

Articles 19 to 23. It also took note of the relevant provisions of the 1978 Convention and the 1986 Convention on the subject. The Special Meeting also considered the Preliminary Conclusions on Reservation to Multilateral Normative Treaties including Human Rights Treaties adopted by the International Law Commission. The Meeting also recalled that the General Assembly at its 52nd Session had drawn the attention of Governments to the importance for the International Law Commission, of having their views on the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties.

The view was expressed that while the Vienna Regime of Reservations to Treaties was based on the assumption that a multilateral treaty is in effect a combination of several bilateral treaty relationships there were a certain category of treaties which, by the very nature of the subject matter addressed by them, did not admit of any reservations. Treaties relating to the protection and preservation of the Environment, Disarmament treaties and Human Rights Treaties were identified as the category of treaties which are applicable and binding upon not only the States Parties but on all members of the international society. The United Nations Convention on the Law of the Sea, 1982 was yet another example of a treaty which by the nature of being a "package deal" did not admit of reservations.

The Special Meeting considered the functions and role as well as the competence of the monitoring bodies to appreciate or determine the admissibility of a reservation. The view of the Commission that the legal force of the findings made by such bodies in the exercise of their functions could not exceed those resulting from the powers given to them, met with approval. However, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation met with resistance.

Many of the participants addressed themselves to the provisions of the international instruments on human rights. The right to religion, the right to work, right to health and the right to compulsory education were among those that were cited and debated. Several views were expressed on the specific provisions of human rights treaties and the reservations thereto. While some identified the lack of resources, unrealistically high international human rights standards, among others, some participants listed the different socio-economic, cultural and political backgrounds of the people and states as the reasons for the formulation of reservations to human rights treaties. It was pointed out that the provisions of some of the human rights treaties could be subclassified as those (i) requiring intervention of States; and (ii) those not requiring any action or intervention by States parties.

#### **Points of convergence**

The deliberations in the Seminar revealed a convergence of views on a wide range of issues. These included:-

- (i) The law of reservation ushered in by the Vienna Convention has, by and large, served well the needs of the international community of States. It may be unwise to derail the Vienna regime on reservations. The provisions of the Vienna Convention on Treaties had been and continue to enjoy wider acceptance. In as much as these provisions had stood the test of time they should not be tampered with. There was no need to amend or alter them. The majority of participants were of the view that the right to formulate and express reservations to one or more provisions of a convention is an attribute of State sovereignty and power to make or express reservation can only be restricted by a treaty.
- (ii) The existing regime of reservations as incorporated in Articles 19 to 23 of the Vienna Convention on Law of Treaties, 1969 were sufficiently flexible and whilst recognizing the inherent right of a State to make a reservation merely restricted that right by stipulating that the reservation or declaration

that may be amenable to misuse. It was stated in this regard that the Commission should avoid handing out political handles which could result in the defeating the very object of universality of participation in a treaty.

### Recommendations

A number of recommendations were made in the course of the Special Meeting. The proposal advanced included:

(i) One view suggested that the International Law Commission undertake an empirical study of state behaviour and study the reservations to treaties and if feasible the motives thereof. It could thereafter seek to develop the reservation regime by way of "interpretative codification".

(ii) Another view emphasized the universal acceptability of the existing reservation regime and proposed that the gaps and lacunae could be filled by commentaries on the existing provisions of the Vienna Convention. He favoured the preparation of a guide to state practice rather than the formulation of model clauses or a protocol.

(iii) It was recommended that the ILC consider concluding its work on this topic not on the basis of "intuitive feeling" but on the basis of an empirical study of the behaviour of States.

(iv) The Commission should approach its future work on the subject with due caution and not be guided by the European precedents which may not always be relevant or appropriate to the universal context. One view was that a realistic stance would require taking note of the different political, social economic and cultural milieu of the States and accepting some reservations to treaties as the price to be paid for the promotion and achievement of universality.

(v) The Secretariat should report the debate of the Special Meeting to the International Law Commission. It also requested the Representative of the International Law Commission to report his findings to the Commission at its forthcoming 50th Session.

## VI. UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT-ROME, ITALY 15TH JUNE TO 17 JULY 1998: A REPORT

### (i) Introduction

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) held in Rome from 15 June to 17 July 1998, is considered by international Lawyers and large number of experts to be the most important institutional decision making process since the establishment of the UN itself. The ICC would deal with exceptional situations, where the state machinery fails or where the judicial system is either so flawed, inadequate or non-existent that justice has to be meted out through an international court, redressal being unavailable within the country. "The institution of the Court will prevent national sovereignty being used as a convenient shield behind which violence and outrage are committed." In short the International Criminal Court is being established to deal with truly exceptional situations, and to try individuals who, on the gross scale, violate rights of individuals. It would be a crucial instrument to fight against crime, violence and genocide and would establish law, justice and peace. In words of the UN Secretary General "The Establishment of the International Criminal Court was a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law".

The Secretariat of the AALCC has in the past very closely followed the evolution of the work of the United Nations, paving the way to an International Criminal Court. It followed very closely the work of the ILC on the establishment of an ICC, in the context of its work on the Draft Code of Crimes Against the Peace and Security of Mankind. The matter has been extensively discussed at the 33rd, 35th 36th and

37th Sessions of the AALCC held in Kampala, Tokyo Doha, Manila, Tehran and New Delhi respectively. The AALCC closely monitored the work done in the *Ad hoc* Committee<sup>1</sup> as well as Preparatory Committee<sup>2</sup> on the Establishment of an International Criminal Court and participated in the PREPCOM meeting in New York in August 1996.

The topic has been considered at two Special Meetings held during 35th (Manila, 1996) and 36th (Tehran, 1997) Sessions of the AALCC.

A Special Meeting held during the 35th Session (Manila) in March 1996, had requested the Secretary General of the AALCC to transmit, the report and the proceedings of the special Meeting to the Chairman of the Preparatory Committee and directed the AALCC Secretariat to monitor the outcome of the meetings of the PREPCOM to be held in New York. It may

<sup>1</sup> The question of establishment of the ICC was debated in the *ad hoc* Committee established by GA Resolution 49/53 of 9 December 1994. The *ad hoc* Committee open to all States Members of the United Nations or Members of Specialized Agencies, was established to review the major substantive and administrative issues arising out of the draft statute prepared by the ILC.

<sup>2</sup> The Preparatory Committee on the Establishment of an International Criminal Court was established by G.A. Resolution 50/46 of 11 December 1995 to "further consider substantive and administrative issues arising out of the draft statute of an ICC prepared by the ILC in 1994 and to draft texts with a view to preparing widely acceptable consolidated text of a convention for an ICC for consideration by a Conference of Plenipotentiaries. The mandate of the PREPCOM was thereafter reaffirmed by GA Resolution 51/207 of 17 December 1996. Under the Chairmanship of Mr. Adriaan Bos, the PREPCOM held a total of six sessions: (i) March 25 to April 12, 1996; (ii) August 12 to August 30, 1996; (iii) February 10 to February 21, 1997; (iv) August 4 to 15, 1997; (v) December 1 to 12, 1996; and (vi) March 16 to April 3, 1993. The precom also held an inter-sessional meeting in Zutphen, Netherlands, in January (19 to 30), 1998. The Secretariat of the AALCC was represented only at the second session of the PREPCOM.

be stated that deliberations at the Special Meeting had revolved around the following 6 issues Viz. (i) Mode of Establishment; (ii) The Principle of Complementarity; (iii) Issues Pertaining to Jurisdiction and Applicable Law; (iv) ICC and its Relationship with the Security Council; (v) Procedural Issues; and (vi) Consent and Accountability.

Another Special Meeting on Inter-related Aspects between the International Criminal Court and International Humanitarian Law organized by the AALCC Secretariat during the 36th Session held in Tehran 1997 facilitated exchange of views on the work of the PREPCOM on the Establishment of an ICC as well as the measures towards the implementation of International Humanitarian Law. During this Meeting discussions revolved among other things around 5 issues namely (i) Mode of Establishment; (ii) Principle of Complementarity; (iii) Jurisdiction and Applicable Law; (iv) ICC and its relationship with the Security Council; and (v) Procedural Issues.

The 37th Session of the AALCC was held in New Delhi in April 1998, shortly after the Meeting of the PREPCOM in Zutphen a short while before the Rome Conference of Plenipotentiaries. The Member States of AALCC had laid great emphasis on the universality, independence and impartiality of the ICC. Discussion among other things revolved around the following issues: (i) Mode of Establishment; (ii) Issue of Complementarity; (iii) Trigger Mechanism; (iv) Jurisdiction and Applicable Law; (v) ICC and its relationship with the Security Council; (vi) Procedural Issues; (vii) Financing of the Court; (viii) Role of the Prosecutor; (ix) Penalties; and (x) Number of Ratifications.

The work of the Precom Culminated in the convening of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The 37th Session of the AALCC had mandated the Secretariat to participate actively, as well as to convene one or two meetings of its Member States with the aim of collating

the views and presenting a collective view regarding the contentious issues to the Conference.

### **Thirty -Eighth Session: Discussion**

The *Deputy Secretary General* Ambassador Dr. Wafik Zaher Kamil while introducing the topic stated that the adoption of the Statute of the International Criminal Court in Rome in June -July last year is considered by the international legal fraternity to be the most important decision since the establishment of the United Nations. The aim of the international community, is to create within the framework of the United Nations a permanent independent judicial body with clearly defined rules, empowered to prosecute individuals alleged to have committed international crimes deemed to be the most serious by the international community.

He pointed out that the culmination of the work of the PREPCOM resulted in the convening of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome from 15th June to 17th July 1998. The 37th Session of the AALCC held in New Delhi in April 1998, had mandated the Secretariat to "monitor and report the developments and outcome of the Conference to the 38th Session, as well as to convene one or two meetings of AALCC Member States during the Rome Conference with the aim of collating the views and presenting a collective stance regarding the contentious issues to the Conference.

He noted that the imperfections of the Statute need not be a cause for despair, on the contrary the fact that a significant number of states with varied legal systems and cultural ethos had agreed upto a common text, is an indication of the strong will and political commitment of these states to address international crimes that have hitherto gone unpunished.

He stated that the Statute had been adopted by a vote of 120 for 7 against and 21 abstentions. Not all the task had been

accomplished. 75 States had signed the Statute and it is a matter of pride that Senegal, one of the Member States of the AALCC, had been the first State to ratify the Statute. Still to be prepared are other instruments within the Preparatory Commission, as well as the ratification in a sufficient number before the Court can start its work.

He emphasized that it was imperative that the AALCC Member States evolve common strategies in furthering the progress achieved at Rome. In the short term the work in the Preparatory Commission offers scope for articulating AALCC's viewpoints. Care should be taken to ensure that the Court's rules are simple and clear as far as possible and to have it protected from undue interference which would damage its credibility. In the long run, the provision for a Review Conference could provide the suitable forum for pursuing the tasks left unaccomplished at Rome.

The *Delegate of India* stated that her country had actively participated in the process aimed at the establishment of the ICC, with the goal of realizing a universally acceptable, independent and efficient court to deal with not only traditional crimes grave crimes of war and genocide, but also the most, heinous crimes such as 'international terrorism' and 'drug-trafficking'. Unfortunately these topics, she said, were belied on several counts - both in the manner of their inclusion of the Statute as well as their substantive contents. She charged that the Conference failed to include international terrorism in the list of the crimes and failed to provide flexibility in the nature of the jurisdiction of the Court. It blurred the distinction between customary law and treaty obligations in respect of the definitions of internal conflicts and crimes against humanity, legitimized the overstretched interpretation of the powers of the Security Council by subordinating the future Court to the discretion of the P-5 States. While the Statute treats offences such as 'murder' as international crimes, she termed it ironic that it refuses to do so with regard to the first use of nuclear weapons-which posses annihilatory potential of a great mass of humanity.

Against this backdrop, she expressed doubts over whether the ICC had the prospects of becoming truly universal.

With reference to the on-going work within the Preparatory Commission, more particularly the commission's deliberations which commenced at its first session in February 1999, the Indian delegate stated that the formulation of "Rules of Procedure and Evidence" should be guided by the consideration that these do not make ICC more intrusive than the Statute adopted in Rome. Drawing attention to the Conference's recommendations pursuant to Article 111 of the Statute, calling for a Review Conference to arrive at an acceptable definition of the crimes of terrorism and drug trafficking and consider its inclusion in the Statute, she drew attention to the fact that the Preparatory Commission had not been expressly assigned any role in this process, as it was the case with the crime of aggression. Therefore, it was her delegation's view that the Preparatory Commission, on a priority basis, prepare proposals for a provision on terrorism, including the definition and elements of the crime of terrorism.

The *Delegate of the Arab Republic of Egypt* stated that his country had consistently supported the efforts to establish the International Criminal Court and had actively contributed to this effort. While welcoming the adoption of the Statute of the Court in Rome there were, however, some misgivings regarding a number of issues relating to the non-inclusion of the crime of aggression, the relationship of the Statute to the non-party States, the relation of the Court with the Security Council especially the Statute regarding Article 16 and the power it grants to the Security Council. He observed that in light of the above and in order for the Statute to attain universality he hoped that the following points will be resolved through the Preparatory Committee. (i) Agreement on the definition of the crime of aggression to enable it to be included in the jurisdiction of the Court; (ii) the principle of Complementarity needs clarification, since its current mention in the Preamble could lead to confusion; and (iii) the relation with the Security Council needs to provide for maintaining the independence of the Court as a juridical body free from the

political influence of the Council. Thus acknowledging the existence of a role for the Council regarding the determination of the crime of aggression.

The Delegate of Palestine thanked the Deputy Secretary General for his introductory statement. Welcoming the adoption of the ICC Statute at Rome, he hoped that the legal framework established by the Statute would operate to curb the potential for selectivity and double standards in the administration of criminal justice. To ensure an independent and effective functioning of the court, the delegate called for more clarification on the role of the Security Council in relation to the ICC. Stating that the response of the Asian-African States to the proposed establishment of the ICC had thus far been encouraging, he called for a more active role by the AALCC in sustaining and carrying forward this process.

The *Delegate of Iran*, expressed the hope, that the establishment of the ICC would promote respect for international law, especially humanitarian law and the wider participation of States at the Rome Diplomatic Conference was a manifestation of the resolve of the international community to pursue this endeavour in right earnest. While lauding the successful adoption of the ICC Statute, he reminded the Committee that much work still needed to be completed within the Preparatory Commission. The Preparatory Commission has been mandated to prepare proposals for a provision on aggression (including the definition and elements of the crime of aggression) with a view to submitting it to the Assembly of States parties at a Review Conference, so as to arrive at an acceptable provision for inclusion in the Statute. The Islamic Republic of Iran, he informed, has unanimously been designated as the coordinator of the NAM on this subject. Though some delegations at the Rome Conference had been sceptical on the definition and elements constituting the crime of aggression, the delegate pointed out that the consensus definition of aggression articulated in the General Assembly Resolution No.3314 dated 14th December, 1974 is a compromise of three proposals, viz. Western, Eastern and NAM tests could be a useful reference point. Towards achieving the

primacy of order and justice over political considerations, he urged the AALCC Member States to actively participate in the work of the Preparatory Commission.

The *Delegate of the People's Republic of China* observed that the establishment of an International Criminal Court to punish the most serious crimes of international concern had been a goal actively pursued by the international community for nearly a century. The Chinese Delegation had actively participated in the formulation of the Statute. She added that it was regrettable that the Rome Conference was not able to reach consensus on a number of important issues and had to resort to a vote to adopt the Statute. Some of the provisions of the Statute do not fully reflect international political realities and the development of international law, thereby going beyond what a considerable number of countries considered acceptable. It had failed to fully ensure the participation of all countries in the elaboration of the statute on the basis of equality, democracy and transparency. The Statute did not address many major problems such as the (i) jurisdiction mechanisms; (ii) definitions of crimes; (iii) the opt-in approach for accepting jurisdiction of the court; (iv) the authority of the Prosecutor to initiate investigations *proprio motu* and (v) the principle of complementarity.

She further added that the Chinese delegation maintained that a realistic approach be taken in finding a proper solution on the basis of democracy and transparency, and that one should not be pressured to meet deadlines at the expense of the quality of the document and substitute ideals for reality. Her delegation would continue to actively participate in the Preparatory Committee, and would actively participate in framing the elements of crimes and the Rules of Procedure and Evidence.

The *Delegate of Kuwait* said that his country had actively participated in the process leading to the adoption of the Statute of the ICC. The resolve exhibited by the States to adopt the Statute, he said, was a reflection of the determination of the international community to construct an

effective and universal criminal justice system. The jurisdiction of the Court, as a supplement to an ineffective or lack of national jurisdiction on matters relating to the core crimes was a step towards fulfilling a long standing aspiration of the international community. He noted that the task towards formulating the crime of aggression was crucial in the effective functioning of the Court. Commenting on the differing views among States on the nature of punitive measures designed for the core crimes, he said that such matters should be sufficiently deterrent in form so as to prevent the commission of serious crimes. Noting that the AALCC Member States need to consolidate their stand prior to the meeting of the Preparatory Commission he urged the Committee to explore the prospects of holding a Special Session for this purpose.

The *President*, in response to this said that the AALCC should seek to undertake follow-up action before the Review Conference scheduled to be held in August 1999. On the suggestion for a Special Session to coordinate the views of AALCC Member States to consider making an offer to convene the special Session.

The Observer to the International Committee of Red Cross (ICRC) stated that the agenda of this session included several substantive matters of current importance and of concern to the ICRC. The adoption of the Statute of the ICC in July reflected the resolve of States to ensure that those who commit the gravest crimes do not go unpunished. She noted that the ICC would provide international humanitarian law with an instrument that would remedy the shortcomings of the current system of repression of violations of humanitarian law. The obligation to prosecute persons alleged to have committed grave breaches of international humanitarian law already existed under the Geneva Conventions of 1949 and the Additional Protocols but was frequently ignored. She hoped that the ICC, which is intended to be complementary to national criminal jurisdictions, will encourage States to adopt the legislation necessary to implement international humanitarian law by bringing violations before their courts. She informed the meeting that ICRC through its Advisory

services would be available to assist States in adoption of national legislation.

In her view a welcome feature was that the Court could try individuals for crimes committed during non-international armed conflicts. The Statute had adequately widened the scope of jurisdiction in relation to war crimes. According to her, the greatest disappointment arose in relation to Article 124 of the Statute, she urged States not to make the declaration required under the article. She congratulated the Republic of Senegal on becoming the first State Party to ratify the Statute. Finally, she hoped that the centennial commemoration of the First International Peace Conference and 50th Anniversary of the Geneva Convention of 1949 would provide the international community with an opportunity to appreciate the importance and relevance of international humanitarian law and to reaffirm its commitment to ensure that the victims of atrocities are not forgotten and that those who commit such acts do not go unpunished.

(ii) **Decision on the "Report on the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome-Italy 15th June to 18th July 1998**

**(Adopted on 23.04.1999)**

*The Asian African Legal Consultative Committee at its Thirty-eighth Session.*

*Taking note with appreciation of the Brief prepared by the Secretariat contained in Document No. AALCC/XXXVIII/Accra/99/8;*

*Mindful of the adoption of the Rome Statute for an International Criminal Court.*

1. *Welcomes* the successful conclusion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, from 15th June to 17th July 1998;
2. *Takes note* of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court done at Rome on 17 July 1998;
3. *Recalls* that the Statute was opened for signature in Rome from 17 July until 17 October 1998 and that thereafter it will remain open for signature at United Nations Headquarters in New York until 31 December 2000;
4. *Notes that* a significant number of States have signed the Rome Statute;
5. *Reiterates* the vital importance of the universal acceptance of the International Criminal Court;