'unilateral acts of States', he expressed the view that it is of great topical importance. With regard to singling out only legal effects of unilateral acts, the delegate felt that though it is theoretically correct, in practical life these contain certain political acts.

The Delegate of Myanmar commenting on counter measures which appear in the topic "State Responsibility" stated that the draft articles on this part dealt with the most difficult and controversial aspects of the whole regime. She expressed the view that in case of a wrong doing by a state which caused injury to the other state, the first simple and straight forward counter measure which the injured state could take was not to comply with one or more of its obligations towards the wrongdoing State. Secondly the injured State should not resort to counter measures based on its unilateral assessment. From this premise it follows that if the assessment was incorrect, the state taking counter measures was taking a risk for which it could incur responsibility for a wrongful act. This assessment from the standpoint of the state making the unilateral assessment would be good, but the same did not hold good for a neutral state, which would be asked to pass a judgement, an acceptable solution was still evasive. She also observed that the right of an injured State to resort to counter measures was circumscribed by permissible functions, an aim sought to be achieved by such measures. She felt that a proper valuation of the subject was still required.

The Delegate of Japan at the outset commended the Secretariat for having prepared a well-organized report on the topic. She appreciated the remarkable achievements of the ILC during the 49<sup>th</sup> Session, especially the completion of the first reading of the draft articles on nationality in relation to the succession of States in a single session and the adoption of the preliminary

conclusion by the ILC to normative multilateral treaties including Human Rights Treaties. This had been possible because of intensive discussions among members of the Commission, the Reports of the Special Rapporteurs and assistance from the Secretariat. As regards the progress on the work on the topic articles of "State Responsibility", she stated that the Commission had decided to complete the second reading by 2001. The commission would begin the second reading of draft articles at its 50<sup>th</sup> session. Her delegation was also appreciative of the enormous efforts of the ILC for having completed the first reading and noted that the comments and observations by Government would be more useful in order to make the draft article more consistent with the state practice. She added that comments due to be sent by Japan to the ILC had taken into consideration recommendations of a group of twelve scholars of international law, and comments of other members of the AALCC would further contribute to accelerate the process.

She noted that the ILC had commemorated its 50<sup>th</sup> anniversary last year, but the mandate given to it in the field of progressive development and codification of international law, is as valid as before. The Commission, she added, is expected to select new topics for the long term programme and in selecting such topics it is of paramount importance that there was co-ordination and co-operation between governments, which would ensure that needs of the international community were properly taken into account. She finally stated that to this end it was necessary that AALCC Member States actively participate in discussions of the General Assembly and the Sixth Committee and provide the ILC with appropriate guidance.

The Delegate of Sudan thanked the Secretary General and the representative of the ILC Mr. Yamada for their succinct and informative presentation on this item. It was his view that the AALCC could make useful contributions to the work of the ILC on the subjects of 'diplomatic protection' and 'unilateral acts of States'. These two topics were recently referred to the ILC by the General Assembly for examination and the Commission is in the process of delineating the scope and content of the proposed work to be undertaken in these areas. On the subject of 'diplomatic protection' he was of the opinion that the stipulation of the Hague Convention of 1930 that a State may not accord diplomatic protection to one of its nationals against a



State whose nationality such person also possesses, is still applicable. Given the increasing trend towards exchange of persons and commerce across States which encourages bearing of two or more nationalities, he felt that any departure from the established principle could result in unforeseeable consequences. Though as a matter of principle, claims should be espoused by a State on behalf of its nationals only, he stated that the cases of claims of non-nationals forming a minority in a group national claimants might be considered by the ILC provided that such claims shall not be allowed against national States of such individuals. Calling for the exclusion of the aspect on "protection claimed by international organisations on behalf of their agents" from the ILC study, he underscored the distinction that underlies the following two categories. While the espousal by a State of an injury suffered by its national is designed to circumvent the lack of direct access for individuals in the international sphere, there was no such comparable deficiency regarding international organisations as they were already subjects of international law capable of directly seeking redress at the international level.

On "Unilateral Acts of States" his delegation was in agreement with the work of the ILC. He reiterated that the objective of the Commission should be to identify the constituent elements and effects of unilateral legal acts of states and formulate rule generally applicable to them.

## (ii) Decision on the "The Work Of The International Law Commission"

(Adopted on 18.4.98)

### The Asian-African Legal Consultative Committee at its Thirty-seventh Session

Having taken note with appreciation of the Report of the Secretary-General on the work of the International Law Commission at its Forty-ninth Session (Doc.No.AALCCXXXVII\New Delhi \98\S. 1)

**Expresses** its appreciation on the comprehensive statement made by the Representative of the ILC H.E.Ambassador Chusei Yamada, on the work of the Commission;

1. **Expresses** its satisfaction on the work of the International Law Commission at its Forty-ninth Session;
2. **Affirms** the significance of the contribution of the ILC to the progressive development of international law and its codification;
3. **Requests** the Secretary-General to bring to the attention of the International Law Commission at its 50th Session the views expressed on different items on its agenda during the Thirty-seventh Session of the AALCC, in particular the views of the Committee developed in the Special Meeting on the subject of 'reservations to multilateral treaties'
4. **Takes note** that the ILC has commenced work on some new topics and set priority for the completion of the topics on State Responsibility and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law;
5. **Decides** to inscribe on the agenda of its Thirty-eighth session an item entitled "The Report on the Work of the International Law Commission at its Fiftieth Session".



### (iii) Secretariat Study : Report On The Work Of The International Law Commission -At Its Forty Ninth Session

#### 1. State Responsibility

The object of the work of the ILC on the topic "State Responsibility" has been to codify the customary rules governing State Responsibility *stricto sensu*, as a general and independent topic. The basis of the ILC's work were, and have generally been (i) to not limit its study of the topic to any particular areas, such as responsibilities for injuries to the person or property of aliens: (ii) to codify the rules governing international responsibility without engaging in the definitional and codification of the primary rules whose breach entails, or would entail, responsibility for an internationally wrongful act. The Commission has, accordingly, concerned itself with the progressive development and codification of what may be termed as "secondary rules" aimed at determining whether a breach of the obligations imposed by the primary rules has taken place and, in the event that it has, what the consequences of that breach should be.

It will be recalled that the General Assembly had by its resolution 3071 (XXVII) of 30 November 1973 *inter alia* recommended that the Commission should continue, on a priority basis, its work on State Responsibility with a view to the preparation of a set of draft articles on responsibility of States for internationally wrongful acts and that it should, at an appropriate time, undertake a separate study of the topic of International Liability for Injurious Consequences Arising Out of the performance of other activities.<sup>1</sup> Accordingly, the set of draft articles developed by the Commission deal solely with the responsibility of States for internationally wrongful acts not relating to lawful or even risk creating activities which are not, otherwise, wrongful. It may be recalled that the ILC has also prepared a set of draft articles on the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law".

<sup>1</sup> See The Work of the International Law Commission, No. 7, 4th ed, 1988, p. 95.

### Work of the Commission at the Forty Eighth Session

In accordance with its plan of work the Commission had at its 48<sup>th</sup> Session adopted a set of 60 draft articles arranged in Three Parts and Two Annexes thereto. Part One of the draft articles comprising 35 draft articles addressed the issue of the origin of international responsibility, and dealt with such issues as determining the grounds and circumstances in which a State may be held to have committed an international wrongful act. It may be recalled that a set of 35 draft articles relating to the origin of international responsibility was adopted, on first reading, by the ILC in 1980 with a view towards its possible adoption in the form of a Convention. The Commission proposes to commence the second reading of these draft articles during its next session.

#### Part One of the Draft Articles

Part One of the draft articles as adopted, on first reading together with commentaries thereto, in 1980 is in principle divided into five chapters. Chapter 1 entitled General Principles comprising 4 articles is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements - subjective and objective - of an internationally wrongful act. Chapter 11 of Part One of the draft articles on the Act of State under International Law is concerned with the subjective element of the internationally wrongful act, and the provisions of draft articles 5 to 15 are addressed to the determination of the conditions in which particular conduct must be considered as an "Act of State" under international law. The various aspects of the objective element of international wrongful obligation are dealt with by the provisions of draft articles 16 to 26 comprising Chapter III and termed Breach of an International Obligation. Chapter IV on the implication of a State in the International Wrongful Act of another State deals with cases in which a State participates in the commission by another State of an international offence and the cases in which responsibility is placed on a State other than the State which committed the internationally wrongful act. Finally draft articles 29 to 35 comprise the Chapter Circumstances precluding Wrongfulness define such 'circumstances as; prior consent of informed State; legitimate application of counter-measures in respect of an internationally wrongful act; *force majeure* and fortuitous



event; distress; state of necessity; and self defence ; may have the effect of precluding wrongfulness.

### Part Two of the Draft Articles:

Part Two of the draft articles as adopted on first reading by the ILC in 1996 is designed to deal with matters relating to the content, forms and degrees of international responsibility. The text of draft articles 36 to 53 comprising Part Two are divided into four Chapters. Chapter 1 comprising the text of draft articles 36 to 40 spell out the General Principles relating to the content, form and degree of international responsibility. Draft Article 36 on the Consequences of an Internationally Wrongful Act forms the link between Parts One and Two. Paragraph 2 of Article 36 stipulates that the legal consequences of internationally wrongful acts are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

Paragraph 2 of Article 36 states the rule that where as a result of an internationally wrongful act a new set of relations is established between the author State and the injured State, the previous relationship does not ipso facto disappear and that even if the author State complies with its secondary obligation it is not relieved of its duty to perform the obligation which it has breached. Chapter 11 of Part Two of the draft articles is addressed to the Rights of the Injured State and Obligations of the State which has committed An Internationally Wrongful Act. The provisions of draft articles 41 and 46 stipulate such obligations as cessation of wrongful acts and Assurances and Guarantees of NonRepetition, Draft articles 42, 43, 44 and 45 provide for such rights as Reparation: Restitution in Kind; Compensation; and Satisfaction respectively for the injured State.

Chapter III of Part Two of the draft articles on Counter Measures deals *inter alia* with such issues as conditions relating to resort to countermeasures proportionality and prohibited counter measures. The four draft articles comprising this part deal with not only the most difficult but also controversial aspect of the whole regime. of State Responsibility. The basic notion of countermeasures is the entitlement of the injured State not to comply

with one or more of its obligations towards the wrongdoing State. The fundamental prerequisite for any lawful countermeasure - unilateral reaction - is the existence of an internationally wrongful act infringing a right of the consequently injured State. An injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment. The right of an injured State to resort to countermeasures is circumscribed by the permissible functions or aims to be achieved by such measures. In practice injured State resorting to countermeasures may seek the cessation of the wrongful conduct, in the case of a continuing wrongful act; reparation in a broad sense, inclusive of satisfaction, as well as guarantees of non-repetition.

Finally, Chapter IV of Part Two of the draft articles entitled "International Crimes" addressed such vital issues as the consequences of an international crime; specific consequences; and obligations for all States.

### Part Three of the Draft Articles

It will be recalled that the former Special Rapporteur, Mr. Roberto Ago in his fifth report presented in 1984, had submitted that the Commission should give its consideration at an early stage to the possible content of Part Three of the draft articles concerning "Implementation of State Responsibility" would influence the way in which Part Two would be elaborated. He had expressed doubts as to whether States would be willing to accept the rules elaborated in Part One of the draft articles as binding upon them if there were no guarantees for an impartial assessment of the facts and the interpretation or application of the primary rules. Several members of the Commission had stressed the link between Parts Two and Three and emphasized the relevance of "Implementation provisions" in the elaboration of Part 2 of the draft articles or at least in respect of some of the articles.

During its 47th Session the Commission adopted a set of 7 draft articles and two annex thereto. The seven draft articles and the Annex are addressed to the Settlement of Disputes and now form Part Three of the proposed instrument on State Responsibility. It may be recalled that the present



Special Rapporteur Mr. Arangio Ruiz, had in his fifth report presented to the ILC at its 45th Session proposed "general compromissory clauses" of the future convention on State Responsibility. The settlement obligation procedures proposed, it was then stated, would complement, supersede or tighten up tiny obligations otherwise existing between the injured State and the wrongdoing state in any given case of an alleged breach of international law. The proposed draft articles had envisaged a threestep third party dispute settlement procedure which would come into play after a countermeasure had been resorted to by an injured State and a dispute had arisen with regard to its justification and lawfulness. The three steps of the dispute settlement procedure then proposed were conciliation, arbitration and Judicial settlement. Subsequently, the Drafting Committee added Negotiation and Good Offices and Mediation to the dispute settlement procedure proposed by the Special Rapporteur.

It may be stated that Article 1 of the Annex I (The Conciliation Commission) to draft articles of Part Three of the articles on State Responsibility is addressed to the issue relating to the appointment of a five member conciliation commission, its rules of procedure, method of work, and decision making. Article 2 of the Annex II on the Arbitral Tribunal provides for the establishment of a five member arbitral tribunal, its rules of procedure, decision making and related matters.

### Work of the Commission at the Forty Ninth Session

At its forty ninth Session the International Law Commission established a Working Group to address matters dealing with the second reading of the draft articles on the topic. The Working Group which met twice under the Chairmanship of Mr. J. Crawford,<sup>2</sup> decided to limit its discussion on three procedural and methodological issues viz.

- (i) the work plan of the topic within the present quinquennium (1997-2001);

<sup>2</sup> The other members of the Working Group were: Mr. Ian Brownlie; Mr. J. Dugard; Mr. Q. He; Mr. P. Kabatsi; Mr. J. Kateka; Mr. T. Melescanu; Dr. D. Opetti-Badan; Mr. G. Pambou-Tchivounda; Mr. R. Rosenstock; Mr. B. Simma; Mr. C. Yamada and Mr. Z. Galicki (ex-officio member).

- (ii) identification of areas; if any, where more work was required in the light of developments since the provisional adoption of the draft articles; and
- (iii) the procedure to be followed for the second reading.

The Working Group, it may be mentioned, decided to confine itself to methodological and procedural issues because the topic deals with a number of important and delicate issues and Governments of Member States of the United Nations had not yet responded to the request for written comments. It may be recalled in this regard that General Assembly Resolution 51/160 adopted on December 16, 1996 had *inter alia* drawn the attention of 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 had urged States to present in writing their comments and observations by January 1, 1998, as requested by the Commission.

As regards the work plan on the subject, the Working Group agreed that the Commission design its work plan with a view to allowing the completion of the second reading of the draft articles on State Responsibility by the end of the present quinquennium. It recommended that the Commission accord priority to this topic during its current term.

With regard to the identification of areas, if any, where more work was required in light of the developments since the provisional adoption of the draft articles on State Responsibility, the Working Group agreed that The Commission should consider in -1999, if possible, the character of the draft articles. The proposed consideration, in 1999, of the draft articles is to take into account the written comments of Governments and with due regard to the significant links which exist between various key issues.

On the basis of the recommendations of the Working Group the Commission decided :

- (i) to design its work plan for the quinquennium with a view to allowing the completion of the second reading of the topic



of State Responsibility by the end of its quinquennium;

- (ii) taking into account comments by the Governments and having regard to the significant links which exist between various key issues to consider in 1999, if feasible, the character of the draft articles;
- (iii) to follow the usual practice of the appointment of a Special Rapporteur to prepare reports for consideration by the Commission, bearing in mind that a significant amount of inter-sessional work will be required;
- (iv) to proceed to the appointment of a Special Rapporteur, for the topic, at the present Session;
- (v) to follow the usual practice of debates in the plenary followed by reference of the draft articles to the Drafting Committee; to expedite its work on the topic, to establish working groups to consider and report on key issues;
- (vi) that comments by Governments are of particular relevance as regards the treatment of key issues; and
- (vii) that an examination of case law and literature could also serve as a useful guide in determining whether there are any lacunae in the draft articles, or whether particular draft articles may require modification in the light of recent developments in international law.

The Working Group recalled that the latter had been found to be relevant to the draft articles of Part One completed in 1980.

The Commission at its forty ninth session appointed Mr. James Richard Crawford Special Rapporteur for State Responsibility. At its Fiftieth Session in 1998 the Commission is expected to consider the First Report of the Special Rapporteur, Mr. J. Crawford, dealing with review of Part I of the draft

articles, except draft article 19 (overview of issues relating to State Crimes).

## 2. International Liability for Injurious Consequences arising out of acts not prohibited by International Law

At its 48<sup>th</sup> Session the Commission had considered the twelfth report of the then Special Rapporteur<sup>3</sup> Mr. Julio Barboza. That report had furnished a review of various liability regimes proposed by the Special Rapporteur in his previous reports. At that session the ILC *inter alia* established a Working Group<sup>4</sup> under the Chairmanship of the Special Rapporteur, to consolidate work already done on the topic and to seek solutions to some unresolved questions with a view to producing a single text for transmission to the General Assembly. It had then been felt that it would then be possible for the Commission at its 49<sup>th</sup> Session to take informed decisions as to consideration of the topic during the next quinquennium.

The Working Group in its report to the Commission had *inter alia* pointed out that in view of priorities attached during the 48th Session of the ILC to the completion of draft articles on other topics it had neither been possible for the draft articles to be discussed by the Drafting Committee, nor were they debated in detail by the plenary during the session. The Working Group recommended that it would be appropriate for the Commission to annex to its report to the General Assembly the report of the Working Group and to transmit it to Governments for comments as a basis for future work of the Commission, on the topic. In its opinion the "Commission would not be committing itself to any specific decision on the course of the topic, nor to particular formulations, although much of the substance of Chapter I and the whole of Chapter II have been approved by the Commission in earlier sessions.

<sup>3</sup> See A/CN.4/475.

<sup>4</sup> The Working Group consisted of Mr. Julio Barboza (Special Rapporteur and Chairman); Mr. Hussain Baharana; Mr. Mehmod Bennouna; Mr. James Crawford; Mr. Gudmundur Eiriksson; Mr. Salifou Fomba; Mr. Kabatsi; Mr. Igor I. Lukashuk; Mr. Patrick L. Robinson; Mr. Robert Robinson; Mr. Albert Szekley and Mr. Fran Villagran Kramer.



The Working Group in its report had observed that the draft articles formulated on the topic are limited in scope and residual in character. To the extent that existing rules of international law, whether customary or conventional, prohibit certain conduct or consequences those rules will operate within the field of State Responsibility and will fall outside the scope of the present draft articles. Attention was drawn in this regard to draft article 8. On the other hand, the field of State Responsibility for wrongful acts is separated from the scope of the present draft articles by the permission to the State of Origin to pursue the activity at "its own risk".

The Working Group expressed the view that the present topic is addressed to an issue different from that of responsibility. The key elements of the difference are (i) the prevention of transboundary harm arising from acts not prohibited by international law or, in other words prevention of certain harmful effects outside the field of State Responsibility and; (ii) the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. Thus, the first element covers prevention in a broad sense, including notification of risks of harm whether these risks are inherent in the operation of the activity or arise, or are appreciated as arising at some later stage.

The other element, in the opinion of the Working Group, is the principle that States, on the one hand are precluded from carrying out activities not prohibited by international law, notwithstanding the fact that there may be a risk of transboundary harm arising from those activities. However on the other hand their freedom of action in that regard is not unlimited and may give rise to liability for compensation or other relief, notwithstanding the characterization of the acts in question as lawful. The Working Group had also emphasized the significance of the principle that the victim of transboundary harm should not be left to bear the entire loss.

The 22 draft articles recommended by the Working Group are arranged in three chapters. Chapter I (draft articles 1 to 8) delimits the scope of the draft articles as a whole, defines 4 terms used therein and states the applicable general principles equally in the context of prevention of and liability for transboundary harm. Chapter II (draft articles 9 to 19) is primarily concerned

with the implementation of the principle of prevention stipulated in draft article 4 including the issues of notification, consultation etc. Finally, Chapter III (draft articles 20 to 22) deals with the compensation which may be available before the national courts of the State of origin or which may flow from arrangements made between that State and one or more other affected States. In that much it is concerned with implementation of the general principle of liability stipulated in draft article 5.

### Work of the Commission at the Forty Ninth Session

At its 49<sup>th</sup> session the International Law Commission established a Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law to consider the question of how the Commission should proceed with its work on the topic and to make recommendations to that effect. The Working Group met twice under the chairmanship of Ambassador Chusei Yamada<sup>5</sup> during which it reviewed the Commission's work on the topic since 1978.

The Working Group noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group, in its report, pointed out that the topic dealt with two distinct but interrelated issues viz. (i) prevention, and (ii) international liability. The Working Group was of the view that the two issues should be dealt with separately.

Introducing the report of the Working Group, Ambassador Chusei Yamada stated that as the work of the Commission on Prevention was already at an advanced stage and many draft articles had been provisionally adopted by the Commission the Group had been of the opinion that the Commission could proceed with that work and possibly complete its consideration on

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<sup>5</sup>. The other Members of the Working Group were Mr. E. Addo, Mr. E. Candioti, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. Q. He, Kateka, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. G. Pambou-Tchivounda, Dr. P. S. Rao, Mr. B. Simma and Mr. Z. Galicki



first reading of the draft articles on prevention in the next few years. It believed that any decision on the form and nature of the draft articles on "prevention" should be decided at a later stage.

As regards "international liability" while a majority of the Group's members had been of the view that it was the core issue of the topic as originally conceived and that the Commission should retain that subject.

There had been no unanimity on that point but the Group had agreed that the Commission needed to await further comments from Government before it could make any decision on the issue. The Group also noted that the title of the topic might need adjustment when a decision was taken on the scope and contents of the draft articles

The Group concluded that the Commission should proceed with its work on prevention under the sub-title "Prevention of transboundary damage from hazardous activities" and that a Special Rapporteur for this sub-title should be appointed as soon as possible with the aim of completing the first reading of the draft articles by 1999. It may be stated that though the report of the Group did not specify the timing of the appointment of a Special Rapporteur, the Chairman of the Group, Ambassador Chusei Yamada in his oral presentation stated that if it was done at the Commission's spring session in Geneva in 1998 the Commission would be in a position to complete its consideration of the draft articles on first reading by 1999. The question of the appointment of a Special Rapporteur should be decided within the overall framework of the Commission's work programme for the current quinquennium.

The Working Group had recommended that the Commission proceed with it on international liability for injurious consequences arising out of acts not prohibited by international law, undertaking first prevention of transboundary damage from hazardous activities. It recommended also the appointment of a Special Rapporteur as soon as possible. The Working Group also recommended that the Commission reiterate its request for comments by Governments in the Sixth Committee or in writing.

The Commission at its 49<sup>th</sup> session appointed Dr. P.S. Rao, Special Rapporteur for the subtitle "Prevention of Transboundary damage from Hazardous Activities". At its next session the Commission expects to consider the first report of the Special Rapporteur.

### **3.RESERVATIONS TO TREATIES**

At its 48<sup>th</sup> session the Commission had before it the Second Report of the Special Rapporteur, Mr. Alain Pellet.<sup>6</sup> In addition to the Second Report, the Special Rapporteur had also prepared a "non-exhaustive bibliography on the question of reservation to treaties."<sup>7</sup> However, owing to the priority attached to the completion of the second reading of the articles on the Draft Code of Crimes Against the Peace and Security of Mankind as well as the first reading of the draft articles on State Responsibility the consideration of the Second Report of the Special Rapporteur on Reservations to Treaties had had to be deferred. The Commission at its forty ninth Session considered that Report which presented an overview of the study of the question of reservation to treaties.

Chapter I of the Report of the Special Rapporteur, Mr. Alain Pellet, formulated an overview of the study in three sections. It referred to the Commission's earlier work on Vienna Convention on the Law of Treaties, 1969; the Vienna Convention on Succession of States in respect of Treaties, 1978; and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986. The first section entitled "the First Report on Reservation to Treaties and Outcome" (Paragraphs I- 8) summarized the conclusions that the Special Rapporteur had drawn from the debate both in course of the consideration of that report in the Commission during the course of its 48<sup>th</sup> Session as well as the debate on the item in the Sixth Committee at its fiftieth session.

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<sup>6</sup> See A/CN.4/477

<sup>7</sup> See A/CN.4/478.



The Special Rapporteur, Mr. Alain Pellet, recalled that the General Assembly in its resolution 50\45, *inter alia*, invited the Commission to "Continue its work along the lines indicated in the reports".<sup>8</sup> The report also pointed out that the General Assembly had also invited "States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur, on the topic concerning reservation to treaties".

Presenting his report during the 49<sup>th</sup> session the Special Rapporteur pointed out that although thirty States had sent their replies to the questionnaire sent to States Members of the United Nations or of Special Agencies or parties to the Statute of the International Court of Justice., none of the States with a national in the Commission had responded to the questionnaire. Replies had also been received the Special Rapporteur had added, from international organizations.

The second section of Chapter 1 of the Report was addressed to the 'Future work the Commission on the topic of Reservation to Treaties' (Paragraphs 9 - 50). This was divided into three parts viz. (i) Area covered by the study (Paragraphs 9-17); (ii) Form of the study ( Paragraphs 18-32); and (iii) General outline of the study ( Paragraphs 33-50).

The Special Rapporteur pointed out that although the regime established by the Vienna Conventions worked satisfactorily there existed some ambiguities and gaps in the provisions relating to reservations. As regards the Area covered by the Study the Special Rapporteur identified five topics which required a careful study because of the gaps that continued to exist. The issues identified included:

- (a) The question of the definition of reservation;
- (b) The legal regime governing interpretative reservations;
- (c) The effect of reservations which clash with the purpose and object of the treaty;
- (d) Objections to reservations; and
- (e) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

<sup>8</sup> See General Assembly Resolution 50\45 of 24 January 1996 operative paragraph 4.

This list of questions does not limit the Commission's scope of enquiry regarding reservation to treaties. One would agree with the Special Rapporteur's assertion that while devoting attention to questions of importance and recalling the applicable rules as codified by existing conventions or resulting from practical application it seems "logical to take account of the broader picture in considering questions relating to reservations which are imperfectly addressed or not addressed at all by existing conventions". Moreover this list of questions would need to be supplemented by other questions relating to the existence of rival institutions of reservations, aimed at modifying participation in treaties, such as additional protocols, selective acceptance of certain provisions and the like which while modifying participation in treaties put to risk the universality of the international instrument in question. The point was made that there is no denying that "considered in themselves, such approaches are not part of the field of study in that they are reservations. However, to the extent that they have similar aims and comparable consequences, it would seem useful to take account of them, if only, to draw the attention of States to the options which they offer in certain cases.

The rival techniques can, in the opinion of the Special Rapporteur, prove to be useful alternatives to the employment of reservations when recourse to the latter meets objections of a legal or political nature.

### Form of the Study

Addressing the issue of the form of the study, the Special Rapporteur had recalled that the ILC at its 47<sup>th</sup> Session had decided in principle to draw up a "guide to practice in respect of reservations" and taken the view that there were insufficient grounds for amending the relevant provisions of the existing international instruments. The Commission had also decided that the guide to practice in respect of reservations would ' necessary,, be accompanied by model clauses. The Special Rapporteur, had addressed four issues in his Second Report These included (a) Preserving what has been achieved (b) Draft articles accompanied by commentaries (c) Model Clauses; and (d) Final form of the guide to practice.

#### (a) Preserving what has been achieved