ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
AND
SELECTED DOCUMENTS
OF THE
THIRTY-SECOND SESSION
KAMPALA, UGANDA
(1-6 February, 1993)

THE AALCC SECRETARIAT

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Preface

The Thirty-Second Session of the Asian-African Legal Consultative Committee (AALCC) was held in Kampala (Uganda) from 1st to 6th February 1993. The Session was attended by high ranking officials from the member States of the AALCC. Observer delegations from non-member countries also attended. Representatives of the United Nations, its subsidiary bodies, the specialized agencies and other international and regional organizations actively participated in the deliberations.

The subject items on the Agenda of the Thirty-second Session were as follows: (i) Law of the Sea; (ii) Environmental Law — United Nations Conference on Environment and Development (UNCED); (iii) Status and Treatment of Refugees; (iv) Deportation of Palestinians in Violation of International Law, particularly the Geneva Convention of 1949; (v) International Law Commission; (vi) UN Decade of International Law; (vii) Law of International Rivers; (viii) Responsibility and Accountability of Former Colonial Powers; (ix) International Trade Law (A) Legal Aspects of Privatisation (B) Debt Burden of Developing Countries and (x) World Conference on Human Rights: PREPCOM.

Most of the above topics were taken up for discussions. The present Report covers the background information, deliberations of the Thirty-second Session, the decisions adopted and the following selected studies prepared by the AALCC Secretariat for the Session:

(a) Report on the work of the International Law Commission (ILC) at its Forty-Fourth Session

At the Kampala Session, a report containing the progress made at the Forty-fourth Session of the ILC, held from 4th May to 24th July 1992 was placed before the Committee. During that Session, there were as many as five substantive topics on the Agenda. These included:

(i) Draft Code of Crimes Against the Peace and Security of Mankind;

(ii) The Law of Non-Navigational Uses of International Watercourses;

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

(iv) State Responsibility; and

(v) Relations between States and International Organizations (Second Part of the Topic).

(b) Status and Treatment of Refugees

(i) AALCC's Model Legislation on Refugees: A Preliminary Study

The Secretariat study attempts to analyse the shortcomings of the 1951 Convention and its 1967 Protocol. It also discusses whether the definition of "refugees" provided for in the 1951 Convention satisfied today's problems and conditions and whether this definition should be expanded to cover the areas dealt with in 1969 OAU Convention, the 1984 Cartagena Declaration and in the AALCC's Bangkok Principles of 1966. The latter part of the study provides an outline for a draft of the Model Legislation.

(ii) Establishment of a Safety Zone for Displaced Persons in Their Country of Origin

The Secretariat was mandated not only to update its study on this topic but also to analyse the legal implications of recent attempts to establish such zones in either war-stricken countries of areas of conflict compounded by natural calamities like drought, famine etc.

(c) Law of International Rivers

For the Thirty-first session the study prepared by the Secretariat provided a detailed analysis of all the articles on the ILC draft namely "Law of Non-Navigational Uses of International Watercourses", as adopted by ILC on first reading. The study under consideration of the Committee has undertaken a preliminary examination of the State practice in the region (Asia and Africa) of user agreements and also examines the modalities employed in the sharing of water.

(d) Responsibility and Accountability of Former Colonial Powers

The Secretariat study for the Kampala Session, examined briefly the international law dealing with the responsibility and liability of colonial powers to return to their rightful owner the cultural heritage which was illegally plundered and removed by them.

(e) United Nations Conference on Environment and Development (UNCED): Outcome and Follow-up

The Committee's Secretariat has prepared Notes and Comments on the

outcome of the Rio Summit and analytical studies on the Framework Convention on Climate Change and the Convention on Biological Diversity. Environment was the main topic on the agenda of the AALCC's Legal Adviser's Meeting held in New York in October 1992.

(f) United Nations Decade of International Law: Note of the Secretary General

The paper prepared for the Kampala Session includes the observations of the AALCC Secretariat forwarded to the office of the Legal Counsel of the United Nations in pursuance of the General Assembly resolution 46/53 requesting an update of activities undertaken on the Decade.

(g) Preparation for the World Conference on Human Rights

At its 31st session the AALCC Secretariat was mandated to monitor the preparatory process of this Conference, focussing on the issues with legal implications and to make necessary studies. A documents entitled "The Preparation for the World Conference on Human Rights" was prepared by the Secretariat for its consideration at the Kampala Session with a view to exchanging views and developing possibly a common position on the basic principles of human rights. A draft declaration in this regard was prepared and adopted by the Committee.

(h) Trade Law Matters: Legal Aspects of Privatization

The study presented at the Kampala Session was a preliminary study submitted to the Islamabad Session (1992) with the final objective of preparation of a guide on legal aspects of privatization in Asia and Africa. It has been elaborated in the light of the information collected by the Secretariat.

To attain the objective of encouraging study, dissemination and wider appreciation of international law, the Committee continues to print the research-oriented reports of its annual sessions. It is intended to publish regularly in the annual reports, some selected AALCC studies. Also, the emphasis in the work programme of the UN Decade of international Law has encouraged the AALCC to reproduce its studies which have a direct bearing on current topics of International Law.

Frank X. Njenga
Secretary General

New Delhi,
1st October, 1993

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I. Asian African Legal Consultative Committee

(i) Background Note

The Asian-African Legal Consultative Committee, an inter-governmental organization was constituted on the 15th November, 1956 as a tangible outcome of the historic Bandung Conference held in April 1955. The Committee has at present a membership of forty three countries,[1] comprising almost all the major States from Asia and Africa. The Committee's annual sessions are attended by about fifty observer delegations representing governments and international organizations from all regions consistent with the global impact of its work in a number of fields, every year.

1. Basic Purpose

The purpose of the Committee, as originally envisaged, was to serve as an advisory body to its member governments in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern. Its activities have, however, been broadened from time to time to keep pace with the needs and requirements of its member governments and this has been especially so in recent years in the field of economic relations. The Committee as the only organization at governmental level embracing the two continents of Asia and Africa has also oriented its

1. Arab Republic of Egypt; Bangladesh; China; Cyprus; Gambia; Ghana; India; Indonesia; Islamic Republic of Iran; Iraq; Japan; Jordan; Kenya; Democratic People's Republic of Korea; Republic of Korea; Kuwait; Libya; Malaysia; Mauritius; Mongolia; Myanmar; Nepal, Nigeria; Oman; Pakistan; Philippines; Qatar; Saudi Arabia; Senegal; Sierra Leone; Singapore; Somalia; Sri Lanka; State of Palestine; Sudan; Syria; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates; and Yemen Arab Republic. Botswana is an Associate Member.
Australia and New Zealand have the status of Permanent Observers.

activities to complement the work of the United Nations in several areas. In the light of the Committee's growing involvement with the work of the United Nations, the General Assembly by a Resolution, adopted at its thirty-fifth Session in 1980 decided to accord the Committee Permanent Observer Status at the United Nations; a distinction which it shares with eleven other inter-governmental organizations. The Committee holds its annual session in its member countries on the basis of invitations received. In addition, consultations and meetings are held throughout the year, in Working Groups or special meetings related to specific topics.

2. The Secretariat

The Committee's Secretariat is located in New Delhi and is headed by an elected Secretary General. He is assisted by Deputy Secretaries General and Assistant Secretaries General who are senior officers of Member Governments sent on secondment besides the regular staff of the Secretariat in professional and administrative categories. The Committee also maintains Permanent Observer Missions to the United Nations both at New York and at Vienna.

3. Procedure for Membership

Membership of the Committee is open to Asian and African Governments desirous of participating in the Committee in accordance with its Statutes and Statutory Rules. Any such government has to address a written communication to the Secretary General of the AALCC intimating its desire to participate in the Committee as a full or an associate member and stating its acceptance of the Statutes and Statutory Rules. The communication when received is circulated among the Member Governments with a request for submission of their comments within a period of six weeks. Unless objections are received from not less than one-third of the total membership of the Committee, the government concerned is declared admitted as a member. The only distinction between full members and associate members is that the associate members have to pay a fixed contribution and can not participate in the policy or organisational matters.

4. Finances

The Committee's finances are met primarily from three sources namely (i) the general budget to which contributions are made by all Member States; (ii) voluntary contributions including contribution in the form of deputation of officers; and (iii) special budget for specific purposes such as for the Arabic Division.

All members have obligation to contribute towards the general budget which is shared on the basis of an agreed formula. The minimum contribution on this basis comes to approximately US $ 5,000 whilst the upper limit is considerably higher depending upon various factors such as the country's rate of contribution to the budget of the United Nations. The Arab Member States also make contribution towards the Arabic budget which goes towards translation of documents into Arabic and for interpretation during the Annual Sessions. All other contributions are on a voluntary basis.

5. Activities of the Committee

The Committee and its Secretariat work very closely with its Member Governments, particularly in the context of advisory role, resulting in frequent consultations between the Secretary-General of the Committee and the Member Governments at ministerial and expert levels.

During the first ten years of the Committee's establishment its main functions centered on consideration of international legal questions referred to the Committee by its Member Governments. Some of the topics so referred were of considerable importance to the region where uniformity of approach was desirable. The subjects considered by the Committee during this period included Diplomatic Immunities and Privileges; Immunity of States in respect of Commercial Transactions; Extradition of Fugitive Offenders; Status and Treatment of Aliens; Dual or Multiple Nationality; Legality of Nuclear Tests and the Rights of Refugees.

Since 1968, the main emphasis of the Committee's work has been to render assistance to the Member Governments to prepare themselves on some of the major international questions before the United Nations and especially those of Plenipotentiary Conferences. In this connection, mention may be made of the Vienna Convention on the Law of Treaties and the Negotiations on the Law of the Sea spread over a period of eleven years. More recently, the Committee has actively been involved in the preparatory and follow-up work related to the United Nations Conference on Environment and Development, held in Brazil in June 1992.

Almost simultaneously with the establishment of the Committee on a regular footing, the United Nations had evinced considerable interest in the Committee's activities and close collaboration has been developed not only through inter-secretariat consultations but also through the Committee's participation in a number of plenipotentiary conferences convoked by the United Nations. In the year 1960 the Committee entered into official relations with the International Law Commission (ILC) in pursuance of which the

Commission is traditionally represented by its Chairman at the Committee's regular sessions. The Committee is also represented by its Secretary-General at the Annual Sessions of the ILC. In 1968 the Committee was accorded the status of a participating inter-governmental organization at the UNCTAD and in 1970 official relations between the Committee and the UNCITRAL were established. In addition, the Committee has been working in close co-operation with the United Nations High Commissioner for Refugees (UNHCR), the United Nations Environment Programme (UNEP), the International Maritime Organization (IMO), the Food and Agricultural Organisation (FAO), International Atomic Energy Agency (IAEA) and various regional Economic Commissions of the United Nations. The Committee also maintains relations with the Commonwealth Secretariat, the Hague Conference on Private International Law, the UNIDROIT, the Organisation of African Unity (OAU), the League of Arab States, and other regional, inter-governmental organisations.

During the past few years the Committee's activities have also been devoted to the field of economic relations and trade law. In this area the Committee has been working closely with the UNCTAD as a participating inter-governmental organisation as well as with the UNCITRAL. In addition, special subjects of importance to Member Governments have been taken up such as preparation of Standard/Model Contracts for use in international trade transactions relating to commodities and model bilateral agreements on promotion and protection of investments, formulation of schemes for industrialisation and organization of dispute settlement system in economic matters through establishment of Regional Centres for Arbitration and development of national arbitral institutions. Three Regional Centres for Arbitration have so far been constituted under the auspices of the Committee which are located in Kuala Lumpur, Cairo and Lagos. The Committee also sponsored two ministerial meetings on regional co-operation in industry, one in Kuala Lumpur in 1980 and the other in Istanbul in 1981.

The items on the current work programme of the Committee comprises of the following: Preparation of notes and comments on agenda items before the Sixth Committee and items having legal implications for the Annual Session of the General Assembly; United Nations Decade of International Law; Status and Treatment of Refugees; International Rivers; Law of the Sea; Mutual Co-operation on Judicial Assistance; Jurisdictional Immunities of States; Legal Framework of the Zone of Peace; UN conference on Environment and Development (UNCED); Elements of a Legal Instrument on Friendly and Good Neighbourly Relations of States of Asia, Africa and the Pacific; Indian Ocean as a Zone of Peace; Environmental Protection;

Control of Transboundary Movement of Hazardous Waste and its Disposal; Deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Convention; Responsibility and Accountability of former colonial powers; Debt burden of developing countries; Regional co-operation in Industries; World Conference on Human Rights; Follow-up of the work of ILC, UNCITRAL, UNIDO and UNCTAD, Hague Conference and UNIDROIT on legal issues and preparation of notes and comments as may be necessary; Periodic meetings of Legal Advisers of member governments; Training Programme; Rendering of assistance by the Committee's Secretariat to a Member Government on any problem of particular interest to that government upon request.

(ii) International Seminar on the Palestinian Question, New Delhi

As a first step towards the implementation of the recently concluded Cooperation Agreement between the AALCC and the League of Arab States, a Seminar on Legal aspects of the Palestinian question was organised jointly by the AALCC and the League of Arab States Mission in New Delhi on 27th and 28th November, 1992. It also provided an occasion to celebrate the International Day of Solidarity with the Palestinian People. Besides the representatives of AALCC Member States it was attended by diplomats from non-members States, Members of Parliament, academicians and the media representatives. It was inaugurated by H.E. Mr. Eduardo Felerio, the Minister of State for External Affairs, Government of India.

Messages of Solidarity were received from Mr. Yassir Arafat, President of the State of Palestine, Mr. Narasimha Rao, the Prime Minister of India and Dr. Ahmed Esmat Abdul Meguid, Secretary General of the League of Arab States. The speakers among others included, Dr. (Mrs.) Najma Heptulla, Deputy Chairperson Rajya Sabha (India), Mr. A.L. Abdul Latif Hagiah, Director General of Political Department of PLO and envoy of Mr. Yassir Arafat, Mr. Ahmed Attaf, Chairman, Council of Heads of Arab Diplomatic Missions in New Delhi and Ambassador of Algeria, Mr. F.X. Njenga, Secretary General of AALCC and Mr. Yu Xing Zhi, Counsellor, Ministry of Foreign Affairs, People's Republic of China. The AALCC Secretariat contributed a paper entitled "Legal Aspects of the Palestine Question." A Resolution of Solidarity was adopted at the conclusion of the Seminar.

(ii) Co-operation Between the United Nations and the Asian-African Legal Consultative Committee

The General Assembly, at its thirty-fifth session, accorded permanent observer status to the Asian-African Legal Consultative Committee and invited the Committee to participate in its sessions and work in the capacity of an observer. In February 1981, AALCC established a permanent observer mission to the United Nations. On the occasion of the Commemoration of the Committee's twenty-fifth anniversary, the Assembly, at its thirty-sixth session, requested the Secretary-General of the United Nations to carry out consultations with the Secretary-General of AALCC to further strengthen and widen the scope of the co-operation between the two organisations. A co-operative framework was subsequently established and was noted with deep satisfaction by the Assembly at its thirty seventh session. At its thirty-eighth session, the Assembly requested the Secretary-General of the United Nations to continue to take steps to strengthen the co-operation between the United Nations and AALCC in the field of progressive development and codification of international law and other areas of common interest. At its thirty-ninth session, the Assembly commended AALCC for orienting its programme to strengthen its supportive role to the work of the United Nations in wider area. At its fortieth session, the Assembly took note of the study on the strengthening of the United Nations prepared by AALCC (A/40/726 and Corr. 1, annex), as well as the study on the role of the International Court of Justice (A/40/682, annex) and other efforts of AALCC in the continuation of its programme of support to the work of the United Nations. At its forty-first session the Assembly noted with appreciation the continuing efforts of the Committee towards stengthening the role of the United Nations and its various organs, including the International Court of Justice, through programmes and initiatives undertaken by it. The General

Assembly appreciated the commendable progress achieved during the past five years towards enhancing co-operation between the two organisations in wider areas.

In May 1987, following a series of consultations and meetings between the officials of the United Nations and the then Secretary-General of the AALCC, a programme of Co-operation was drawn up which identified nine specific areas viz., Co-operative framework; Representation at Meetings and Conferences; Sixth Committee Matters; Law of the Sea Matters; Question of Refugees; Efforts towards strengthening the Role of the United Nations through Rationalization of functional modalities; Illicit Traffic in Narcotic Drugs; International Economic Co-operation for Development, Zone of Peace and International Co-operation.

In its resolution 45/4, the General Assembly noted the continuing efforts of AALCC towards strengthening the role of the United Nations and its various organs, including the International Court of Justice, through programmes and initiatives undertaken by the Committee; the commendable progress achieved towards enhancing cooperation between the United Nations and AALCC in wider areas; and the decision of AALCC to participate actively in the programmes of the United Nations Decade of International Law.

A. Cooperative framework

Pursuant to the cooperative framework agreed in 1987, consultations have been routinely conducted on matters of common interest between the secretariat of AALCC and the competent offices and organs of the United Nations, in particular, regarding representation at meetings and sessions, exchange of documentation and information, and the identification of areas where the supportive role of AALCC might be most productive. In light of these consultations, AALCC has tried to orient its work programmes to accord priority to matters that are of current interest to the United Nations and to initiate actions with a view to strengthening the role of the United Nations. The areas of cooperation now cover matters in the economic and humanitarian fields in addition to progressive development and codification of international law.

B. Representation at meetings and conferences

During this period, the Asian-African Legal Consultative Committee was represented at various meetings and conferences held under the auspices of the United Nations and its organs and agencies, including the regular session of the General Assembly, the International Law Commission, the

United Nations Commission on International Trade Law (UNCITRAL), the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, the Preparatory Committee for the United Nations Conference on Environment and Development, the Meeting of Senior Environmental Law Experts on the Progress made on the 1981 Montevideo Programme and Preparation for the Second Meeting on Development and Periodic Review of Environmental Law held at Geneva in July 1991, the International Working Group on the Creation of an Effective International Crime and Justice Programme held at Vienna in August 1991 and the United Nations Conference on Environment and Development (UNCED).

With a view to assisting its Member States in preparing for UNCED, the secretariat of the Committee has been represented at most of the meetings of the Preparatory Committee for UNCED; the Inter-Governmental Negotiating Committee on the Framework Convention on Climate Change as well as the Inter-governmental Negotiating Committee on a Convention on Biological Diversity. AALCC circulated a statement of General Principles of International Environmental Law in the form of a working document (A CONF 151/PC/WG.III/5) at the final session of the Preparatory Committee for UNCED held in New York in 1992.

The thirty-first session of AALCC held at Islamabad, Pakistan, in 1992, was attended, *inter alia*, by the Registrar of the International Court of Justice, the Chairman of the International Law Commission, the Director of the Codification Division of the Office of Legal Affairs (on behalf of the Legal Counsel) and officials representing the United National and the Office of the United Nations High Commissioner for Refugees (UNHCR).

C. Role of the United Nations and the United Nations Decade of International Law

As a part of its contribution to the commemoration of the fortieth anniversary of the United Nations, the Secretariat of AALCC prepared a study on "Strengthening the role of the United Nations through rationalization of functional modalities with special reference to the General Assembly" (A/40/726 and Corr. 1, annex). The study provided an overall assessment of the functioning of the United Nations focussing on certain specific matters and issues. Subsequently, the AALCC prepared a set of recommendations on the improvement of the functioning of the General Assembly (A/41/437, Annex). The AALCC continues to follow-up the implementation of the relevant resolutions relating to this subject as well as the progress on various other related proposals.

Pursuant to General Assembly resolution 44/23 of 17 November 1989, in which the Assembly, *inter alia*, declared the period 1990-1999 as the United Nations Decade of International Law, the secretariat of AALCC prepared a paper identifying a number of issues involved and of activities that may be taken during the Decade. At its twenty-ninth session held in Beijing in March 1990, AALCC, while endorsing the secretariat's proposal, urged greater collaboration with the United Nations in this regard. A report on the role that AALCC could play in the realization of the objectives of the Decade was submitted to the Secretary-General under that topic (A/45/430. annex).

D. Promoting wider use of the International Court of Justice

At the fortieth session of the General Assembly, an AALCC Study on the question of possible wider use of the International Court of Justice by a *compromis* when the parties so agree, was submitted and circulated to Member States (see A/40/682, annex). The study focussed attention on the advantages to be obtained by using the Court or its Special Chamber in preference to using ad hoc arbitral tribunals. A colloquium on the role of the Court in disputes referred to it by Member States by means of special agreement was subsequently held at the United Nations Headquarters to provide opportunities for in-depth explanation of the available procedures under the Rules of the Court for resolving disputes in matters referred under special agreements, with special reference to hearing of cases by a chamber of the Court at the request of the parties.

A meeting of the Legal Advisers of the member States of AALCC, convened at United Nations Headquarters in New York in November 1991, *inter alia* considered the issue of peaceful settlement of disputes. While addressing the meeting, the President of the International Court of Justice, Sir Robert Jennings, said that he had found renewed support for the Court in the General Assembly; he also emphasized, *inter alia*, the importance of the advisory opinions of the court as an instrument of preventive diplomacy.

Recently, the Secretariat of the AALCC has undertaken preparation of a study on the enhanced utilization of the International Court of Justice in matters relating to the protection and preservation of the environment. A memorandum outlining the basic approach of the study was submitted to the Registrar of the International Court of Justice. In this context, it should be noted that the General Assembly, in its resolution 44/23 entitled "United Nations Decade of International Law", recognizes that one of the main objectives of the Decade is to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice.

E. Measures designed to further the work of the Sixth Committee

Pursuant to its programme of rendering assistance to its member States for active participation in the work of the General Assembly, AALCC has, since 1982, prepared notes and comments on items before the Sixth Committee, including the report of the International Law Commission. In addition, consultations have been arranged from time to time during the General Assembly between the representatives of member States of AALCC and other interested Governments to provide opportunities for an exchange of views on those matters.

AALCC continues to maintain its links with the International Law Commission and has included in its current work programme the question of non-navigational uses of international watercourses — a subject under consideration by the Commission. At its thirty-first session, the Committee, *inter alia*, requested the International Law Commission to take up as a priority item the subject "Legal aspects of the protection of the environment of areas not subject to national jurisdiction (global commons)".

Collaboration has also continued between AALCC and UNCITRAL. The secretariat of AALCC was represented at the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century, held in New York in May 1992, in conjunction with the twenty-fifth session of UNCITRAL. The secretariat is now in the process of preparing notes and comments on the items discussed in the course of the aforementioned Congress for the use of its member States when those items are to be discussed at the next session of UNICITRAL.

F. Measures for the promotion of ratification and implementation of the United Nations Convention on the Law of the Sea

AALCC has considered the question of encouraging and facilitating the ratification of the United Nations Convention on the Law of the Sea, and has urged its member States signatories to the Convention to ratify it in order to allow its early implementation. AALCC has also made an appeal to all other States to consider ratifying or acceding to the Convention at the earliest possible date. At its Cairo (thirtieth) session in 1991, AALCC considered a note prepared by its secretariat on the significance and cost of ratification of the Law of the Sea Convention. Subsequently, AALCC also discussed matters relating to the Preparatory Committee for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. At its thirty-first session, AALCC urged the International Law Commission to consider including in its work programme an item entitled

"Reservation for peaceful purposes of the international sea-bed area and the high seas for marine scientific research."

G. International economic cooperation for development

Since the eleventh special session of the General Assembly, held in 1980, AALCC has concentrated on the question of international economic cooperation for development and, to this end, it has participated in the sessions and meetings of the Economic and Social Council, UNCTAD and UNCITRAL. Various suggestions have been put forward for consideration by its members. AALCC has also prepared model bilateral agreements for promotion and protection of investments, so as to generate a wider flow of capital and technology to the developing countries in the Asian-African region. Steps are now being taken to promote wider appreciation of the models among the Governments of the Asian-African region.

The AALCC has been able to prepare a legal framework for industrial joint ventures. It has compiled the relevant information and successfully prepared a legal guide on joint ventures similar to the one prepared by UNCITRAL on drawing up of international contracts for industrial works.

Under an AALCC scheme for settlement of disputes in economic and commercial transactions, three regional arbitration centres have been established at Kuala Lampur, Cairo and Lagos. One of the objectives of these centres is to help in the promotion and implementation of the UNCITRAL arbitration rules. Negotiations concerning the establishment of another similar regional arbitration centre at Tehran, intended primarily for oil arbitration, are at an advanced stage.

In response to a request, the secretariat of AALCC prepared a feasibility study on establishing a centre for research and development of legal regimes applicable to the economic activities in developing countries. The secretariat of AALCC prepared further a study on how to strengthen its capabilities to collect and disseminate information and data from various United Nations agencies and other bodies. A Data Collection Unit has been established recently at its headquarters at New Delhi to acquire expertise in collecting and analysing the necessary data and to develop the requisite expertise. The Unit has reportedly acquired the requisite hardware and is in the process of preparing the necessary software; it has requested the member States of the Committee as well as the relevant international organizations to make available to the Unit the requisite data in this regard.

An item on the debt burden of developing countries has been on the agenda of the Committee since its Kathmandu (twenty-fourth) session in

1985. The subject was also considered by an Expert Group Meeting held at New Delhi in November 1986. The secretariat prepared several studies on the subject which were considered by successive sessions. A paper entitled "Legal aspects of international loan agreements" was circulated at its Singapore (twenty-seventh) session in 1988. The current phase of work on the subject includes *inter alia* a study of the legal aspects of loan rescheduling. At its twenty-ninth session, the secretariat of AALCC was requested to continue monitoring developments in this field and to formulate a set of legal principles and guidelines on that subject. The Committee, however, discussed this item at its Kampala Session.

H. Question of refugees

In cooperation with UNHCR, AALCC has, since 1964, been actively engaged in the study of refugee law and refugee problems. Its work on these subjects led to the adoption of its Bangkok principles in 1966 and an addendum thereto in 1970. This pattern of cooperation was reactivated following the adoption by the Central Assembly of its resolution 36/38 and the AALCC decision at its Tokyo (twenty-second) session in 1983. The deliberations at that session paved the way for closer cooperation between AALCC and UNHCR. At its Kathmandu (Twenty-fourth) and Arusha (twenty-fifth) sessions in 1985 and 1986, respectively AALCC gave detailed consideration to the "principle of burden-sharing", and a consensus was reached at the twenty-fifth session that the concept of burden-sharing had become through the practice of States, "a principle of humanitarian refugee law".

At its Bangkok (twenty-sixth) session in 1987, AALCC adopted another addendum to its Bangkok Principles of 1966, which elaborated the concept of burden-sharing. AALCC also examined the question of State responsibility in regard to refugees. At its twenty-fifth session, the Secretariat of AALCC was asked to examine the concept of a safety zone for the displaced persons in the country of origin. During its twenty-sixth and twenty-seventh sessions, AALCC held discussions on this matter, centering on the legal status of such a safety zone and the circumstances under which a safety zone could be established in the country of origin of refugees or displaced persons. Currently, the secretariat of AALCC is re-examining the definition of the term "refugees" and is preparing a compendium of legal principles and case law on various issues relating to refugees. At the twenty-ninth session, the secretariat was mandated to prepare a study on the rights and duties of refugees as well as on the obligation of states towards refugees.

In 1991, AALCC organized jointly with UNHCR a two-day workshop at New Delhi on "International Refugee and Humanitarian Law in the Asian-African region". The objective of the workshop was to enhance the awareness of government authorities of member and non-member States of the region of the comprehensive character of the international instruments concerning refugees and, in particular, to promote the ratification of or accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees among AALCC member States. The workshop, *inter alia*, recommended that the secretariat of AALCC should consider the possibility of preparing a draft model legislation relating to refugees. Accordingly a draft model legislation has been prepared by the secretariat of AALCC to help its member States in formulating their national legislation on the subject and in implementing the 1951 Convention and the 1967 Protocol and other relevant regional instruments on refugees.

I. Zones of peace and international cooperation

At its twenty-fourth session, AALCC considered the concept and legal framework of a zone of peace in the concept of a reference made by a member State and a preliminary study on the concept prepared by the Secretariat. The matter was further discussed at the twenty-fifth session and it was decided that an expert group would consider the contents and implications of various proposals on the establishment of peace zones made within and outside the United Nations. Thereafter, a study on the Indian Ocean as a zone of peace was considered at the twenty-ninth session. The secretariat of AALCC was requested to establish close cooperation in this regard with the United Nations Ad Hoc Committee on the Indian Ocean.

AALCC had included in its work programme a topic entitled "Elements of a legal instrument on friendly and good-neighbourly relations of States in Asia and the Pacific". At the twenty-sixth session, it was decided to widen the scope of the topic to include the African region as well and to appoint the delegate of Mongolia as the Rapporteur. At the twenty-seventh session, the discussion centered on the Rapporteur's report. The Rapporteur prepared a further report for the twenty-ninth session, examining the relevance of certain principles such as the principle of sovereign equality of States; the non-use of force or threat of force; peaceful settlement of disputes; respect for territorial integrity and inviolability of frontiers; the principle of promotion of collective security and disarmament; and State responsibility. This topic however could not be taken up at the Kampala Session.

J. Illicit Traffic in Narcotic Drugs

Pursuant to a decision taken at the twenty-fourth session, the secretariat

of AALCC prepared a study entitled "International control of narcotic drugs and psychotropic substances: efforts within the United Nations". This study was submitted to the General Assembly on the occasion of the fortieth anniversary of the United Nations.

K. Other issues currently before AALCC

At its twenty-seventh session, AALCC included an item on its agenda entitled "Criteria for the distinction between terrorism and the people's struggle for liberation". The subject was discussed at the twenty-eighth and twenty-ninth sessions of the Committee. The secretariat was asked to work in close coordination with the Sixth Committee of the United Nations where a similar item has been under consideration.

At its twenty-seventh session, AALCC included an item in its agenda entitled "Deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Conventions". At its twenty-eighth session, AALCC considered the customary and codified law relating to occupied territories, and briefly discussed the duties of occupying power. The Committee then directed its secretariat to undertake a comprehensive study on the subject, including the question of payment of compensation to Palestinians. The study prepared by the secretariat was considered by AALCC at its twenty-ninth Session, which directed the secretariat to prepare a further study taking into account all legal aspects of the matter, including the issues of resettlement in violation of international law by Isreal of a large number of Jews from the former Soviet Union into Palestine. Thereafter the matter was also considered at its thirty-first and thirty-second sessions, held in Islamabad and Kampala respectively.

At its twenty-ninth session, the Committee directed the secretariat to undertake a study on cooperation between the Asian-African Countries to ban the dumping of toxic and other wastes into their countries and to cooperate in the formulation of regional or subregional conventions banning the dumping of toxic and other wastes.

At its thirty-first session (1992) the AALCC secretariat was mandated to monitor the preparatory process of the World Conference on Human Right to be held in Vienna in June 1993. A document entitled 'Preparation for the World Conference on Human Rights' was prepared by the secretariat for consideration at the Kampala session with a view to exchanging views and developing possibly a common position on the basic principles of human rights.

Forty-seventh Session Agenda item 20

COOPERATION BETWEEN THE UNITED NATIONS AND THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Australia, China, Cyprus, Egypt, India, Indonesia, Iraq, Iran (Islamic Republic of), Japan, Kenya, Mongolia, Mauritius, Nepal, Nigeria, Namibia, Pakistan, Philippines, Sri Lanka and United Republic of Tanzania; draft resolution

The General Assembly,

Recalling its resolutions 36/38 of 18 November 1981, 37/8 of 29 October 1982, 38/37 of 5 December 1983, 39/47 of 10 December 1984, 40/60 of 9 December 1985, 41/5 of 17 October 1986, 43/1 of 17 October 1988 and 45/4 of 16 October 1990,

Having considered the report of the Secretary-General on cooperation between the United Nations and the Asian-African Legal Consultative Committee,[1]

Having heard the statement made on 21 October 1992 by the Secretary-General of the Asian-African Legal Consultative Committee on the steps taken by the Consultative Committee to ensure continuing, close and effective cooperation between the two Organizations,

1. **Takes note with appreciation** of the report of the Secretary-General;

2. **Notes with satisfaction** the continuing efforts of the Asian-African Legal Consultative Committee towards strengthening the role of the United Nations and its various organs, including the International Court of Justice, through programmes and initiative undertaken by the Consultative Committee;

3. **Notes with satisfaction** the commendable progress achieved towards enhancing cooperation between the United Nations and the Consultative Committee in wider areas;

4. **Notes with appreciation** the decision of the Consultative Committee to participate actively in the programmes of the United Nations Decade of International Law;

5. **Requests** the Secretary-General to submit to the General Assembly at its forty-ninth session a report on cooperation between the United Nations and the Consultative Committee;

6. **Decides** to include in the provisional agenda of its forty-ninth session the item entitled "Cooperation between the United Nations and the Asian-African Legal Consultative Committee".

1. A/47/385.

(iii) Meeting of Legal Advisers of the AALCC

The proposal for the periodic meetings among the Legal Advisers of the member States of the AALCC for exchange of views on current problems and issues was initiated and approved at the Committee's Tokyo Session held in 1974. The first meeting of the Legal Advisers was held in 1978 followed by another in 1979 both of which were devoted to exchange of views on the organization of legal advisory services in member governments.

Thereafter at the Tokyo session held in May 1983, at the initiative of Bangladesh, it was decided to regularly hold the Legal Advisers Meeting. Then in 1983 in New York such a meeting was held to consider a number of matters. These included, *inter alia,* Jurisdictional Immunities of States; Improvements of Modalities of Work before the Sixth (Legal) Committee of the United Nations General Assembly; Promoting the wider use of the International Court of Justice; and the question of Implementation of Multilateral Conventions adopted under the auspices of the United Nations.

A meeting of the Legal Advisers was again held in New York in November 1987 for the consideration of draft articles on the Jurisdictional Immunities of States as adopted by the International Law Commission on first reading at its Thirty-eighth Session.

The AALCC recently convened a Meeting of the Legal Advisers of the member states at the United Nations Headquarters in New York on 23rd October 1992. The Meeting was chaired by Hon'ble Justice Akhtar Ali Kazi of Pakistan, and was attended by the Secretary General of the AALCC Mr. Frank X. Njenga, the President of the International Court of Justice Sir Robert Jennings, the Chairman of the Sixth Committee Ambassador Javed Zarif, the Under-Secretary-General, Legal Counsel of United Nations.

Mr. Carl August Fleischhauer and the Secretary-General of the United Nations Conference on Environment and Development, Mr. Nitin Desai.

The meeting was also attended by the representatives of Australia, Austria, Botswana, China, Cyprus, Democratic Republic of Korea, Egypt, Ghana, India, Indonesia, Iran, Kenya, Malyasia, Mexico, Myanmar, Nepal, New Zealand, Nigeria, Pakistan, Palestine, the Philippines, Senegal, Sudan, Uganda Vanuatu, United Republic of Tanzania and the United Kingdom.

The Agenda of the meeting included: (1) The role of the International Court of Justice in peaceful settlement of environmental disputes; (2) A review of the outcome of the United Nations Conference on Environment and Development 1992; (3) Follow-up work related to the United Nations Framework Convention on Climate Change and the Conventon on Biodiversity; (4) Report on the work of the International Law Commission at its Forty-fourth Session; (5) Report of the Secretary-General of the Asian African Legal Consultative Committee on the United Nations Decade of International Law.

The Chairman in his opening statement recalled the United Nations Conference on Environment and Development, held in Rio from 3 to 14 June 1992, as one with mixed but historical results. he stated that among many developing countries there was a degree of disappointment that there were no real commitments made by the industrialized countries. He further recalled that the toughest negotiations were on the Agenda 21 chapters. The Commission on Sustainable Development — to be set up as a follow-up mechanism for the Rio Conference — would regularly review and monitor progress towards this target and the review would systematically combine the monitoring of the implementation of Agenda 21 with a review of the finances available. This was an important development for developing countries as it was "for the first time that the monitoring and review of ODA flows would come under the jurisdiction of a UN body".

With respect to the UN Framework Convention on Climate Change he stated that despite the fact that some countries have expressed their dissatisfaction over the Climate Convention in view of the absence of concrete commitments for emission control, it was a Framework Convention which can be strengthened by additional protocols. He pointed out that the Earth Charter, the Convention on Biological Diversity and the Framework Convention on Climate Change recognize and incorporate the principles of peaceful resolution of conflicts including reference to the International Court of Justice.

The AALCC Secretary-General Mr. F.X. Njenga thanked Chairman Kazi for presiding over the Meeting and also Sir Robert Jennings for agreeing to address the Meeting and drew the attention of delegations to the documents available on the subject matter.

Sir Jennings spoke on the role of the International Court of Justice in peaceful settlement of environmental disputes. He suggested the creation of a special Chamber of the Court within the ICJ to deal with environmental problems.

Mr. Nitin Desai observed that the Earth Summit held in Rio was essentially not a technical or scientific conference. It was a political conference of policy makers. It was not an attempt to explore intellectual frontiers but to stretch the political limits to define political compromises and policy consensus on environmental issues.

The representatives of China, Nigeria, Cyprus, Democratic People's Republic of Korea and Islamic Republic of Iran also made brief observations.

(iv) Matter Concerning the Headquarters of the AALCC

The Asian Legal Consultative Committee, as it was originally called, was constituted on 15th November 1956. The Committee was renamed as the Asian-African Legal Consultative Committee with effect from 19th April, 1958 to include participation of countries from the African continent. At the Sixth Session of the Committee held in Cairo in 1964, the Committee by its resolution VI(10) adopted a set of articles regarding its privileges and immunities as well as the privileges and immunities of the delegates and observers to its sessions and the officials of the Secretariat. Pursuant to that resolution an Agreement was concluded between the Asian-African Legal Consultative Committee and the Government of India in September 1966. The Committee was intially constituted for a period of five years and thereafter its term was extended for successive five year periods on four subsequent occasions.

A Special Committee of Liaison Officers in its report in 1980, recommended that the Committee should function on a permanent basis. In order to facilitate its effecitve functioning, the following steps were identified:

(i) Review of the Committee's financial structure and the pattern of financing;
(ii) Complete revision of the Statutes and Statutory Rules in order to bring them in conformity with the present structural position and its activities;
(iii) Conclusion of a Headquarters Agreement with the host Government;
(iv) Amendment of the Articles on the Privileges and Immunities of the Committee;
(v) Acquisition of premises for the Committee's Secretariat and
(vi) Review of the Staff structure and conditions of the service including retiral benefits for local personnel employed in the Secretariat.

The report of the Special Committee of Liaison Officers was submitted to member Governments in October 1980 for their comments and thereafter

it was taken up at the Committee's Colombo Session held in May 1981. There being no objection by any Member Country it was decided to place the Committee on a permanent footing.

At its Bangkok Session held in January 1987, the Committee adopted the revised statutes. A new Secretary General was elected during the Singapore session held in 1988. At the Nairobi Session (1989) the Committee adopted the revised statutory rules which came into force with effect from 1st May, 1989.

At the Beijing Session (1990) the Committee adopted the Administrative Staffand Financing Regulations which came into force on 17th March 1990.

Since, then the item on 'Headquarters Agreement' has regularly been on the Agenda of the AALCC Annual Sessions. Exhaustive consultations were held between the Secretary General of the AALCC and the Officials of the Government of India. While negotiating the issue of providing premises for the AALCC Secretariat, the Indian Government promised to offer a plot of land for the building, free of cost in the post diplomatic area of New Delhi.

During the thirty first session of the Committee held in Islamabad in 1992, the Heads of Delegations constituted a Working Group comprising of China, Egypt, Ghana, India, Indonesia, Japan, Malaysia and Uganda to examine the outstanding issues concerning the proposed Headquarters Agreement between the Government of India and the AALCC. The Secretary General ws designated as the convenor.

The Working Group held exhaustive discussion on the matter and examined in detail the possible course of action which the Committee would take to finalise the matter of the Headquarters Agreement including the issue of the premises.The Indian representative confirmed his Government's offer of a plot of land at no cost to the Committee in the prestigious diplomatic area in New Delhi measuring about (0.40) acres. The cost of the land which was yet to be determined, would be set-off against India's contribution to the cost of construction of the building which would have to be borne by all AALCC Member States. The terms and conditions of the offer of the plot were to be specified later and communicated in writing to the Secretary General. In the view of the Indian representative this was the most favourable offer that his Government could make and while they were privileged to have hosted the Committee for the last 35 years, they would not stand in the way of any other member State willing to make a better offer.

At the Thirty-Second Session held in Kampala (1993) an important development took place, concerning the relocation of the Headquarters of

the Committee. The Government of the State of Qatar made a generous offer to host the AALCC Headquarters at Doha on very flexible and attractive terms.

They offered to provide certain facilities such as necessary land for the headquarters building, adequate interest-free loan to finance its construction and full diplomatic privileges and immunities to the Secretary General and other eligible staff in accordance with international law and the Vienna Convention. The Committee in its decision adopted at that Session thanked the Government of Qatar for its generous offer to host the headquarters of the AALCC, and accepted the offer as reflected in the Resolution. Rich tributes were paid to the Government of India for hosting the AALCC for thirty-seven long years and for all the cooperation extended to the Organisation in discharging its functions as an intergovernmental organisation. The Delegate of India reiterated his Government's commitment to host the headquarters of the Committee. In view of the new offer made by the Government of Qatar, the Indian Government would appreciate Qatar's offer in writing to facilitate its full examination and to review its own offer.

After deliberations on the subject during which most delegations expressed their views, on various aspects concerning the relocation of the headquarters and its implications including additional financial obligations of the Member States, the President ruled that the Government of India would be given one month to consider whether they wished to improve upon their offer and communicate the same to the President. If their offer was comparable to that of the Qatar Government's offer then at his discretion, an intersessional meeting would be held at the Ambassadorial level in New Delhi under his chairmanship. Otherwise he would proceed to implement the decision as reflected in the resolution the text of which has been reproduced herewith.

Subsequent to Kampala Session the Joint Secretary, Ministery of External Affairs of the Government of India informed the Secretary General in a letter dated 19th February 1993 that the Indian Government had decided to withdraw its offer in support of the proposal made by the Government of Qatar.

RESOLUTION ON THE PROPOSED RELOCATION OF THE HEADQUARTERS OF AALCC FROM INDIA TO QATAR ADOPTED AT THE SIXTH PLENARY MEETING HELD ON 4TH FEBRUARY, 1993.

The Asian-African Legal Consultative Committee

Recalling its resolution dated 1st February 1992 adopted at the Thirty

First session in Islamabad, Pakistan regarding Headquaters Agreement;

Having considered a report by the Secretary-General contained in document No. AALCC\XXXII\Kampala\93\20;

Noting the historic role of the Government of India as one of the founders of the Non-Aligned Movement;

Noting with appreciation the contribution of the Government of India to the spirit and aspirations of the Non-Aligned Movement by hosting AALCC since its foundation;

Noting with satisfaction that the unfailing back-up of the Indian Government to the AALCC's activities has helped it to flourish and expand on both regional and international levels, and thus to contribute in sharing International Law developments and its condification;

Noting with great Satisfaction the Indian representative's assurance that the Indian Government will continue its full-fledged commitment to AALCC's principles, purposes and activities;

Decides:

1. To express its deep appreciation and esteem to the Government of India for the tremendous efforts and sincere support rendered to the AALCC for more than three decades during which the AALCC was based in New Delhi.
2. To express its thanks to the Government of the State of Qatar for its generous offer to host the Hedquartes of the AALCC in Doha which it accepts, unless the Indian Government would make a better offer in one month after the conclusion of the Thirty-Second Session of the AALCC, in which case the President would hold an Inter-sessional Meeting at Ambassadorial level in New Delhi.
3. To request the Secretary-General of the AALCC and the President of the Thirty-Second Session to hold consultations with the Government of Qatar to consider and finalise the relevant details as soon as possible.
4. To request the Secretary General to report on this matter, at the earliest possible convenience, to the Liaison Officers in New Delhi.
5. To request the Secretary-General to report also on the financial implications involved in the moving of the Headquarters and the necessary staff from New Delhi to Doha; and
6. To report on the progress in the implementation of this decision to the Thirty-Third Session of the AALCC.

II. United Nations Decade of International Law

(i) Introduction

The item entitled "United Nations Decade of International Law" was inscribed on the agenda of the Twenty-ninth Session Committee held in Beijing in March 1990 in accordance with Article 4(d) of the Statutes of the Asian-African Legal Consultative Committee. At that Session the Committee considered a preliminary note submitted by the Secretary-General. The Note *inter alia* pointed out that the U.N. General Assembly at its Forty-fourth Session declared the Decade of the Nineties as the United Nations Decade of International Law and that the main purposes of the Decade should be:

(i) To promote acceptance of and respect for the principles of international law;

(ii) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;

(iii) To encourage the progresstive development and codification of international law;

(iv) To encourage the teaching, study, dissemination and wider appreciation of international law.

In order to gather specific proposals for the programme for the Decade and the appropriate action to be taken the Secretary-General of the United Nations was requested to seek the views of member States, appropriate international bodies and non-governmental organizations and to submit a report thereon to the Forty-fifth Session of the General Assembly. In the light of the proposals received a Working Group of the Sixth Committee in

the course of the Forty-fifth Session of the General Assembly was to be charged with the preparation of a generally agreeable programme for the United Nations Decade of International Law.

As an inter-governmental organization the AALCC had been invited to submit views on the programme for the Decade and an appropriate action to be taken on programme for the Decade including the possibility of holding a third international peace conference or other suitable international peace conference at the end of the Decade. The AALCC whose very *raison d'etre* is the progressive development and codification of international law addressed itself to and responded to the substance of the General Assembly Resolution 44/23 of 17 November 1989. That Note of Twenty-ninth Session spelt out the role which the AALCC could play during the decinneum in respect of the four elements which the General Assembly had identified. The main points of the Note, it had been proposed, could form the basis of the Secretariat's formal reply to the United Nations Secretary-General. The Committee was also requested to consider the preliminary enterprise with a view to mandating the Secretariat with the preparation of a comprehensive brief on the appropriate action to be taken during the United Nations Decade on International Law.

The Twenty-ninth Session of the Committee (1990) after a preliminary exchange of views, mandated the preparatioin of a comprehensive study on the UN Decade of International Law. In fulfillment of that mandate the AALCC Secretariat took some initiatives to update the study. It expressed the view that a further exchange of views both in the proposed Working Group of the Sixth Committee of the General Assembly at its Forty-fifth Session and at the subsequent Session of the AALCC could contribute useful inputs to the Secretariat's study. Subsequently, the Secretariat after the Twenty-ninth Session prepared and forwarded to the office of the Legal Counsel of the United Nations its observations and views on the Decade which were reporoduced in the Report of the United Nations Secretary-General on the item "United Nations Decade of International Law" (A/45/430 of 12 September 1990)

During the Forty-fifth Session the Sixth Committee established a Working Group on the United Nations Decade of International Law to prepare generally acceptable recommendations for the Decade. At that Session the General Assembly while adopting the programme of activities during the first term (1990-1992) of the Decade, requested the Working Group to continue its work at the Forty-Sixth Session in accordance with its mandate and method of work.

Subsequently with a view to inviting further comments and observations

from Member States the Secretariat prepared a paper for the Thirtieth Session of the AALCC held in Cairo (1991) where it furnished an overview of the opinions expressed during the Twenty-ninth Session (1990) and enumerated the initiatives which the Secretariat had undertaken in fulfillment of its mandate on the subject. That paper also included the observations and views which the Secretariat had prepared and forwarded to the Office of the Legal Counsel and the Draft Programme of activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law as prepared by the Sixth Committee's Working Group on the United Nations Decade of International Law and submitted to the Forty-fifth Session of the General Assembly.

The AALCC during its Thirtieth Session held in Cairo (1991) decided that the item should be given serious attention, and therefore, placed the item on the agenda of the meeting of the Legal Advisers of Member States of the Committee to be convened at the U.N. Headquarters in New York during the Forty-sixth Session of the General Assembly and on its Thirty-first Session agenda.

In the course of the meeting of the Legal Advisers of Member States of the AALCC a view was expressed that the 'Decade' could greatly contribute to the enhancement of the rule of law in inter-state relations. It was felt that the United Nations Declaration on the Decade of International Law had underscored the fact that the international community had, in recent years, rendered added importance to both international law and the International Court of Justice (ICJ). It was emphasized that the international community needed to take necessary steps to strenthen the role of the World Court. Pointing out that discussions on the role of the ICJ generally emphasized only its adjudicative role and overlooked the other roles it could perform, it was stated that the advisory opinions of the International Court of Justice were a very significant aspect of the role of the Court.

It was proposed that during the UN Decade of International Law the AALCC and the Sixth Committee of the General Assembly could take up progressive development and codification of such aspects of international law as (1) State Responsibility; (2) the Draft Code of Crimes Against the Peace and Security of Mankind; and (3) the Legal Effects of the Resolutions of the General Assembly.

The subject of the 'Decade' was subsequently discussed at the Thirty-first Session of the Committee held in Islamabad (1992). Inroducing the item at that Session the Assistant Secretary-General *inter alia* stated that the brief prepared by the Secretariat of the Committee endeavoured to furnish an overview of the numerous activities of the Committee since the

matter was last discussed, at the Committee's Thirtieth Session with a view to preparing comments for transmission to the Office of the Legal Counsel of the United Nations. In May 1992 the Secretariat of the Committee transmitted to the Legal Counsel of the United Nations a report on the activities of the Committee relating to the objectives of the Decade and observations on the United Nations Decade of International Law. That report has been reproduced herewith as the "Secretariat Study".

After due deliberations the Committee at its Thirty-first Session resolved that the item should be placed on the agenda of the meeting of the Legal Advisers of Member States of the Committee during the Forty-seventh Session of the United Nations General Assembly in New York. The Committee further directed the Secretariat to continue its efforts towards the success of the United Nations Decade of International Law and decided to place this item on the agenda of its Thirty-second Session.

Thirty-second Session: Discussions

At the Thirty second Session held in Kampala in 1993 the Assistant Secretary-General Prof. Huang Huikang while introducing the item 'UN Decade of International Law' stated that the item had been on the agenda of the Committee since the twenty-ninth session held in Beijing and had been considered at successive Sessions. He stated that the Geneal Assembly Resolution 46/53 had invited all international organisations to provide information on the activities that they had undertaken in the implementation of the objectives of the Decade. The AALCC Secretariat had accordingly furnished to the office of the UN Secretary-General some notes and observations. The documentation prepared by the Secretariat of the AALCC (Doc. No. XXXII/Kampala/93/2 and 2A) reflected the work of the Secretariat since the Islamabad Session (1992).

During the discussions, the *Delegate of the People's Republic of China* stated that his government supported the UN Decade of International Law and had participated in the organisation of the activities of its first term. During the first term programme of activities of the Decade, his government had organised an International Seminar on Developing Countries and International Environmental Law in 1991 and a Symposium on Third World Countries and International Law in 1992. During the same period, the Chinese Society of International Law had organised an International Seminar on the Teaching, Study and Wider Dissemination of International Law. His government shared the desire of the majority of members of the international society to strengthen the role of the ICJ in the peaceful settlement of disputes.

The Delegate of the Islamic Republic of Iran expressed the view that the proclamation of the decade of nineties as the UN Decade of International Law was a timely initiative. In the view of his delegation it was imperative that all members of the AALCC upheld the primacy of the rule of law in inter-State relations. He called upon the members of the Committee to endeavour towards the objectives of the Decade so as to facilitate the implementation of the programme of activities.

Referring to the programme of activities, adopted by the General Assembly at its forty-seventh session, for the second biennium of the UN Decade he pointed out that it called upon States to act in accordance with international law and particularly with the charter of the United Nations. He stated that international and regional organisations should be encouraged to promote the acceptance of and respect for principles of international law. Referring to his Government's proposal to the Sixth Committee to convene a week long congress on public international law, he stated that the same had been mooted to seek inputs from external sources. He observed that the proposed congress, if held, would provide a unique opportunity to the AALCC to publicise its activities.

The Delegate of Japan stated that the significance of the objectives of the Decade could not be overemphasized. It was essential to observe the principles of international law in order to establish a peaceful international community. He said that his government had undertaken several activities for promotion of the understanding of international law and for developing public acceptance of the UN Charter.

Referring to the means and methods for the peaceful settlement of disputes enumerated in the programme of the second term of the Decade, he stressed the significance of strengthening the role of the ICJ. His government, he said, encouraged all members States to accept the compulsory jurisdiction of the World Court with a view to facilitating the rule of law in international society. His government proposed to contribute an additional sum of US $25,000 to the Secretary-General's Trust Fund for Peaceful Settlement of International Disputes through ICJ.

The Delegate of the Republic of Korea said that his government had supported the programme of activities during the first term of the Decade and had undertaken the task of promoting its objectives. His delegations reaffirmed its commitment to the principles and norms of international law which represent central pillars of contemporary international relations. He expressed the hope that the AALCC would continue to make positive contributions to the progressive development and codification of international

law by strengthening bonds with such international legal institutions as the ILC and the Hague Academy of International Law.

The *Delegate of the Arab Republic of Egypt* expressed the view that one of the means of realising the objectives of the Decade was to ensure support for the idea of formulating a Convention on peaceful settlement of Disputes. He pointed out that despite its vital importance for the stability of international relations the issue of peaceful settlement of disputes was treated only as a declaratory legal disposition. In the view of his delegation there was need to negotiate specific legal obligations on peaceful settlement of disputes and to define adequate interim measures for their containment as well as to establish effective mechanisms for the settlement of disputes through negotiations.

The *Delegate of India* stated that his delegation supported the objective of the UN Decade of International Law and would contribute to the activities during its second term. He emphasized the significance of peaceful settlement of disputes in contemporary international relations.

The *Delegate of Libya* was of the view that some of the objectives of the Decade required in-depth consideration by the developing countries — particularly that of observance of international law and the peaceful settlement of disputes.

The *Delegate of Tanzania* addressed himself to the question as to what could be done to promote attainment of the objectives of the Decade by the developing states members of the AALCC. He stated in this regard that during the Decade member states could ratify various International Conventions. Calling for a period of more action rather than rhetoric he said that where national domestic legislation was required to give effect to multilateral instruments, endeavours should be made to enact such legislations.

In his view stock was required to be taken to ensure that human rights are respected. While preparing for the proposed Third Peace Conference, third world countries must avail themselves of the opportunity which they did not have at the second Peace conferece. The developing countries had the ability to influence the world order by making tangible contribution to international law principles as they had in the recent times in such cases as treatment of refugees, the law of the sea etc.

The Representative of UNCITRAL stated that the General Assembly in declaring the nineties as the UN Decade of International Law had considered international trade law as an integral part of international law. He said that his organization had made its contribution to strengthen the rule of law in

the international society. The UNCITRAL congress under the theme "International Trade Law in the 21st Century" (New York, 18-22 May 1992), provided a conceptual underpinning for further work in the area of international trade law. The congress placed particular emphasis on the need for the United Nations to provide technical assistance to developing states in implementing modern and harmonized trade laws and to the need for the United Nations to assist developing states in improving the quality of teaching of international trade law. Besides, the UNICITRAL had also organised a number of seminars on international trade law both in Africa and Asia. He proposed that the decision of the Committee on the item should recognise the significance of international trade law.

The *Delegate of Cyprus* said that the proposed draft Code of Crimes Against the Peace and Security of Mankind should clearly define crimes such as aggression, ethnic cleansing, demographic alteration and illegal transfer of populations.His delegation favoured vesting the proposed International Criminal Court with compulsory jurisdiction. The establishment of an International Criminal Court with compulsory jurisdicton would, in his view, reflect the Will of the community for a uniform application of international law.

The *Delegate of Kenya* while supporting the objectives of the Decade said that some recent events reflected a lack of commitment on the part of certain States to act in accordance with the principles of international law. He said that developing countries were often victims of opportunistic interpretation and application of international law.

The *Delegate of Iraq* said that the issue that required consideration was that of double standards adopted by the Security Council. Referring to violation of the fourth Geneva Convention of 1949 and Protocol I thereto resulting in acts of aggression and violation of State sovereignty, he said that jurists were obliged to stop the use of force.

The *Delegate of Syria* expressed the hope that during the Decade of International Law the principles and rules relating to international rivers would be progressively developed and codified.

The *Representative of the Organisation of African Unity (OAU)* said that during the Decade of International Law developing countries needed to look into the existing principles of law and institutions and consider whether these subserve the common interests of all States.

(ii) Decision on the United Nations Decade of International Law

Adopted on 5.2.1993

The Asian-African Legal Consultative Committee

Having taken note of the Report of the Secretary-General on the United Nations Decade of International Law contained in Doc. No. AALCC\XXXII\93\2 and *having* considered the Report of the meeting of the Legal Advisers of the Member States on the United Nations Decade of International Law convened during the Forty-sixth Session of the United General Assembly;

Reaffirms the importance of strict adherence to the principles of International Law as enshrined in the Charter of the United Nations;

Reiterates that many of the political, economic and social problems which riddle the member states of the International Society can be resolved on the basis of the law;

Welcomes the various initiatives taken by Member States of the Committee in the implementation and observance of the Decade;

Requests Member States to continue to give serious attention to the observance and implementation of the Decade;

Requests the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in this regard;

Decides that the item be given serious attention and steps be taken to place the same on the agenda of the Meeting of the Legal Advisers of Member States of the Committee to be convened at the UN Office in New

York during the Forty-eighth Session of the General Assembly;

Accepts the offer of the Government of Qatar to host an International Seminar under the auspices of the AALCC on the implementation of the principles of the new international law within the new international order;

Directs the Secretariat to continue its efforts towards the realisation of the objectives of the U.N. Decade of International Law; and

Decides to place the item the "U.N. Decade of International Law" on the agenda of its Thirty-third Session.

(iii) Secretariat Study: The United Nations Decade of International Law

The present report has been prepared pursuant to paragraph 3 of General Assembly Resolution 46/53 of 9 January 1992, entitled "United Nations Decade of International Law" whereby the Assembly invited all States and international organizations and institutions referred to in the programme to provide, update or suppplement information on activities they have undertaken in implementation of the programme to the Secretary General, as well as to submit their views on possible activities for the next term of the Decade.

Role of the AALCC

Following upon the adoption of the United Nations Decade of International Law the Secretary-General of the Asian-African Legal Consultative Committee has held consultations with the Legal Advisers of Member States of the Committee at each successive sessions of the General Assembly. The informal exchange of views that the Legal Advisers held coupled with intensive debate on some selected issues has further underscored the unique character of this organization who is constantly working to promote the progressive development and codification of international law.

Promotion of the Acceptance of and Respect for the Principles of International Law

The Asian-African Legal Consultative Committee has continued to urge Member States which have not already done so, to consider ratifying or acceding to multilateral conventions. The AALCC Secretariat is of the view

that since negotiations in multilateral treaty-making process are a longdrawn affair the instruments emanating from the process which often codify international law ought to be ratified as early as possible to bring law making conventions into force. This would ensure that the time, energy and labour as well as other resources invested in its adoption are not wasted. In this regard one may refer to such conventions as the Law of Sea Convention 1982, adopted by UNCLOS III, and such other treaties and conventions whose draft articles are drawn up by the International Law Commission over a period of years with the collaboratioin of the Sixth Committee of the General Assembly of the United Nations.

The AALCC organised a Workshop jointly with the Office of the UNHCR; to commemorate twenty-five years of AALCC and UNHCR relationship; entitled "International Refugee and Humanitarian Law in the Asian-African Region" in New Delhi in October 1991. The aim of the Workshop was to enhance the awareness of the government authorities in the region concerning the comprehensive character of the international instruments concerning refugees and in particular to promote the ratification of or accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees amongst the member States.

It should also be pointed out that in so far as the objective of acceptance of and respect for international law is concerned the AALCC Secretariat was among the first to endorse and urge ratification of or accession to both the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal as well as the Bamako Convention on Ban of Import Into Africa and the Control of Movement of Hazardous Wastes within Africa by its member States.

It should be noted that in many jurisdictions, while a State may have ratified or acceded to a treaty, in the absence of a national, enabling, legislation the provisions of the international instrument can only be cited out but cannot be invoked before the courts of that State. In promoting "acceptance of respect for the principles of international law" efforts have been made to ensure that such principles are effective and legally binding within the Member States. Thus, the Workshop on "International Refugee and Humanitarian Law" organized by the Secretariat of the AALCC and the UNHCR in New Delhi *inter alia* recommended that the Secretariat of the AALCC consider the possibility of preparation of a draft model legislation which could serve as guideline for the enactment of national/municipal laws relating to refugees. The AALCC is currently working on such a draft model legislation on refugee law which will, hopefully, be of use to the member states in formulating their national legislation on the subject in

implementing the 1951 Convention and 1967 Protocol and other relevant regional instruments on refugees.

Promotion of the means and methods for peaceful settlement of Disputes between States including resort to and full respect for the International Court of Justice

The AALCC is of the view that peaceful settlement of disputes is one of the cardinal principles of the Charter of the United Nations. This principle has since been reiterated in such instruments as the Declaration of Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, 1970; the Manila Declaration on the Peaceful Settlement of Disputes, 1982; and the Declaration on the Enhancement of the Effectiveness of the Principles Refraining from the Threat or Use of Force in International Relations, 1986. In the changing political climate the World Court has come to assume significance and importance hitherto unwitnessed and the time to come could well witness a universal, virtually unqualified acceptance of the role that the World Court can play in the pacific settlement of disputes.

A meeting of the Legal Advisers of the Member States of the AALCC organized in November 1991 *inter alia* considered the question of peaceful settlement of disputes. The President of the International Court of Justice, Sir Robert Jennings addressed the above meeting. Sir Robert Jennings prefaced his address with the remark that he found the renewed support for the Court in the General Assembly most gratifying and encouraging. He also emphasized the importance of advisory opinions of the International Court of Justice as an instrument of preventive diplomacy.

It may be recalled that a brief on the 'Role of the International Court of Justice' prepared by the Secretariat of the AALCC was circulated as a document of the Fortieth session of the General Assembly (A/40/680 ANNEX). The Secretariat now proposes to undertake a further study of the enhanced Role of the International Court of Justice in matters relating to the protection and preservation of the environment.

The Secretary-General of the AALCC participated in the working group of jurists convened by the Secretary-General of the Permanent Court of Arbitration at the Hague in May 1991. The members of that Working Group were of the view that the Permanent Court of Arbitration should enter into co-operation agreements with other existing arbitration institutions such as the AALCC whose Arbitration Centres in Kuala Lumpur, Cairo and Lagos, could provide their facilities to the Court if it was decided to hold

proceedings outside the Hague. It may be recalled that arbitrations under the Court at present are held at the Hague, which is not always the most convenient venue for many member States, particularly from Asia and Africa. As a follow-up measure the Secretary-General of the Asian-African Legal Consultative Committee intends to write to the Secretary-General of the Permanent Court of Arbitration as well as the Directors of the Regional Centres for Arbitration currently functioning under the auspices of the AALCC to initiate such agreement or agreements as may be necessary to facilitate such co-operation.

Progressive Development of International Law and its codification

One of the roles of the Asian-African Legal Consultative Committee is to articulate the view of the developing countries in order to strike a balance in the process of progressive developing and codification of international law. If the rule of law is to prevail, the formulation of principles and norms must go hand in hand with the process of implementation. The Thirty-first Session of the AALCC held at Islamabad (1992) furnished three instances of the inputs, which the Committee had made to the progressive development and codification of International Law.

The first of these relates to International Economic and Trade Law. The AALCC recognising the importance of relationship between economic development and harmonization of legal regimes concerned with international trade through sharing of accumulated experiences among Member States of the Committee have established a Data Collection Unit at its Headquarters in New Delhi. It is expected that once the unit acquires sufficient expertise in collecting and analysing the necessary data and develops the requisite expertise, an autonomous Centre for Research and Development of Legal Regimes applicable to the Economic Activities in Developing Countries would be established. The Data Collection Unit has already acquired the requisite hardware and is in the process of preparing the software necessary to achieve its objectives. The Unit has approached the Member States of the Committee as well as relevant international organisations to make available to the Unit the requisite data in this regard.

The second input was made in the course of deliberations on the Report of the International Law Commission at its Forty-fifth Session when the Committee at its Thirty-first Session (Islamabad, 1992) *inter alia* urged the International Law Commission to consider the inclusion in its programme of work an item entitled "Progressive Development of the Concept of Reservation for Peaceful Purposes with Regard to the High Seas, the International Sea-bed Area, and Marine Scientific Research."

Environment is the Common Concern of all mankind and in this sphere too the Asian-African Legal Consultative Committee has made an effort to contribute to the progressive development of International Environmental Law. The Secretary-General of the Committee was an active member of the Group of Legal and Technical Experts convened by the UNEP to formulate the principles relating to Liability and Compensation for Damages Arising from the Transboundary Movement of Hazardous Wastes. The Secretary-General of the Committee also participated in the meeting of the Group of Senior Environmental Law Experts on the Progress Made on the 1981 Montevideo Programme and Preparation for the Second Meeting on Development and Periodic Review of Environmental Law. The AALCC's Thirty-first Session had requested the International Law Commission to take up as a priority item the subject "Legal Aspects of the Protection of the Environment of Areas not Subject to National Jurisdiction (Global Commons)."

The Secretariat of the Committee has also made a modest contribution to assist the Member States of the Committee in preparing for the United Nations Conference on Environment and Development (UNCED). To this end the Committee's Secretariat has been represented at most of the meetings of the PREPCOM of the UNCED; the International Negotiating Committee on the Framework Convention on Climate Change as well as the International Negotiating Committee for a Convention on Biological Diversity. In the course of its Thirty-first Session the Committee adopted a Statement of General Principles of International Environmental Law which were circulated among the Working documents of the final Session of the PREPCOM of UNCED held in New York between 2 March, 3 April, 1992 as Doc. No. A/CONF. 151/PC/WC. III/5 dated 5 March, 1992.

Encouraging the Teaching, Study, Dissemination and Wider Appreciation of International Law

In connection with the objective of encouraging, study, dissemination and wider appreciation of International Law, the Committee continues to print the Reports of its annual sessions. The Committee also published a book entitled "International Refugee and Humanitarian Law" containing the Report of the Workshop, organized conjointly by the AALCC and the UNHCR, Back-ground papers and Universal and Regional Instruments Relating to Refugees which have been given wide publicity in the region. It is also intended to publish regularly selected studies prepared for the annual sessions, which have a direct bearing on current topics of international law.

The Secretary-General had been invited to participate in a symposium

on teaching, study, dissemination and wider appreciation of international law in developing countries convenced by the People's Republic of China in Beijing in August 1992.

Finally, the Secretariat continues to liaise with the United Nations and its specialised agencies and other international and regional organizations such as the Commonwealth Secretariat and the Organization of African Unity. To this end, a co-operation Agreement between the AALCC and the OAU has recently been signed by the Secretaries General of the two Organizations. The Seceretary-General of the AALCC and the Executive Director of UNEP signed a Memorandum of Understanding between the Asian-African Legal Consultative Committee and the United Nations Environment Programme, to enhance co-operation on environmental law.

III. Status and Treatment of Refugees

(i) Introduction

The topic 'Status and Treatment of Refugees' was taken up for consideration by the AALCC at the reference of the Government of Arab Republic of Egypt in 1963. In its Memorandum, Egypt indicated the legal issues for consideration and stated that apart from humanitarian concerns, the status and rights of refugees raised several issues of mutual interest to the member states of the AALCC and the AALCC's views would be invaluable in understanding the refugee problem.

This topic has regularly been studied and discussed at various sessions of the Committee. At its eighth session held in Bangkok (1966) the AALCC adopted certain principles concerning the status and treatment of refugees known as the 'Bangkok Principles', which were taken into consideration while formulating the basis for the UN Declaration on Territorial Asylum adopted in 1967. An "Addendum to the Bangkok Principles" was adopted at the eleventh session in Accra (1970). In continued efforts to improve upon the Bangkok Principles, at its twenty-sixth session in Bangkok (1987) the AALCC adopted the Burden Sharing Principles as an additional set of Principles to Supplement the Bangkok Principles'. The AALCC prepared a study on the rights and duties of refugees in the first country of asylum for the thirtieth session held in Cairo (1991). The AALCC was directed to prepare a further study on the same subject with particular emphasis on the principle of non-refoulement. Accordingly the Secretariat prepared a study evaluating the principle of non-refoulement under the 1951 Refugee Convention as well as the Bangkok Principles of 1966 and the 'OAU Convention governing Specific Aspects of the Refugee Problem in Africa' of 1969 and placed it before the Islamabad Session in 1992. Also for the Islamabad Session, two more studies had been prepared: (i) The Establishment of Safety Zone in the country of origin for the displaced

persons, and (ii) Report of the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law in the Asian African Region.

The Principle of non-refoulement was discussed both as a generally recognised principle of law and as state practice. The study on Safety Zone analyzed the status of the persons seeking asylum in the safety zones, the issue of domestic jurisdiction and the Status of Safety Zones in practice. The Report of AALCC-UNCHR Workshop contained the proceedings and outcome of the workshop held in New Delhi in October 1991. According to the Workshop, one recommendation was to prepare model legislation in cooperation with the UNHCR to assist member States in enacting appropriate national legislation on refugees. The second one urged the Asian-African States to move further by considering adherence to the 1951 Convention relating to the Status of Refugees and/or the 1967 Protocol.

After due deliberations, the thirty-first session mandated the Secretariat to commence preparation of such a draft model legislation. The topic was taken up at the Thirty-second Session held in Kampala (1993). The studies prepared according to the above mandate, were presented for consideration of the session.

Thirty-second Session: Discussions

At the Thirty-second Session, the Deputy Secretary-General, Mr. Minoru Hirano introducing the topic stated that in keeping with the mandate given at the Islamabad Session of the Committee, the Secretariat had prepared two studies, namely (i) AALCC's Model Legislation on Refugees: A Preliminary study'' (Doc. No. AALCC/XXXII/Kampala/93/3) and (ii) 'Establishment of Safety Zones for the Displaced Persons in the Country of Origin" (Doc. No.AALCC/XXXII/Kampala/93/4).

Referring to the first study, the Deputy Secretary-General stated that this was of a preliminary nature and advanced suggestions to enlarge the definition of the term 'refugee' in the Asian-African region in the context of the AALCC's Bangkok Principles of 1966 and the Cartagena Declaration of 1984 which had cumulatively expanded upon the scope of the definition of the term 'refugee' as employed in the 1951 UN Refugee convention and the 1969 OAU Refugee Convention. Comparative study of the definitions incorporated in the abovementioned instruments necessitated the expansion of the scope of the term 'refugee' to conform to the contemporary developments. He emphasized in this regard the particular attention which would require to be given to the refugee women and children since they were more vulnerable to the hardships arising from displacement.

He further stated in this regard that a comprehensive framework legislation which could benefit Member States desirous of enacting a national legislation on refugees aimed at safeguarding their rights with special reference to particular vulnerable sections would require to incorporate the following elements:

Definition, Procedure for Refugee status determination, Principle of family unity and dependency status, The basic principles of refugee law including (i) state sovereignty, (ii) non-refoulement, (iii) non-discrimination and (iv) standard of treatment.

Administrative measures: Rights of refugees, Duties of refugees, Assistance to refugees, Burden sharing, International monetary assistance to the country of origin while taking back its citizens. Punishment for violation of local laws, Freedom of association, Exclusion clauses, etc.

He requested Member Delegations to give due consideration to the abovementioned elements as their interventions and comments would contribute substantially to the proposed legislative formulations and the commentaries thereon.

Referring to the second study on the Establishment of Safety Zones, the Deputy Secretary-General pointed out that recent developments had made the question of establishment of such zones topical. Referring to the difficulties faced by the internally displaced persons, particularly in the absence of any international protection, he stated that those persons have normally been denied the status of refugees and therefore measures were needed to alleviate the plight of such persons within their own country. The study referred to the contemporary practice in various conflict areas as one way of reducing refugee exodus to other States.

The *Representative of the UNHCR* considered the study on Model Legislation as an important document which would enable the elaboration of an appropriate, refugee legislation. The AALCC document presented among other things, the evolution of refugee law at regional as well as at universal level. It pointed with precision the shortcomings and inadequacies of the currently existing International Refugee Instruments. The document highlighted the difficulties faced by refugees due to such inadequacies. It was the belief of the UNHCR that the problems which were being faced by the refugees were not only due to inadequacies or lacunae in refugee instruments but also because of lack of effective implementation in many countries of the existing internationally established rules for the treatment of refugees.

The initiative taken by the AALCC in preparation of a model legislation on refuges certainly would contribute to the effective implementation of

refugee law particularly at this juncture when over 18 million refugees were facing deplorable situations in many parts of the world. The incorporation of international standards for treatment of refugees into national law through domestic legislation would indeed be the most appropriate method and in certain legal systems the only method. Such a Model Legislation would undoubtedly enable African and Asian States to enact appropriate domestic legislations on refugees. It would be useful to recall that in 1979 during the Arusha Conference on African Refugees, the African States had recommended that the OAU in co-operation with UNHCR should elaborate a national legislation to serve as a guideline for African States. UNHCR would be ready to assist the AALCC in the elaboration of such a Model Legislation on refugees.

Regarding establishment of Safety Zones for the displaced persons in the country of origin, the Secretariat paper presented the plight of the internally displaced persons in many Parts of the world. There was no particular international organisation entrusted with the responsibility of caring for the internally displaced persons, nor was there a clearly defined international legal instrument which dealt with the problems of the internally displaced except for the Geneva Conventions applying in times of war or armed conflicts. UNHCR on an *ad hoc* basis, had been requested on a number of occasions by the UN General Assembly or the Secretary General to assist certain groups who were in refugee like situation or intermingled with refugees or returnees.

On the proposed Safety Zones the current position of UNHCR was similar to that expressed at previous sessions. The main principles to be kept in mind were as follows:

1. The Safety Zone proposal undoubtedly has a place as a further contribution to increasing important endeavour to avert new flows of refugees by responding to the problems within countries of origin.
2. Caution should remain concerning the proposal which should not undermine the institution of asylum or conflict with basic principles of refugee protection.
3. Fundamental principles of human rights, refugee and humanitarian law, as well as principles guiding sovereign states need to be taken into account and indeed reconciled in any serious elaboration of the Safety Zone.
4. There would seem to be greater scope for Safety Zones in relation to persons fleeing conflict and generalised violence than to persons fleeing persecution where the State is either unwilling or unable to provide protection.

This would require appropriate studies and investigation. The institution of asylum should be fully protected while appropriate mechanism should be developed to take care of the plight of the internally displaced persons. The thirteen principles presented by the AALCC concerning Safety Zones should be considered as the basic conditions for establishment of such zones. Provisions contained in principle No. 1 and No. II certainly cover the main concerns of the UNHCR and conformed with guidelines in the UN General Assembly resolution 46/128 of 17 December 1991 as cited in the Secretariat study.

The Delegate of Egypt stated that there was no denying of the humanitarian attraction of the Safety Zone concept. But there were certain legal aspects which remained unresolved, such as:

(i) In the case of the absence of a Central Government, or a representative Central Government which could validly give state consent, how would such zones be established.?

(ii) The criteria by which the Security Council should recommend the establishment of safety zones were unclear.

(iii) The concept of Safety Zones as an application of the International Humanitarian Law could be misused for not purely humanitarian reasons or at least be applied in a selective manner.

He felt that this item needed to be given more attention specially after the end of cold war. He hoped that the UNHCR would guide the Committee in further study of the topic.

The Representative of OAU pointed out that Africa was host to over 6 million refugees, and over 12 million displaced persons within or outside their borders. The vulnerable groups suffered the most. These included children, women and the aged. The root cause of such outflows were civil strifes, inter-State-conflicts, human rights abuses, economic hardships and persistent drought and famine. He gave statistics of the refugee population in Africa. To deal with the problem the OAU had formed a Committee of 15 Ambassadors resident in Addis Ababa and also a co-ordinating Committee on Assistance to refugees. This served as an Advisory body to the Committee of 15. The latter UNHCR, UN Agencies and NGOs were all working together in the Committee.

In order to deal with the problem it was necessary to address the *root causes* of the influx of the refugees. Apart from the 1969 OAU Convention it should be noted that the African Charter gave an individual fleeing persecution the right not only to seek but also to receive asylum (Art 12). He felt that it was necessary for countries who had not ratified the OAU

Convention Governing the Specific Aspects of the Refugee Problems in Africa and the African Charter on Human and Peoples Rights to do so at the earliest possible moment. The remaining ratifications to the two Instruments were ten and two respectively.

The *Delegate of China* stated that the world study of refugee problem was of vital importance. In the recent years with efforts of the United Nations some regional conflicts had been solved which was beneficial to the settlement of the refugee problem. But still the situation was far from satisfactory as continuing conflicts and worsening of the world economy and damage to natural environment were causing refugee problem. The Chinese Government afforded fundamental rights to refugees and had acceded to the 1951 Convention and 1967 Protocol in 1982. The Government had helped about 280,000 refugees. It had played a positive role in guaranteeing refugee rights and safeguarding peace and stability. The burden sharing principle propounded by the AALCC was an important basis of dealing with refugees. The principle of non-refoulement was very well established. The topic of Safety Zones was a complex matter which needed further cautious study. The actual solution to the problem of refugees lay in sending them back to the country of origin after peace had returned to the area.

The *Delegate of Tanzania* stated that since the 1951 Convention and 1967 Protocol came into being, tremendous changes had taken place and hence there was a need for improving on the definition of refugees. Africa had hosted a number of Conferences to deal with the issue. Ironically the poor countries of Asia and Africa which were heavily indebted were bearing the heaviest burden of refugees. In this regard it was necessary to address the basic causes which created the problem. Violation of human rights needed to be stopped. It was necessary to create atmosphere conducive to minimizing the influx of refugees. The economic situation needed to be improved. Ratification of Conventions was important. There was an urgent need for incorporating International Laws into national legislations. Tanzania recommended that another International Conference on Refugees be convened before the adoption of the Model Legislation. The work being done by the UNHCR was highly commendable. The topics of Model Legislation and Safety Zones should therefore be studied further.

The *Delegate of Japan* stated that the refugee problem was a humanitarian one and it was an international obligation to extend a helping hand to the suffering refugees who had escaped fighting or oppression and were deprived of human needs for food, shelter and clothing. It was essentially a political issue affecting the peace and security of the region. The neighbouring countries receiving refugees were often faced with social tension in addition

to economic burdens. Assistance to refugees could have as important effect in alleviating the difficulties and contributed to maintenance of peace and security in the region.

There were a variety of problems which were often beyond the control of neighbouring countries. International Law in this field was not comprehensive and fell behind the dramatic evolution of the situation. It was necessary to maintain political and economic security in the world. It was necessary that all States became parties to the Refugee Convention. The Comittee could help countries enact appropriate national legislations. Japan had enacted a national legislation in 1982 which respected the principle of non-refoulement. As the 1951 Convention did not cover all refugees it might be useful to formulate a more comprehensive framework to deal with refugees. The establishment of Safety Zones could lessen the burden of refugees on the neighbouring States, but further study was required on the topic.

The *Delegate of Thailand* stated that his country had been harbouring refugees from neighbouring countries for a very long time out of humanitarian concern and had accorded asylum more than 45,000 Vietnamese refugees. He was of the view that International Law only imposed stringent obligations on receiving States whereas the countries of origin remained unaffected. It was necessary that the "cessation clauses" were elaborated in a more pragmatic manner. UNHCR had helped immensely in repatriating Cambodian refugees but there could be another outburst. The solution of the regugee problem lay in addressing the root causes by the country of origin. The establishment of Safety Zones could help a lot in lessening the burden on neighbouring countries. If such zone were created the refugees could be repatriated without waiting for peace to return to the area. But such a zone should only be created with the consent of the country of origin and respecting its sovereignty fully. Thailand was fully supportive of the 13 points proposed by AALCC.

The *Delegate of Iraq* pointed out that Iraq had a national legislation on refugees and it fully complied with the principle that a refugee could not be repartriated if his life and freedom was threatened in the country of origin. Iraq gave a monthly income to the refugee families, they enjoyed free electricity, water and education. Even though some of them had gone back due to the economic blockade still many remained. But it was sad that no international organization had assisted them.

Iraq did not support the idea of Safety Zones as it was undue interference with the sovereignty of the country of origin. Refugees were persons who had crossed an international border. The UNHCR had strong reservations

on the topic as it was in contradiction with Art 2 para 7 of the UN Charter. This concept should not be studied any further and should be removed from the Agenda.

The *Delegate of Nigeria* was of the view that it was essentially the political will of States which would bring about a solution to the refugee problem. The basic problem was of providing protection to refugees. There had to be a tangible role played by the UNHCR. Safety Zones should only be created with the consent of the country of origin. Recent past had shown that there could be no legal solution until human rights were respected. Unless human rights were respected it was futile to create Safety Zones.

The *President* at this juncture pointed out that it was important that international law grew with time. What was legal today could be illegal tomorrow and vice versa.

The *Delegate of the Republic of Korea* stated that there was a necessity for wider adherence to the 1951 Convention and its Protocol as it was essential for solving refugee problems. The Republic of Korea had ratified the Convention and the Protocol on 3 December 1992. This ratification was fundamental and he hoped that other Member States would do so. The topic of Safety Zones was a new initiative which needed careful analysis.

The *Delegate of India* was of the view that there were two main issues of concern to the AALCC. One was the call for model legislation and the other was the factual situation regarding creation of Safety Zones. Regarding the first he referred first to the Bill of Rights and the Refugee Convention as a result of the second World War. The 1951 Convention and the 1967 Protocol were still the basic instruments dealing with the refugee problem. What needed to be done was to expand the refugee definition so that it covers the aspects of the OAU Convention and the Cartegena declaration. The AALCC should not only deal with the new categories of refugees but also ensure that the minimum standards of treatment should remain the same as enshrined in the 1951 Convention and the 1967 protocol. Regarding the Safety Zone concept there were only three incidents which had brought out this phenomenon. It was for the meeting to decide whether it should be considered adequate. Could the AALCC as a legal body consider this topic and what was the role of law?

The *Delegate of Jordan* stated that his country had been witnessing serious condition of the Palestinian refugees since 1949. The Palestinian refugees were being given free education, medical facilities since then and their status was similar to that of the Jordanian citizens. This disaster was repeated in 1967 and doubled the burden of refugees for Jordon but still they looked after them well. The refugees had been living in poor tents and

were suffering from serious living conditions. In such a situation where were the regulations of international law? It was the duty of the international community to look after the Palestinians and to do something for them.

The *Delegate of Palestine* was of the view that there were three main reasons for refugee flows: natural catastrophes, wars and civil strife. Here the establishment of Safety Zones came into the picture. The affluent countries saw this as an opportunity to interfere in the internal affairs of poor countries. The creation of Safety Zones was basically a political decision. Here lay the application of double standards. It was appropriate to ask what the international community was doing for the Palestinian refugees? Safety Zones were not a matter of international law but a political matter.

The *Delegate of Kuwait* stated that the refugee problem was basically humanitarian in nature. Even though they were not a party to the 1951 Convention and the 1967 Protocol they had done all they could to look after refugees within Kuwait. He praised the activities of the UNHCR which had done a lot for Iraqi refugees. It was the duty of sovereign States to stop the flows of refugees all over the world.

The *Delegate of Uganda* pointed out that in his country nearly all the refugees had come back to Uganda and only a few had stayed away mainly for economic reasons. He paid a tribute to the UNHCR for its commendable role. He endorsed the view expressed by the Ugandan President that the need of the hour was to deal with the root causes of the refugee situation. He mentioned that the President of Uganda had personally travelled to Somalia to attempt the reconciliation of warring parties and that Uganda had also sent a contingent to join the peace keeping force there.

The initiative of Safety Zones was worth further study. Uganda has had an experience where they were able to provide with analogous concept since safety zones for many citizens, who were displaced from their homes in the North and North-Eastern parts of the country as a result of insurgency. The exercise was possible since there was no general breakdown of law and order in the country.

Finally, the committee adopted the following decision incorporating minor amendments to reflect the role of the Organization for African Unity (OAU).

(ii) Decision on "Status and Treatment of Refugees and Displaced Persons"

Adopted on 4.2.1993

The Asian-African Legal Consultative Committee

Having considered the Secretariat briefs on Status and Treatment of Refugees: "AALCC's Model Legislation on Refugees: A Preliminary Study" contained in document No. AALCC/XXXII/Kampala/93/3 and also AALCC's study on Safety Zones contained in document No. AALCC/XXXII/Kampala/93/4:

1. **Takes** note of the Statement of the Representatives of the UNHCR and OAU;
2. **Urges** the Member States and UNHCR to guide and assist the Committee on the preparation of the model legislation and on whether or not the refugee definition should be expanded;
3. **Decides** to continue with the study of the model legislation in close co-operation with UNHCR and OAU which includes study of various legislations on refugees in the Asian-Africa region;
4. **Further** takes note with appreciation of the study entitled "Establishment of Safety Zones for the displaced persons in the country of origin" and the statements of the Representatives of the UNHCR and OAU on the subject;
5. **Decides** to study further the concept of Safety Zones and to analyse the role played by the United Nations in general and UNHCR in particular in the recent past in that context;

6. **Appeals** in the meantime to Member States to take all measures to remove from their countries the causes and conditions resulting in their nationals being forced to leave their countries and becoming refugees; and

7. **Directs** the Secretariat to include the item''Status and Treatment of Refugees and Displaced persons on the agenda of the Thirty-Third Session of the Committee.

(iii) Secretariat Studies:

A. AALCC's MODEL LEGISLATION ON REFUGEES: A PRELIMINARY STUDY

'Refugee Law'' was recognised as an important branch of humanitarian and human rights law after the tragic events of World War II. This was manifested by the enactment of the 1951 Convention relating to the Status of Refugees. That Convention was originally intended to cater to the mass of the European refugees and their legal rights, and in that sense it could not be considered a universal instrument. Universality was however conferred to the Convention by the adoption of the 1967 Protocol which did away with the dateline and geographical limitations which were imposed by the 1951 Convention.

Today more than forty years have elapsed since the 1951 Convention was adopted. But hardly a week passes without news of some failure in the international community's efforts to help and protect refugees. Often there is news, of massacres in refugee camps; of failure to rescue those in distress on the high seas, of starvation, disease and death among the uprooted masses who could not get international aid in time; of the forced repatriation of asylum seekers, and of practices designed to deter refugees from seeking asylum.

As in many spheres of life, it is the failures which hit the headlines—successes are rarely heard of. For all its weaknesses, the international structure of refugee protection and assistance does save lives, and contributes in the best way it can to the maintenance of human dignity.

It is essential, therefore, to believe in the efficacy and worth of international action. But it is equally important to recognise the shortcomings

of the current structures and to suggest ways in which they might be strengthened and constantly adjusted to meet the needs of the uprooted.[1]

As mentioned above the legal and institutional framework of refugee protection was established, at the beginning, to deal with specific situations. After the First World War, international action was limited to specific minority groups such as the Assyrians and Armenians. After the Second World War, the United Nations Relief and Rehabilitation Agency (UNRRA), followed by International Refugee Organization (IRO) were set up to solve the problems of those displaced and uprooted by war. There was no comprehensive framework to help and protect all displaced people.

The 1951 UN Convention Relating to the Status of Refugees represented the first attempt by the World Community to establish a definition which was not limited to a specific group. New legal instruments, rules and regulations have since evolved at regional levels, including the OAU Convention of 1969 dealing with the problems of Africa, the 1984 Cartagena Declaration catering to Latin American problems, the 1966 Bangkok Principles propounded by the AALCC. In a pragmatic way, adjustments have been made in the law and practice governing the work of the UNHCR. But, there remain serious gaps in the overall framework. The 1951 Convention remains a vitally important international instrument "providing the foundation" for refugee protection around the world.

Features of Modern Refugee Law

The Convention's general practice can be summarised in these points:-

(i) It maintained a strategically conceived definitional focus on refugee law: the principle of comprehensive humanitarian or human rights-based protection for all refugees. Similarly situated persons so long as they were within national borders were rejected by a majority of states.

(ii) A universalist approach to refugee protection was originally defeated in favour of a Eurocentric legal mandate derived from a highly selective definition of international burden sharing. This was rectified by the 1967 Protocol.

(iii) States opted to take direct control of the process of refugee determination and have established an international legal framework that permits the screening of applicants for refugee protection on a variety of national interest grounds.

1. Refugees Dynamics of displacement: A report for the Independent Commission on International Humanitarian issues : p 43

(iv) The cumulative effect of these trends has been the legitimisation of a political rationale for refugee law, the evolution of a two-tired protection scheme that shields western states from most Third World asylum seekers, and the transfer to States of the authority to administer refugee law in a manner consistent with their own national interests. In sum, the current framework of refugee law, even if it were to be fully and universally implemented, is largely inconsistent with the attainment of either humanitarian or human rights ideals on a universal scale.

The 1967 Protocol could be considered to have failed to review the substantive content of the "definitions". Specifically even after the "universalization" effected by the 1967 Protocol, only persons whose migration is prompted by a fear of persecution, in relation to civil and political rights come within the scope of the Convention protection. The Convention and Protocol and several domestic laws, designate as refugees only those "*who have fled*" from persecution and exclude fugitives from natural disasters and from civil and international war. This limitation on the designation of refugee owes its origin to the fact that the refugee was designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country.

Such reasoning and definition may well be appropriate for the purpose of determining whether an individual should receive an international travel document and should be eligible for the diplomatic protection afforded by the UNHCR. The claim of a fugitive from persecution may, afterall, be no greater than that of a person displaced by an earthquake or a civil war. The question to be answered here is whether crossing the border is such a cardinal principle without which no matter how grave the fear or need, the refugee status could or could not be claimed.

Third World refugees remain *de facto* excluded under existing criteria since their flight is more often prompted by natural disaster, or broadly-based political and economic turmoil than by "persecution". In addition to political persecution and the ravages of war, the modern refugee flees the whole range of problems which accompany under-development in the post-colonial period, including civil strife, political instability, and harsh economic conditions as has been observed. "Though the post-world war refugee and the modern refugee are thus treated differently under international law, the actual position of both groups is the same. The argument continues, both groups should be accorded the same rights under international law".[2] The

2. Lawani, The definition of refugee in International Law: proposals for the future, Third World Law Journal p. 183-184, 1985

adoption of the 1967 Protocol was therefore a victory gained at too much of a cost for the less developed world. While modern refugees from outside Europe were formally included within the international protection scheme, very few Third World refugees can in fact lay claim to the range of rights stipulated in the Convention and its Protocol.

It is because the definition in the Convention fails to reflect the full range of phenomena that give rise to involuntary migration, particularly in the Third World, that its application in practice as the threshold criterion for access to even minimal protection against *refoulement* works a pernicious injustice against many genuine refugees. Most Third World refugees find themselves turned away by developed states or offered something less than durable protection.[3]

The second dominant feature of modern refugee law is its establishment of a selective burden sharing. The deficiencies of the present arrangement may mean that "States of first asylum" will feel the full weight of the humanitarian obligations but yet not enjoy the support which, in their view, should properly be provided by other states.[4]

The third dominant feature of modern refugee law is its establishment of a protection system over which individual states, rather than an international authority have effective control. Four elements of domestic control over refugee protection may be identified:—

(i) The Convention leaves protection decisions to States. International law neither refers to the procedure that States are to employ in the making of determinations of refugee status nor establishes any form of direct international scrutiny of the procedures adopted.

(ii) The refugee definition which international law requires States to respect is flexible enough to allow States to make protection decisions in a way that accords with their own national interests.

(iii) States are explicitly authorized to exclude refugees even from basic protection if they are adjudged undesirable or unworthy of assistance, and

(iv) The international refugee regime does not require States to afford asylum or durable protection to such refugees as the State chooses not to recognise. Rather, States are only obliged to avoid the return of a refugee to a state where his or her life or freedom would be threatened and to treat those refugees admitted to the state's territory in conformity with the international rights regime.[5]

3. U.S. Commission for Refugees p. 9-10.
4. Report for the independent Commission on International Humanitarian Issues 1986: Coles-Refugees.
5. Burke, who should be given asylum? p. 311, 325, 1984.

It is clear from above that, in short, international refugees law is effectively controlled by the authorities of the various participating national Governments. This control is achieved by a combination of minimal international over-sight of determination procedures, the establishment of refugee definition that is susceptible to interpretation in accordance with divergent national interests, the explicit authorization to states to turn away persons in fear of persecution insofar as their protection creates a risk for the receiving state, and the imposition of a minimalist duty to protect that requires no commitment to the provision of enduring asylum as the states sovereignty has to be the first.

A pertinent question which needs to be answered is, can international refugee law be made more relevant to meeting the needs of today's refugees?

Refugee law at present is a means of harmonzing the sovereign prerogative of states to control immigration with the reality of forced migrations of people at risk. It does not challenge the right of states to engage in behaviour which induces flight, nor, the power of states to decide whether to admit victims of displacement. Refugee law is less closely tied to human rights law than it is to general principles of public international law, which enable states—or at least those states which have dominant positions in the international system—to continue to pursue their own interests within a global context.[6]

Another feature of refugee law is that it is designed and administered by states. The availability and quality of protection vary as a function of the extent to which the admission of refugees is perceived to be in keeping with national interests. The nature of flows and conditions within countries of reception have changed over a period of time. Refugee law has evolved from a relatively open system strongly influenced by humanitarianism to a regime that now excludes the majority of the world's involuntary migrants.[7] Humane concern does figure, but modern apparatus of international refugee law is more closely tied to the safe-guarding of developed states than to the vindication of claims to protection. This shift can be explained by the incompatibility of the presumed solution to the needs of refugees—secure exile—with the acute preoccupation of states to avoid cultural, ethnic, political, or economic disharmony within their own borders. An alternative frame-work within which the needs of refugees might be addressed along humanitarian and/or human rights concerns may be found in the regional context.

The regional Convention of Africa and the Latin American Cartagena

6. Manual of International law No. 12, 1967.
7. Independent Commission on International Humanitarian Issues, Note 19.

Declaration demonstrate a comparable degree of generosity premised on mutuality of interest and cultural compatibility. The Organization of African Unity's Convention governing the Specific Aspects of Refugee Problems in Africa provides for a dramatic extension of the international legal definition of a refugee:

Article 1(2)".....every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country".

The Convention also includes a specific obligation on the part of States to endeavour to "receive refugees and to secure the settlement of those refugees" Art. 11(1).

The Cartagena Declaration of 1984, adopted by the Organization of American States, also incorporates added grounds, and expands its definition of refugee, it reads:

> "The definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order".

This definition also provides for a regional over-view of the refugee protection. The Declaration, in particular, stresses the importance of both UNHCR and Inter-American Commission on Human Rights involvement in the provision of protection to refugees.

Though the Bangkok Principles of 1966 formulated by the Asian-African Legal Consultative Committee, does not have a binding force on the countries, yet it has added "colour" as one of the reasons for persecution, and then principles of burden sharing form the corner stone for refugee protection in the Asian regions where refugee protection in practice is concerned.

These regional accords reflect norms that are profoundly a part of the social tradition of these regions. The traditional openness of African borders, the Islamic duty of hospitality and the long standing Latin American practice of granting asylum, all provide the cultural basis for a *shared commitment* to the protection of involuntary migrants.

The nature of refugee movements has changed dramatically since the

drafting of the 1951 Refugee Convention. The forty second session of the Excom[8] in 1991 gave 7 categories of persons who were in search of asylum and refuge, they are:

1) persons covered by the 1951 Convention;
2) persons covered by the OAU Convention/Cartagena Declaration;
3) others forced to leave or prevented from returning because of man-made disasters;
4) persons forced to leave or prevented from returning because of natural or ecological disasters or extreme poverty;
5) persons who apply to be treated as 1) or when applicable 2), but are found not to be in these categories;
6) internally displaced persons; and
7) stateless persons.

Before the outbreak of ethnic violence in Yugoslavia only a small minority of today's refugees have fled from developed states, most modern involuntary migrations are from Africa, Asia, and Latin America. A tiny minority of these refugees have been able to leave their region of origin in order to seek protection in the more economically and politically stable developed countries. These states of destination have, however, proved less than welcoming for these asylum seekers. Formally they are committed to the sheltering of all refugees. But on the other hand these very countries are busily building upon the *Convention's* guarantee of *domestic procedural control* in order to impose stricter visa formalities, "direct flight" rules, screening mechanisms, and unfair determination systems intended to scare refugees from the third world.

The invocation of procedural authority to scare refugees is directly linked to the lack of congruity between the social context of refugeehood today and the historical tenets upon which protection was based. Today admission of refugees is seen as being divergent from political and social characteristics as presenting threats to their own domestic policies,[9] and can see no offsetting benefits that would justify a relaxation of immigation standards.

Another significant area which the 1951 Convention and the regional Conventions leave out is specific protection of refugee women and children. These "social high risk groups" are often unable to claim a status for themselves unless they have a male member at the helm of affairs. Any

8. Doc. No. Executive Commission EC/SCP/64 dt. 12 August 1991.
9. "Neo-Nazi resurgence" Hindustan Times, 1 Sep. 1992.

new legislation should undertake specifically to look after the rights of these groups, rights which they should get in their own capacity.

There is no quick or easy way out of this dilemma. The current legal framework, elaborated in a specific socio-political climate to deal mainly with the refugee situation in post-war Europe, is inadequate to meet contemporary needs. At the same time it would be undesirable if attempts at adjusting the established definition were to result in the erosion of what has been so painstakingly built at an international level and strengthened through regional conventions and practices. Given the present political climate and the reluctance of states to deal with complex issues which have long-term implications, it is not surprising that attempts to change, replace or update the present legislations have failed. This should not, however, provide an excuse for inaction or for thwarting a process of natural evolution. Concepts and institutions which do not evolve with the times tend to wither away gradually.

There are two ways of approaching the problem. On humanitarian grounds there is a strong case to be made for a broader approach, inspired by regional initiatives[10] to expand the refugee definition. But such an initiative would meet with considerable opposition, first from many states which have no desire to widen their obligations towards displaced people; second from some human rights organizations which fear a watering down of established classic concepts such as "refugee' and "asylum", believing that genuine refugees might suffer as a result.[11]

It would seem that although the present position concerning the definition of the term 'refugee' is analytically untidy as it tends to leave out many who are in a refugee like crisis, specially "internally displaced people", in practice flexibility and pragmatism have been exercised to alleviate the suffering of the uprooted. These benefits might be lost in any attempt to define more accurately those who are entitled to refuge or permanent asylum. However, if the current definition of refugee is maintained, the receiving countries must accept the responsibility of developing more constructive national refugee policies and legislation both at home and abroad.

Within developed states additional resources should be made available to government departments dealing with asylum applications. Governments should take rigorous steps to ensure that decisions on refugee status remain within their humanitarian context.

The more prosperous states have a decisive role to play in supporting

10. 1969 OAU Convention, 1984 Cartagena Declaration, and 1966 Bangkok Principles
11. Journal of Refugee: Dynamics of displacement p. 46.

those developing countries which admit large numbers of distressed people, many of whom would probably not formally qualify for refugee status. The principle of international solidarity should be expressed, not only through financial and material assistance, but also through economic and foreign policies which are designed to prevent and resolve the situations which provoke large refugee movements.

The onerous task of preparation of the 'model legislation' to be undertaken by the AALCC no doubt is tough, but once it is complete, countries would positively think of incorporating the principles into their own national legislations, whereby on one hand they would be helping 'refugees' and at the same time sharing this phenomena not as "burden" but in a spirit of universal brotherhood and international solidarity. Another important factor is to see how to strengthen the hands of UNHCR further to facilitate its task of resolving refugee crisis without harming the sovereignty of any country.

The proposed draft structure of the AALCC Model Legislation on Refugees

At present there is an eminent need for enactment of Domestic Legislation on refugees. This is so because the refugee population has grown to an alarming figure of 18 million, of which, majority is unfortunately found in the Asian and African region. Since the adoption of the 1951 Convention the international attitude has radically changed, the existing refugee law is unable to cater successfully to all the new situations and changes. There is an urgent need for International Legal instruments such as the 1951 Convention to the implemented at "National levels" and further, be supplemented and enforced through "National legislations".

The following principles are the proposed main headings of the draft model legislation. This is in fact the initial framework, which if approved by the Committee will be further elaborated, after a study of all existing international regional and national legislations on "refugees" and present a comprehensive piece of legislation which would immensely benefit states desirous of enacting appropriate "national legislation" on refugees keeping their individual and particular needs in mind.

The draft structure of the Model legislation:

1. Preamble;
2. Decision should be made on the "Definition of "refugee" should it be maintained as it is in the 1951 Convention and the 1967 Protocol or

should it be enlarged in accordance with the foregoing discussion? It is proposed that the definition should at least reflect the enlarged definitions provided for in the 1969 OAU Convention, 1984 Cartagena Declaration and 1966 Bangkok principles, which would facilitate states to adopt it to their particular requirements;

3. Procedure for "refugee" status determination;
4. Principle of family unity and dependency status;
5. It is proposed to incorporate the following basic principles of refugee law:
   (i) State Sovereignty;
   (ii) Non-refoulement;
   (iii) Non-discrimination;
   (iv) Standards of treatment;
6. Administrative measures;
7. Rights of refugees;
8. Duties of refugees,
9. Assistance to refugees;
10. Burden sharing;
11. International monetary assistance to the country of origin while taking back its citizens;
12. Punishment for violation of local laws;
13. Association;
14. Exclusion clauses;
15. Miscellaneous clauses.

B. ESTABLISHMENT OF "SAFETY ZONES" FOR THE DISPLACED PERSONS IN THE COUNTRY OF ORIGIN

1. Background

The topic "The possible Establishment of Safety Zones" for displaced persons in their country of origin" was taken up for the first time in 1985 at the suggestion of the delegate from Thailand, who felt that this would lessen the burden imposed upon the international community under the broader principle of "Burden Sharing." It was discussed at the Twenty-sixth (Bangkok) and Twenty-seventh (Singapore) Sessions of the Committee. At the Twenty-eighth Session held in Nairobi the Secretariat presented 13 principles[1] which provided a framework for the establishment of Safety Zones. It was however decided in 1989 in view of the strong reservation of the representative of UNHCR that the issue did not need further elaboration keeping in view of its political nature. The item was therefore deferred to a later date.

The delegate of Thailand during the Thirtieth Session referred to the earlier proposal made by his Government on the question of establishment of Safety Zones for the displaced persons in the country of origin and suggested that bearing in mind the current events i.e. the Gulf War the topic on Safety Zones should be put on the agenda of the next session of the Committee for further study.

At the Thirty-second Session in Kampala in February 1993, the delegate of the UNHCR took more positive attitude on the question. The resolution was adopted which called for closer interaction among AALCC, UNHCR and OAU in undertaking joint studies and in exchanging information on the

1 Doc. No. AALCC/XXVIII/89/3.

subject. The UNHCR/OAU working group has been reactivated by including the AALCC. A tripartite meeting was held in June 1993 in Genva by the participation of the Secretary-General of the AALCC.

II. Introduction

No one knows exactly how many people throughout the world have been uprooted and displaced within their own country. It is estimated that the number of refugees is 19 millions and that of internally displaced persons is more than 20 millions. The reasons for displacement could be civil war, ethnic strife, natural disasters such as famine, drought, floods, earthquakes etc. or massive violation of human rights. Whatever the reasons for displacement, there is no special international organization to protect and assist such people. There is very little international law to protect them or regulate their treatment. As a result, many live in conditions of extreme poverty and insecurity.

Many of the people who are uprooted from their homes are apt not to cross national borders to become recognised refugees but rather remain within their own country. Some have no other option; they live in locations far away from the nearest border, nor are unable to reach a country that will offer asylum. Others make a conscious decision to remain in their own country, because they can find temporary refuge with friends or relations, or because they wish to return to their homes as soon as the cause of their plight has ceased.

There are millions of displaced people in Central America, Angola, Thai/Kampuchean border, Sri Lanka Tamils, Mozambique, Afghanistan. The most recent ones are to be found in Iraq (the Kurds), former Yugoslavia and some members of the NIS which have been savaged by the ethnic wars. Also Somalis who have been uprooted due to civil war and the worst drought of the century have drawn active UN interventions.

III. Need for safety zones

It is extremely difficult for the international community to guarantee the safety and well-being of displaced persons who leave their country of origin and become refugees. Armed attacks on refugee camps, the abduction of politically active exiles and assaults on uprooted people making their way to a country of asylum are growing in frequency and scale. The plight of internally displaced people is often much worse than that of refugees. Refugees can be granted asylum. They can be protected and assisted by UNHCR and other international aid organizations. They can normally be assured that they will not be returned to their own country involuntarily and that efforts will be made by the international community to find a lasting solution to their problems.

Unfortunately none of these conditions holds true for the displaced. They remain under the jurisdiction of their own government, which in many cases has been responsible for uprooting them. If that government continues to persecute or harass them, the only kind of protection they can seek is that offered by voluntary agencies or international organizations. But such bodies are obliged to work within the conditions set by the government. The international community is founded on the principle of *state sovereignty* and governments can almost act as they please within their own borders. (Their excesses may, regrettably, be condoned and even somewhat encouraged by their more powerful allies.)[1] With the growing emphasis on the respect for human rights, it is questionable whether the international community should condone callous or massive repression by any state of its nationals shielding behind its sovereignty. This is particularly so when such repression is likely to have international ramification through mass exodus of refugees and the concomitant burden on neighbouring States.

New initiatives to assist the displaced need to be taken urgently. Programmes designed to resettle displaced people in their own communities may play a vital role in reconciliation and re-establishment of peace in the country. As governments adopt more restrictive attitudes towards refugees, and as refugee settlements acquire an unanticipated permanence, work with the displaced is becoming more important, and the need is increasing for establishing safety zones for the displaced.

IV. What measures need to be taken?

Violations of human rights cannot be regarded as falling solely within the domestic jurisdiction of a state. The UN Charter and Universal Declaration of Human Rights have confirmed the legitimacy of the international communities concern for the protection of fundamental rights and freedoms. This concern is not limited to refugees alone but extends equally to internally displaced persons within their own country. Efforts to improve the situation of the displaced persons must therefore be made even if that may lead to some adjustment to the concept of national sovereignty so as to conform to contemporary humanitarian needs to effectively protect the rights guaranteed to individuals under international human rights

1. Amnesty International Report, 1992.

conventions. One such means might be found in the establishment of Safety Zones.

V. Freedom of movement and the right to seek asylum:

Once they have been uprooted, displaced people are liable to physical assault and deprivation. They are also likely to have new restrictions imposed upon their freedom of movement. In a number of cases, displaced people have been prevented from moving out of a general area where they have been uprooted or to which they have fled. Condition in the camps is horrendous, facilities are lacking the residents have to strive hard to secure food and fuel. Often there is not enough water. Sometimes a dusk to dawn curfew is imposed. There are frequent cases of women being raped while men are attacked and abducted. Meanwhile their homes are looted and ransacked by the army and police.[3]

Displaced people are confronted with the opposite situation faced by refugees. Once uprooted they are liable to be sent back home against their will and without adequate preparation. In this respect the right to freedom of movement as enshrined in the Universal Declaration of Human Rights (Article 13) is infringed. But Safety Zone seen as a means of temporary refuge, providing security and safety to the displaced, and organising orderly movement for people desirous to leave the country, should not become a restriction on the right to freedom of movement, but rather a regulatory measure which prevents further persecution.

VI. The Status of Safety Zone

A Safety Zone which is established within the country of origin and with the consent of the state of origin, could be similar to a "neutralized zone" or a "demilitarized zone" as envisaged in *Article 15* of the Geneva Convention (1949) and expanded by *Article 60* of its Protocol I.[4] The establishment of a Safety Zone during armed conflict could provide a parallel to the "Safety Zones" as envisaged by the Asian-African Legal Consultative Committee. During the Twenty-eighth Session (Nairobi 1989)[5] the AALCC presented 13 principles which provided a guideline to form a framework for the establishment of Safety Zone in the country of origin. For ready reference the principles are as follows:-

(i) The Safety Zone shall be established with the consent of the state of origin, through a resolution or recommendation of the United Nations;

(ii) The Safety Zone should be akin to a demilitarized zone or a neutral zone immune from hostile activities and a specified geographical area could be demarcated as such by a government notification;

(iii) The Zone should be under international supervision, control and management to provide among others international protection to the persons residing therein;

(iv) The United Nations may designate and authorise an international organization or agency for administration and supervision of the Safety Zone;

(v) The state of origin and the neighbouring state which might receive the mass exodus could also be associated with the designated international organization or agencies in the supervision of the Safety Zone;

(vi) The designated international organization or agency shall be responsible for co-ordination and supervision of supply and distribution of food and other essential items and ensure facilities like drinking water, civic amenities and medical care. The cost of operations can be met through voluntary contributions by states, governmental and non-governmental humanitarian organizations;

(vii) The armed forces of the state of origin should withdraw from the Safety Zone and the status of the zone shall be respected by civilian as well as military machinery of the State of origin;

(viii) The authority in control of the Safety Zone shall provide international assistance/protection to the individuals therein seeking asylum;

(ix) The United Nations may provide a multinational security force for the purpose of maintaining law and order within the Safety Zone.

(x) Persons seeking asylum in the Safety Zone shall be disarmed and will not be permitted to participate in any military activity or guerilla warfare against any state. Similarly asylum seekers shall not be a military target for any state.

(xi) The individuals residing in the Safety Zone shall be provided with the facility to seek and enjoy asylum in an other country;

(xii) if normalization is restored in the state of origin and the international organization or agency in charge of the Safety Zone is satisfied that the conditions are favourable and conducive to return, the persons residing in such zones shall be provided with all facilities to return to their permanent place of residence.

(xiii) The Safety Zone thus established shall be of temporary nature.

3. Amnesty International Report, 1992.
4. For detailed provisions refer to Doc. AALCC/XXXI/92/Islamabad/8.
5. Doc. No. AALCC/XXVIII/89/3

It is imperative in our view that such Safety zones should be mandated by the Security Council whose decisions all the member State have undertaken to accept and carry out in Article 25 of the Charter.

VII. When Can UNHCR be Asked for Help in Such Zones

A strong case can be made for clarifying UNHCR's role in assisting and protecting displaced people. UNHCR has normally assisted displaced people only when requested by the UN Secretary-General or the General Assembly and allowed to do so by the authorities concerned. An important step forward could be taken if the UN General Assembly were to clarify the situation and provide for adequate institutional arrangements and a mandate on behalf of internally displaced people. The starting point for UNHCR's involvement in the country of origin for the displaced persons is clearly defined in General Assembly Resolution 46/182 of 19 December 1991. Para 3 of the annex to that resolution states:

"The Sovereignty, territorial integrity and national unity of *states must be fully respected* in accordance with UN Charter. In this context, humanitarian assistance should be provided *with the consent* of the *affected country* and in principle on the basis of an appeal by the affected country."

The recent tragic event in war stricken Yugoslavia and drought-hit Somalia have again witnessed the UN Security Council passing resolutions to help people. These resolutions with respect to former Yugoslavia related to restoring peace in the country and related to providing food and humanitarian assistance to the suffering population in Somalia. These two examples clearly illustrate what has been envisaged in the Chapter VII of the UN Charter, which is an exception to the rule of "non-interference in state sovereignty." The United Nations can intervene in cases where there is a grave threat to peace and security in the region or where the situation is so grave that a suo-motto intervention would be justified. But this provision should be used in the rarest of rare cases and with utmost caution or else we might face a situation where the sovereignty of states can be interfered with at the behest of some other country with ulterior motives.

VIII. Conclusion

The establishment of safety zones for the displaced persons in one's country of origin can be regarded as a humanitarian measure the application of which would help curtail the "refugee population." It is true that under no circumstance should it be established without the consent of the state of origin. However, no country is free to abuse its citizens and to use sovereignty

as a shield to cover its anti-human activities. To this extent, the world opinion matters much. Donor states and international organizations should therefore be urged to support governmental programmes of assistance to displaced people only when certain conditions are fulfilled. First those programmes should conform to the requirements of the Fourth Geneva Convention of 1949. This guarantees the presence of an international organization, prohibits the use of violence against civilians, and specifies the situations in which relocation programme can be implemented.

Second, donors should ensure that relief programmes for the displaced people in Safety Zones are able to function independently of the military actions. There is a danger that the establishment of "Safety Zones" might provide justification for interventions by military powers. Where governmental relief agencies are subject to stringent political controls, assistance should be channelled as far as possible through international organizations and non-governmental agencies. In this sense, the word "humanitarian access" might be more appropriate than the word "humanitarian intervention" as the concept of the latter word contains the meaning of military interventions shown in Iraq and in Somalia.

Assistance programmes for the displaced, like those for refugees, should guarantee choices and participations for the people concerned. Relief aid imposes its own kind of imprisonment, creating conditions of dependence and hopelessness. Many displaced people may become prisoners within the "Safety Zone" in their own country. Therefore they should be empowered to regain control of their lives.

A major consideration in the creation of a Safety Zone is its effectiveness in actually providing Safety to those in need. The guarantees of Safety need to be underlined as clearly as possible and in the most effective manner. They will depend on the actual circumstances, including the degree and nature of the threat as well as the methods used to establish the Safety Zone. If a Safety Zone is created with the consent of the government and supervised by a relavant international organisation their assurances may provide a basis for safety. If it results from multilateral action, international supervision by a UN peace keeping force may be an option. The presence of international human rights observers or monitoring by organisations, including UNHCR and the Commission on Human Rights of the UN could be important additional methods. But experience has shown that such operations are cumbersome and very expensive.

Another factor to be borne in mind is the length of time for which a Safety Zone should be created. How temporary a measure of protection it turns out to be would depend on the success of political initiatives to

resolve the underlying conflict. The dangers of failure to reach a political settlement are evident. The costs of maintaining a Safety Zone for a long period and the number of persons it might attract could make it an unavoidable proposition. These concerns underscore the importance of political initiatives for a solution in parallel to the establishment of a Zone.

The final consideration relates to the presence and participation of other organizations, governmental or non-governmental, in the Safety Zone. The value of inter-agency co-operation would be enhanced in the politically delicate concept of a "Safety Zone."

This topic needs further study with a more careful evaluation of situation such as in Northern Iraq and Sri Lanka. Also it needs to be studied with utmost care and caution, taking into account the evolving concepts, as the recent operations of the UN in Somalia and Bosnia-Herzegovina have come under severe criticism.

IV. The Law of International Rivers

(i) Introduction

The item entitled "Law of International Rivers" was taken up for consideration by the Asian-African Legal Consultative Committee (AALCC) through a reference forwarded by the Governments of Iraq and Pakistan during the AALCC's Eighth Session held in Bangkok in 1966. At the Ninth Session in New Delhi, (1967) Iraq indicated the areas which necessitated a closer consideration, namely: (a) Definition of the term "International Rivers"; and (b) Rules relating to utilization of waters of international rivers by the States concerned, for agricultural, industrial and other purposes not connected with navigation. Pakistan, on the other hand, laid emphasis on the uses of international rivers with particular reference to the rights of lower riparians.

At the Tenth Session held in Karachi, (1969) after extensive deliberations the AALCC decided to set up a sub-committee of all the member governments to prepare draft articles on the Law of International Rivers, "particularly in the light of experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems." In order to fulfill this mandate, the Sub-Committee met in New Delhi in December 1969 with the representatives from the Governments of Ghana, India Indonesia, Iraq, japan, Jordan, Pakistan, Sierra Leone and Sri Lanka. At this meeting the delegation of Pakistan placed a set of ten draft articles for the consideration of the Sub-Committee. The Iraqi delegation also placed before the Sub-committee a set of draft principles consisting of 21 articles. The Indian delegation, on the other hand, suggested that the Sub-Committee should consider the Helsinki Rules drawn up by the International Law Association as the basis for discussion.

During the Eleventh Session of the Committee held in Accra, 1970, the delegations of Iraq and Pakistan jointly submitted a draft consisting of 10 articles as the basis for discussion. The Indian delegation continued to maintain that Helsinki Rules should be the basis for Committee's study. No progress could be registered at this Session on this item as most of the time was spent on procedural issues. Both the proposals were referred to the member governments for their consideration. The Twelfth Session (Colombo, 1971) also did not register any substantial progress towards the finalization of this topic except that once again a Sub-Committee was constituted. It was mandated to prepare a study which would formulate a basis for the further discussion.

In the subsequent sessions of the Committee, the Sub-Committee could not arrive at any conclusions due to few unclear provisions existing in the draft formulations. Meanwhile, the committee was preoccupied with the deliberations relating to the "Law of the Sea and Economic Cooperation." There was also a trend of opinion supporting the idea that since the International Law Commission (ILC) was actively engaged in considering this topic, its examination could be deferred. After a prolonged gap, this topic was placed again on the agenda of the Twenty-third Session of the Committee (Tokyo, 1983) at the insistence of the Government of Bangladesh. The uncertainty regarding the scope of this item continued to hinder the progress towards its finalization. The Government of Bangladesh suggested that the Committee should resume the active consideration of the item without in any way touching the areas under scrutiny by the ILC.

Nepal, on the other hand, specifically suggested that the Committee may direct the Secretariat to initiate studies relating to regional system agreements of the international rivers. However, many member Governments were suggesting that the Committee should await the finalization of ILC work, in order to avoid the duplication of work. At the same time, the member governments were keen to follow the progress of work in the ILC. In order to accommodate these suggestions, the Committee in the final analysis mandated the Secretariat to continue the study on the following patterns (a) to identify the areas which were not likely to be covered by the work of the ILC and where it was deemed desirable, the Committee to undertake a study; (b) to examine the provisions of the Articles provisionally adopted by the ILC; and (c) to submit a tentative programme of work for the consideration of the Committee.

In the Kathmandu (24th) Session, the Committee considered a "Preliminary Report" prepared by the secretariat which *inter alia*, indicated five areas which could be examined by the AALCC, namely, (a) an

examination of the draft articles after they were adopted by the ILC and to furnish comments thereon for consideration of the Sixth Committee and possibly before a diplomatic conference; (b) development of norms and guidelines for the legal appraisal of the validity or otherwise of any objection that may be raised by one watercourse State in relation/regard to projects sought to be undertaken by another watercourse State; (c) study the matter relating to navigational uses of and timber floating in international watercourses; (d) study of other uses of international rivers such as agricultural uses, and (e) study of state practice in the region of user agreements and examining the modalities employed in the sharing of waters of such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

There was, however, no unanimity among the member Governments as to what should be the specific future work programme of the Committee on this topic. Pending a final decision in this regard, the Secretariat continued to monitor the ILC deliberations and presented concisely ILC's progress of work for the consideration of the Twenty-fifth Session (Arusha 1986) of the Committee. For the subsequent sessions, held in Bangkok (1987), Singapore (1988), Nairobi (1989) and Beijing (1990) the Secretariat presented studies which were confined only to the examination of the draft articles so far adopted by the ILC. It should be noted that since Twenty-sixth Session (1987) the Committee has been considering this item while deliberating on the "Report of the ILC". Bangladesh was, however, insisting that at the forthcoming session this study on "International Rivers should be placed on the agenda for a full discussion. India did not accept this proposition.

The Thirtieth Session (Cairo 1991) decided to place this item independently on the agenda of the Thirty-first Session. This was felt necessary as ILC had completed the first reading of the draft articles during its Forty-third Session. Before commencing the second reading, the ILC had solicited comments on these draft articles by the member States. In order to assist the member governments of AALCC to submit their comments, the Cairo Session as mentioned above decided to place this item separately on the agenda in the ensuing session (1992). This was found essential so as to generate substantial discussion with a view to lay down broad and acceptable principles in the Asian-African region. Accordingly, the Secretariat prepared a detailed analysis of the ILC draft articles adopted by it after the first reading. During Thirty-first Session (Islamabad 1992) the Committee decided to keep this item on the agenda for the next session (1993) to facilitate substantive discussion and study on the ILC's draft articles adopted after the first reading in the preparation of their comments

and observations for the second reading of the draft articles by the ILC at its next session.

Thirty Second Session: Discussions

The *Secretary-General*, while introducing the item "Law of International Rivers" briefly explained the background of the study undertaken. The study, however, could not proceed consistently due to Committee's increasing work schedule, especially relating to the Law of the Sea. Subsequently, the Committee continued its evaluation of the work of the International Law Commission and furnished comments on the ILC's draft articles. The Secretary-General outlined the plan and scope of the study which *inter alia* examined three major areas, namely: (a) International Watercourse; (b) Equitable and reasonable utilization and participation; and (c) Protection and preservation of Ecosystems. He informed the meeting that the study under consideration to the extent possible examined institutional and legal aspects of the River Systems Agreements in the Asian-African region. He also emphasized, in the final analysis, the fact that the future studies could be made on the river basin development and its linkages with the legal infrastructure needed for its implementation.

The *Delegate of Syria* appreciating the study outlined the scope and legality of principles relating to international rivers. He explained various sources of these legal principles and their acceptability. He also appreciated and called for the adoption of ILC draft articles so as to finalise the draft of the "Law of International Rivers". He requested the ILC to finalize the second reading and adopt the draft articles so as to fill the gap in the relevant principles of International Law.

The *Delegate of Iraq* termed the study as highly educative and briefly explained the principles as enunciated by the ILC. He stressed on the right of sharing equally the water resources by every State. He also pointed out that no harm to quality and quantity to the watercourse should be done while sharing these resources. In response to cases of harm, they should entail international responsibility on the part of the State concerned.

The *Delegate of India* expressed the view that this topic was not amenable for continued examination as there were immense diverse factors and difficult systems of management in different river basins of the world. Since the matter was before the ILC, the Committee could defer examining it until the ILC had finalised the second reading. This would lessen the burden of more agenda items for discussion.

The *Delegate of Uganda* appreciated the Secretariat study and informed

the meeting about the importance of lakes and rivers to Uganda. Referring to para 23 of document, the delegate pointed out that Nile was much more than a river utilised for hydropower and irrigation. He also informed the meeting about the Water Masterplan for Uganda. He emphasized on the importance of fresh water resources for Uganda. He expressed his delegation's doubt about the "utilization' provisions as existing within the national jurisdictions, since the State should have national sovereignty over such water reservoirs.

The *Delegate of Tanzania*, pointed out that the topic had been on the agenda for a long time and supported the idea that the Secretariat should continue to study the topic in order to arrive at more acceptable principles on sharing of fresh water resources.

The *President* succinctly placed two views as regards continuation of the topic on the agenda; one, to keep it on the agenda; and second, to remove it from the agenda as it was being dealt with by ILC also.

The *Delegate of Tanzania* supported the inclusion of the topic in the future agenda as it facilitated the ILC by supplementing its work.

The *Delegate of Syria* also supported the inclusion of this topic in the agenda as it had very crucial dimensions.

The *President* subsequently ruled that the item should be maintained on the agenda and proposed a draft decision tabled by the Secretariat for adoption. The text of the decision formally adopted is reproduced herewith.

(ii) DECISION ON LAW OF INTERNATIONAL RIVERS

Adopted on 5.2.1993

The Asian-African Legal Consultative Committee

Taking note of the Study prepared by the Secretariat on the item "International Rivers: A preliminary Study Relating to River Systems Agreements" contained in Doc. N. AALCC/XXXII/Kampala/93/6;

Expresses its appreciation for the preliminary study relating to River Systems Agreements;

Requests the Member States to send their comments with necessary details to the Secretary-General for the preparation of a further in-depth study;

Requests the Secretary-General to examine other crucial areas relating to River System Agreements with special emphasis on the utilization of fresh water resources;

Requests the International Law Commission to finish as early as possible the second reading of the draft Convention on Non-Navigational Uses of International Watercourses and to take all necessary measures in order to conclude that law as a Framework Convention for International Law; and

Decides to inscribe the item on the agenda of its next session to facilitate substantive discussion on the topic.

(iii) Secretariat Study: The Law of International Rivers: A Preliminary Study Relating to River System Agreements

Background

The scope of this preliminary study is confined primarily to the study of state practice in the region of user agreements and examine the modalities employed in the sharing of waters of watercourses. It may be recalled here that at the Tokyo Session (1983) the delegate of Nepal had suggested that the Committee might prepare some guidelines for regional system agreements.[1] The Secretariat study had also indicated the difficulties existing in pursuing such a study "in view of the fact that the geographical, hydrological and climatic conditions considerably vary within the Asian-African region leading to the diverse characteristics of various watercourses."[2] The Secretariat study had also indicated that "with a view to assist member governments in the negotiation of user agreements in the future, the AALCC could take up the study of state practice in the region of user agreements and examine the modalities employed in the sharing of water of watercourses such as the River Niger, the Nile, the Gambia River, the Mekong and the Indus."[3]

During the deliberations at the Islamabad Session (Thirty-first Session, 1992) the delegate of India in his brief statement had clarified that his delegation did not "see any necessity for inclusion of this item again as a separate item from the International Law Commission."[4] On the other hand,

1. Doc. No. AALCC/XXXI/Islamabad/92/5.
2. *Ibid.* p. 34.
3. *Ibid.*
4. *Verbatim Record of Discussions*, Thirty-first Session, (Islamabad, 1992) p. 127.

Arab Republic of Syria and Pakistan insisted that his item should be taken up for further study in order to assist member countries in responding to the ILC draft.[5]

In his clarification the Secretary-General said that "the study by the ILC was confined to particular aspects, i.e. the aspect of non-navigational use of international watercourse It was felt these other aspects could be usefully studied within our region, because that would facilitate the preparation of the user agreement."[6]

In accordance with the mandate given to the Secretariat by the AALCC, the following study proposes to examine the regional system agreements relating to international rivers. The broad categories under which this examination will be made are, namely (a) International Watercourse; (b) Equitable and reasonable utilization and participation; (c) Protection and preservation of ecosystems. It may be noted that the above categorization has been adopted from the ILC draft text itself. Apart from this, the study under consideration to the extent possible also proposes to examine the institutional and legal aspects of the river system agreements in the Asian-African region.

International Watercourse:

The draft articles prepared by ILC on the "Law of the Non-navigational uses of International Watercourses", define in Article 2, an "international watercourse" as "watercourse parts of which are situated in different states". Specifically, it defines "watercourse" in Article 2 (b) as "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus." This definition can be examined in the specific context of Afro-Asian rivers.

The Indus Waters Treaty concluded between India and Pakistan in its preamble declares that attaining the most complete and satisfactory utilization of the Indus system of rivers should be its one of the primary objectives.[7] This treaty defines in very clear terms, the term "Tributary" as any surface channel, whether in continuous or intermittent flow and by whatever name called, whose waters in the natural course would fall into that river.[8] It is pointed out that this treaty applies to named rivers, their

5. *Ibid.* p. 128.
6. *Ibid.* p. 130.
7. *The Indian Journal of International Law, Vol. 1.* October 1960- January 1961, p. 341, quoted in *the Legislative Texts and Treaty Provisions concerning the utilization of International Rivers for other purposes than Navigation.* (hereinafter referred to as Legislative Texts) (United Nations Publications, Sales No. 63. V. 3).
8. *Ibid.*

tributaries and connecting lakes and defines the term "tributary" broadly.[9]

In the recent times, the definition of an "international watercourse" has acquired more logistic approach to international water resources management. The Action Plan for the Environmentally Sound Management of the Common Zambezi River System, for example, states its objective as being to overcome certain enumerated problems "and ensure environmentally sound water resources management in the whole river System."[10] The Senegal River Basin Development Project provided in the agreement that "the river is an international basin including all its tributaries". It further stipulated that "the basin is to be exploited rationally in close cooperation between the three states (Senegal, Mali and Mauritania) with the liberty of navigation and equality of treatment of users".[11] it is, however, stated that to identify whether parts of a watercourse are situated in different states "depends on physical factors whose existence can be established by simple observation in the vast majority of cases".[12] So, the "watercourse" would have as its components, in the broadest terms, "rivers, lakes, aquifers, glaciers, reservoirs and canals". It is further stated that "so long as these components are inter-related with one another, they form part of the waterdourse".[13] There is no unanimity in accepting this definition as the final authority. This is clear from the commentaries on the ILC draft articles which *inter alia* pose two important questions.[14] Firstly, accepting the fact that the surface and underground waters form a system, and constituting by virtue of their physical relationship a unitary whole, what about the situations where human intervention at one point in the systems which may have effects elsewhere within it? Secondly, the term "Watercourse" does not include "confined" groundwater i.e., that which is unrelated to any surface water.

During the Thirty-first Session of the AALCC the delegate of Turkey, while presenting his views on the ILC draft articles did not completely

9. *Draft Articles on the Law of Non-Navigational Uses of International Watercourses and Commentaries thereto, provisionally adopted on First Reading by the International Law Commission at its Forty-third Session,* September 1991, p. 9.
10. *Ibid.*, p. 10. See: *Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, Final Act, Harare, 26-28 May 1987* in *International Legal Materials,* Vol. XXVII (1988) p. 1109. This was an agreement among Botswana, Mozambique, Tanzania, Zambia and Zimbabwe to develop regional Cooperation in the management of the Zambezi river system.
11. *River and Lake Basin Development.* Natural Resources Water Series No. 20 (1990) (United Nations Publication Sales No. E-90. II. A. 10) p. 276.
12. *Yearbook of the International Law Commission,* 1987, Vol. II (Part Two) p. 26.
13. *Draft Articles,* n. 11 p. 6.
14. *Ibid.*

accept the abovementioned formulations relating to "watercourse" and he termed them as "too broad."[15] He pointed out that by incorporating glaciers, canals and particularly underground water, it amounted to sharing of those natural resources which was in contradiction with the generally accepted principle of international law concerning the permanent sovereignty of states over their natural resources. He supported the distinction between free groundwater and confined groundwaters.[16] Supporting the definition the delegate of Jordan specifically outlined the importance of groundwaters to the Middle-East and stressed the fact that "the underground water should not be linked with resources that could be far deep in the territories of countries, because the countries have full sovereignty in all the dry surfaces and reservoirs can be built on this".[17]

It may be interesting to note that the basic objectives laid down for the development of the Lower Mekong River basin are too broad including many diverse factors. The Mekong Committee which was formed in 1957 had to deal with highly complex process involving the collection and analysis of a large amount of data on the physical, economic, social and institutional factors that determine the opportunities for development.[18] Accordingly, its basic objective, *inter alia*, incorporates the promotion of "the comprehensive development of the water resources of the lower Mekong basin, including mainstream and tributaries, in respect of hydroelectric power development, irrigation, flood control, drainage, navigation improvement, watershed management, water supply and related developments for the benefit of all the people of the basin, without distinction as to nationality, religion and politics."[19] This approach, though seemingly vague, is quite significant in the context of Mekong river. There are differences in the cultural, political and economic backgrounds of the four Mekong countries who are members of the Mekong Committee.

The International Law Commission has identified with the view that

15. *Verbatim Record of Discussions*, AALCC, (Thirty-first Session, 1992) p. 120.
16. *Ibid.* p. 121. Notably the Turkish delegate considered only "free groundwater" as a part of the definition of "watercourse". Further, he submitted two problems; one, no concrete examples of international practice can be found in relation to groundwater easily; second, the difficulty in collecting scientific data concerning free and confined watercourses for the Asian-African States.
17. *Ibid.* p. 123-124. Supporting the delegate of Jordan, the Syrian delegate pointed out that according to the ILC report 77 per cent of joint rivers have underground sources.
18. Phadej Sayasdihutr, "The Development of the Lower Mekong River Basin, in *River and Lake Basin Development*, Natural Resources Water Series No. 20 (United Nations, 1990) p. 170. The Mekong Committee in 1957 comprised Democratic Kampuchea, Lao People's Democratic Republic, Thailand and Vietnam, joined together with twenty-one other co-operating countries, twelve international agencies and some private foundations.
19. *Ibid.*

the concept of a watercourse or river system was not a novel one.[20] It has also been pointed out that this expression had long been used in international agreements to refer to a river, its tributaries and related canals; and to substantiate this view it has cited many examples.[21]

Equitable and Reasonable Utilization and Participation

The survey of available legal materials show that the principle of "equitable and reasonable utilisation and participation" has generally been widely accepted. The International Law Commission while recognising the legal validity of this principle has not attached same importance to all the sources.[22] However, it has found that the survey did provide an indication of the wide-ranging and consistent support for the rules contained in the draft article.[23] This draft article refers to the attainment of "optimal utilization" which according to ILC "does not mean achieving the "maximum" use, the most technologically efficient use, or the most monetarily valuable user. Nor does it imply that the State capable of making the most efficient use of a watercourse—whether economically, in terms of avoiding waste, or in any other sense—should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each".[24] The principle of "equitable participation is equally important and it is closely connected with the principle of "optimal utilization". It is pointed out that "the core of this concept is Cooperation between Watercourse States through participation, on an equitable and reasonable basis, in measures, works and activities aimed at attaining optimal utilization of an international

20. Draft Articles, n. 11, p. 7.
21. *Ibid.* It is interesting to note that the definition of an "international watercourse" did not specifically touch the principle of "utilization" till few decades earlier. The Treaty of Versailles, for example, referred to "river systems" in terms of "all navigable parts of these river systems..." In the *River Oder* case the Permanent Court of International Justice defined the "International Watercourse" as "All navigable parts of these river systems... together with lateral canals or channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems...".
22. *Ibid.*, p. 43.
23. Article 5: 1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.
Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation include both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.
24. Ibid p. 29.

watercourse, consistent with adequate protection thereof".[25]

In the context of laws relating to international rivers it is not easy to place the meaning of "equitable" on a strong base. This difficulty arises due to the concept of "sovereign equality". There cannot be any dispute as regards the right of a watercourse State to make use of the waters of an international watercourse. It is pointed out that "the principle of the sovereign equality of States results in every watercourse State having rights to the use of the watercourse that are qualitatively equal to, and correlative with, those of other watercourse States."[26]

The ILC draft articles reflect the principles embodied in various international treaties and agreements.[27]

The manner in which States are to implement the rule of equitable and reasonable utilization is also equally important. The commentaries on the ILC draft article specify that "What is an equitable and reasonable utilization in a specific case will therefore depend on weighing of all relevant factors and circumstances".[28] The factors and circumstances which need consideration are:[29] (a) geographic hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) the social and economic needs of the watercourse States concerned; (c) the effects of the use or uses of the watercourse in one watercourse State on the other watercourse States; (d) existing and potential uses of the watercourses; (e) conservation, protection, development and economic use of the water-resources of the watercourse and the costs of measures taken to that effect; and (f) the availability of alternatives of corresponding value, to a particular planned or existing use.

It should be noted that these factors are not exhaustive. It has, however, been stated that due to "wide diversity of international watercourses and the human needs they serve, it is impossible to compile an exhaustive list of factors that may be relevant in individual cases".[30] Further, it may be noted

25. *Ibid.* p. 30. The "Cooperation" generally should extend to — flood-control measures, pollution-abatement programmes, drought-mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works and environmental protection. This list is not exhaustive and extensive cooperative endeavours could be provided under the watercourse agreements as the circumstances call for it.
26. *Ibid.* p. 31. Also See: ILA, *Report of the Fifty-second Conference, Helsinki, 1966*, (London, 1967). The commentaries on the ILC draft articles explain that the scope of a State's rights of equitable utilization depends on the factual and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 6.
27. *Yearbook of the International Law Commission*, 1986 Vol. II (Part one).
28. *Draft Articles*, n. 11, p. 44.
29. Article 6, *Draft Articles*, n. 11, p. 44.
30. *Ibid.* p. 45.

that efforts have been made at the international level to compile lists of factors to be used in giving the principle of equitable utilization concrete meaning in individual cases. For example, the International Law Association adopted the "Helsinki Rules on the Uses of the Waters of International River" in 1966.[31]

For the purposes of integrated development of the resources of the Senegal River basin the States of Mali, Mauritania and Senegal had established the Organization for the Development of the Senegal River (OMBS).[32] The general policy for harnessing the Senegal River and exploiting its resources and for co-operation among the States bordering the river is laid down by the Council of Ministers.[33] Further, the Organization defines the joint programme of work for the co-ordinated development and rational exploitation of the resources of the Senegal River basin (article 13 of the Convention) and defines priority operations for harnessing the river and developing its resources (article 8).[34] There is a Standing Commission on the waters of the Senegal River, established by the amended convention in 1975 which is responsible for defining the principles and procedures for sharing the water of the Senegal River among the States concerned and among the sectors utilizing it.[35]

The River Nile passes through nine countries and is the main source of irrigation and the site of hydropower activities in riparian countries.[36] It is pointed out that the conservation, control and regulation of the Nile and its tributaries has a major bearing on the economic development of the entire area, particularly in respect of irrigation, drainage, swamp reclamation, hydroelectric power generation, navigation and provision of community water supplies.[37] In order to utilize the waters of the River Nile effectively Egypt and Sudan have concluded several agreements which broadly have the following features:[38] (a) each country's share was agreed, taking into consideration (i) the acquired right of each country to the waters used prior

31. ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967). Article IV deals with equitable utilization and article V deals with the manner in which "a reasonable and equitable share" is to be determined.
32. Since its establishment the Organization has several times been remodeled, affecting both the institutional structure of the Organization and the nature and scope of its activities.
33. Article VIII of the Convention. See: *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (United Nations, 1983) p. 142.
34. *Ibid.*
35. *Ibid.*, p. 143.
36. *Ibid.*, P. 158. The nine countries through which the River Nile passes are: Burundi, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Uganda, United Republic of Tanzania and Zaire.
37. *Ibid.*
38. *United Nations Legislative series* (United Nations publications, Sales No. 63, V. 4) p. 143.

to the signing of the agreement; and (ii) the future development of each country; (b) because considerable quantity of the Nile waters was being lost in the swamps of Bahr El Gebel, Bahr El Zerat, Bahr El Gazal and the Sobat River, it was considered essential that this loss be prevented and the yield of the river increased for use in agricultural expansion. The two parties agreed that Sudan would construct projects in the above-mentioned regions, with the participation of Egypt. The net yield of these projects would be divided equally between the two countries and each of them would contribute equally to the costs; (c) in order to ensure technical co-operation between the two countries and continuation of research and study necessary to control the Nile and increase of its yield, as well as continuation of the hydrological survey of its upper reaches, the two Governments agreed to form a Permanent Joint Technical Commission for Nile Waters.[39]

The Niger Basin Authority for the River Niger essentially has the following objectives to utilize its waters which, *inter alia*, include:[40] (a) Harmonization and co-ordination of the policies, projects and programmes of States; (b) Centralization of hydrological and related data and their dissemination to member States; (c) Formulation of the general policy for development of the basin, which shall be compatible with the international character of the river; preparation and implementation of the plan, the integrated development of the basin; implementation and monitoring of an orderly and judicious policy for the utilization of the surface and sub-terranean waters of the basin; (d) conception and implementation of studies, research and surveys; formulation of plans, construction, exploitation and maintenance of works and projects set up within the framework of the general objective of the integrated development of the basin.

The Convention establishing the Gambia River Development Organization declares the river as "of regional interest" and the statute aims to ensure[41] (a) concerted action using the river's water resources; (b) equality of treatment of nationals of member States as regards transport on the rivers; (c) respect for the Commitment undertaken by States in the framework of the development of the Gambia River.

39. For the brief analysis of the institutional and legal arrangements of the Permanent Joint Technical Commission *See: The Permanent Joint Technical Commission For Nile Waters: Egypt-Sudan*, in Natural Resources/Water Series No. 10 (United Nations, 1983) p. 159.
40. The members of the Niger Basin Authority are: Benin, Chad, Guinea, Ivory Coast, Mali, Niger, Nigeria, United Republic of Cameroon, and Upper Volta. For details See: "Technical Note on the River Niger Commission" in *Natural Resources/Water Series No. 10* (United Nations, 1983) p. 191.
41. "Technical Note on the Gambia River Development Organization", in *Natural Resources Water Series* No. 10 (United Nations, 1983) p. 420.

Protection and Preservation of Ecosystems

The International Law Commission in the draft article 20 has laid down a general obligation to protect and preserve the ecosystems of international watercourses.[42] It is pointed out that "these obligations relate to the "ecosystems of international watercourses", ... because it is more precise than the concept of the "environment" of a watercourse".[43] And it requires that these ecosystems be protected in such a way as to maintain them as much as possible in their natural State. Further, it is stated that by incorporating the principle that watercourse States act "individually or jointly", the article 20 recognizes that in some cases it will be necessary and appropriate that "watercourse States co-operate, on an equitable basis, to protect and preserve the ecosystems of international watercourses".[44]

The International Law Commission has identified various provisions concerning the ecosystems of international watercourses in a number of agreements. The reference is made to the 1978 Convention relating to the status of the River Gambia in which Gambia, Guinea and Senegal agreed that "No project which is likely to bring about serious modifications on the characteristics of the river's regime, ... the sanitary state of the waters, the biological characteristics of its fauna and its flora ... will be implemented without the prior approval of the contracting States".[45]

The nine States parties to the 1963 Act regarding navigation and economic cooperation between the States of the Niger Basin "undertake to establish close cooperation with regard to the study and the execution of any project likely to have an appreciable effect on certain features of the regime of the River, its tributaries and sub-tributaries... the sanitary conditions of their waters, and the biological characteristics of their fauna and flora".[46]

The Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System is a unique and far-reaching effort to jointly manage, develop, and preserve the 1,400-mile Zambezi River. This is a major river system which begins in North Zambia, and is fed by hundreds of major tributaries and winds its way towards the

42. The ILC draft article 20 in Part IV — "Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses."
43. Draft Articles, n. 11 p. 123. The Commission preferred the term "ecosystems" as it had "a more precise scientific and legal meaning". Citing various authorities the Commission states — "Generally, the term ecosystem(s) refers to an ecological unit consisting of living and non-living components that are inter-dependent and function as a community".
44. *Ibid*., p. 126.
45. *Natural Resources/Water Series No. 11*, (ST/ESA/141) 1984 p. 59.
46. *UNTS*, Vol. 587, No. 8509 p. 9.

Indian Ocean.[47] The objectives of the Action Plan for the environmentally sound management of the river basin include number of areas. Broadly, these areas are: exchange of data, soil erosion, deforestation, drinking water supply, community participation, health and hydropower irrigation etc. Further, the following main areas are considered to be elements of the comprehensive Action Plan: (a) Environmental assessment; (b) Environmental management; (c) Environmental legislation; (d) Supporting measures. There are detailed provisions with regard to the implementation of the suggested Action Plan. The scope of this study, however, relates to the "Environmental Legislation". It provides that "National Laws and regulations pertaining to the protection and development of the river basin and its coastal and marine environment should be developed, reviewed, and, when necessary, expanded, updated or strengthened. The enforcement of national laws and regulations relating to the river basin and its coastal and marine resources should be improved, for example with respect to deforestation, soil and water conservation, rural and urban health and development planning ,mining and industrial activities, prevention of pollution of the riverine and marine environment and protection of the species living there", It further provides for the "harmonization of national laws and regulations on the protection and development of river basin resources".[48]

The International Law Commission has also noted that the need to protect and preserve the ecosystems of international watercourses is also recognized in the work of international organizations, conferences and meetings. Some of these agreements, were, for example,[49] agreements concerning the environment in general include the 1968 African Convention on the Conservation of Nature and Natural Resources[50] and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.[51]

47. *International Legal Materials*, Vol. XXVII, No. 5 September 1988 p. 1109. The Conference of Plenipotentiaries on the Environmental Management of the Common Zambezi River System was convened by the UNEP; in Harare, Zimbabwe, May 26-28, 1987. All Zambezi basin states were invited. It was attended by: Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe. The Southern African Development Co-ordination Conference (SADCC) and the South-West Africa People's Organization (SWAPO) also participated, with Observers from other States, U.N. bodies, specialized agencies, inter-governmental and non-governmental organizations.
48. It proposes a regional convention for this purpose; development of national legislation; technical asistance and advice on the drafting of national legislation — are the other important features proposed in the Action Plan.
49. *Draft Articles*, n. 11, p. 130.
50. *Natural Resources/Water Series No. 13*, n. 47, p. 20.
51. Draft Articles, n. 11, p. 132.

Conclusion:

In this preliminary study relating to the Regional System Agreements three specific areas as enunciated by the International Law Commission in its draft articles have been examined. Due to paucity of legal materials relating to recent river system agreements in the Afro-Asian region the effort here was confined to the outlining of major objectives and the principles incorporated in these agreements. The study examines, as mentioned above, primarily the following three areas, namely (a) International Watercourse; (b) Equitable and reasonable utilization; and (c) Protection and Preservation of Ecosystems. In the subsequent studies an effort can be made to include other crucial areas as classified under the draft ILC articles.

It is accepted that the concept of a watercourse or river system is not a novel one; it has been in usage for a very long time. However, the definition of a watercourse has undergone significant change. In recent time it has acquired "a more holistic approach", in relation to international water resources management. In addition, the "watercourse" is defined functionally; that is depending upon the tasks which it had to fulfil in a given context. In contrast, the principle of "equitable and reasonable utilization and participation" is more concretely accepted. In its application there may be large-scale differences; accordingly the ILC has not attached same legal validity to all the available sources.

It should be noted that the social and economic development of a basin is closely linked with its fresh waters of all types. While rivers are often considered as dominant features of a basin, lakes, wetlands, ground water aquifers and water contained in the soil are also hydrologically important components of many basins. Therefore, when promoting an environmentally sound policy of any river basin development, all fresh water components should be considered. In the future studies emphasis could be laid more on the river basin development and its linkages with the legal infrastructure needed for its implementation.

conditions whereby everyone might enjoy these rights as set out in the International covenants on Human Rights.

(c) To examine ways and means to improve implementation of existing human rights standards and instruments.

(d) To evaluate the effectiveness of the methods and mechanisms used by the United Nations in the field of human rights;

(e) To formulate concrete recommendations for improving the effectiveness of the United Nations activities and mechanisms in the field of human rights through programmes aimed at promoting, encouraging and monitoring, respect for human rights and fundamental freedoms; and

(f) To make recommendations for ensuring the necessary financial and other resources for the United Nations activities in the promotion and protection of human rights and fundamental freedoms.

The General Assembly also decided to establish a preparatory committee for the World Conference, open to all States members of the United Nations and of its specialized agencies, and with the participation of observers. The Under Secretary General for Human Rights has been appointed as the Secretary General of the Conference.

As decided by the General Assembly resolutions 45/155 and 46/116, the Prepcom should meet for four sessions at Geneva, once in 1991, twice in 1992, and once in 1993. Each session would last one to two weeks. Pursuant to this mandate, the Prepcom held its first session at Geneva from 9 to 13 September 1991, marking the actual beginning of the preparatory process of the Conference. Subsequently, the second and third sessions were held respectively in March and September 1992. The sessions were attended by representatives from over 100 states and a large number of observers from UN bodies, specialized agencies, international organizations and non-governmental organizations. Ms. Halima E. Warzazi (Morocco) was elected as the Chairman of the Prepcom.

The fourth and final session of the Prepcom is scheduled to take place in April 1993 at Geneva.

In view of the importance of the World Conference on Human Rights and its function, the Committee at its 31st Session held in February 1992 in 'Islamabad' Pakistan decided to mandate its Secretariat to monitor the preparatory process of the World Conference, focussed on the issues with legal implications, and to make necessary studies. It further decided to put the item, "Preparation for the World Conference on Human Rights", on the Thirty-second Session of the Committee.

The brief prepared by the AALCC Secretariat is aimed at reflecting, as appropriate, the current preparatory process of the World Conference, upto the conclusion of the Third Session of the Prepcom, and trying to provide a useful basis for the development of a common position among member states of the Committee on the basic principles concerning the promotion and protection of human rights and fundamental freedoms.

Thirty-Second Session : Discussions

At the thirty-second session of the committee, the President Mr. Abu Baker Mayanja announced the constitution of an open-ended Working Group on Human Rights with a core membership of Egypt, Bangladesh, China, India, Japan, Iran, Kenya, Syria, Thailand, Tanzania and Uganda and entrusted with the mandate of preparing a Draft Declaration or statement to constitute the AALCC's contribution to the forthcoming World Conference on Human Rights. The representative of Uganda Mr. Lucian Tibaruha was elected as the Chairman of the Working Group.

The Working Group had before it two basic documents prepared by the Secretariat (1) Preparation for the World Conference on Human Rights and (2) Draft Working Paper Concerning the General Principles of Human Rights. Other reference documents provided by the member delegations included a Joint Statement of the Attorneys General and Ministers of Justice of Eastern, Central and Southern African states on the Administration of Justice and Human Rights issued in Nairobi in October 1992 and the report of the Asia-Pacific Workshop on Human Rights Issues.

The Working Group Meeting was attended by delegates from Egypt, Bangladesh, China, India, Indonesia, Iran, Japan, Kenya, Syria, Thailand and Uganda. Zimbabwe and Swaziland attended as observers. The representative of the Secretariat Prof. Huang Huikang, Assistant Secretary General introduced the item to the Meeting. He stated that the Secretariat's presentation would be based on two documents namely, (i) Preparation for the World Conference on Human Rights" and (ii) "Draft Working Paper submitted by the Secretariat concerning the General Principles on Human Rights". He stated that both the documents were intended to enable member states to prepare fully for the deliberations of the forthcoming World Conference on Human Rights.

He stated that the first document was divided into three parts namely: (i) Introduction ; (ii) The Present State of Preparations for the Conference, and (iii) General Observations.

He also stated that the World Conference is intended to deal with

crucial questions facing the United Nations in the promotion and protection of Human Rights. The objectives of the Conference were clearly spelt out in the General Assembly Resolution 45/155. The main objective is to review and assess the progress made in this field since the adoption of the Universal Declaration on Human Rights and to identify obstacles and ways in which they could be overcome for further progress in the area of human rights.

Prof. Huang informed that the General Assembly had established a Preparatory Committee (PREPCOM), which is composed of all members of the United Nations and Observers from the U.N. Bodies, Specialized Agencies, International Organisations. It was mandated to meet for four sessions at Geneva.

He then turned to the second document, the draft working paper, which contained a number of principles that the Committee might wish to adopt as the Kampala Declaration on Human Rights. He said it was intended to help member states prepare a joint position on the promotion and protection of human rights, which will make valuable contribution to the preparation of the documentation reflecting the final outcome of the Conference.

The meeting thanked the Assistant Secretary General for having given a lucid exposition of the topic and the brief of the Secretariat.

The Chairman as a representative of his country, presented a position paper on the preparation for the World Conference. His country's position was intended to improve on the Secretariat's draft of General principles on Human Rights.

Consensus had emerged in the Working Group after an exchange of views that the proposed draft Declaration could be based on the AALCC's draft with necessary modifications and improvements. Thereafter the Chairman and the Secretariat were mandated to prepare the draft of the Declaration. Divergent views were expressed during the discussions. The Chairman held a series of informal consultations with various delegations to sort out the differences. Finally the Working Group successfully reached an agreement on the text of draft Kampala Declaration on Human Rights.

The report of the Working Group was presented by the Assistant Secretary General before the plenary. After briefing the proceedings of the working group, he read out the full text of the draft Kampala Declaration on Human Rights. Finally, the Assistant Secretary General pointed out that while the Working Group had unanimously adopted the draft Kampala Declaration on Human Rights, it had taken note of the Japanese delegation's position having reservations on some of its paragraphs, but did not wish to block its adoption.

The Delegate of Japan commended the Report of the Working Group and expressed a few comments on the Kampala Declaration, annexed to that Report. He referred to the relationship between development, human rights and democracy, he observed that while his delegation understood the value of social and economic development in ensuring respect for human rights they believed that there were certain fundamental freedoms and human rights that should be respected by all countries regardless of the degree of their political and economic development. Development should protect and promote the human rights of individuals and could not be sacrificed for development. Referring to paragraph 8 of the Kampala Declaration he said that it would be difficult to consider the right to development as a human right since it was the right of the State and not of an individual. Referring to paragraph 10 of the Kampala Declaration which stated that without the realization of the economic, social and cultural rights, the civil and political rights would not be guaranteed, he expressed the view that the restriction of the civil and political rights could not be justified by the indivisibility and interdependence between political and civil rights on the one hand and economic, social and cultural rights on the other.

As regards the problem of human rights and its relationship with the principle of non-interference in the internal affairs of other countries, his Government's view was that since respect for human rights was a widely accepted principle in international society, it was a matter of international concern and could not be regarded as an exclusive internal problem.

He, however, clarified that despite the different views of Japan, his delegation did not intend to block the consensus on the Kampala Declaration. It requested the Secretariat to keep on record the reservations of his delegation to that Declaration.

The Delegate of the Arab Republic of Egypt proposed an amendment in paragraph 6 of the Kampala Declaration.

The Delegate of Tanzania proposed an amendment in paragraph 21 of the Kampala Declaration and expressed his gratitude to the Japanese delegation for not blocking the consensus on the Declaration.

The Delegate of Kenya referred to the views of the Japanese delegation and stated that in the process of development in the developing countries, human rights were often violated. However, that was not intentional but it was due to lack of investment and financial assistance by the developed countries. He requested the Japanese delegation to study the Joint Statement of the Attorney-General and Ministers of Justice of the Eastern, Central and Southern African states held in Nairobi in October 1992 which contained positive and concrete suggestions to the international community on

how jurisprudence in the area of human rights could be furthered. He appealed to the international community to put in more money on reforming prison facilities.

The President dwelt at length on why the human rights were often neglected in developing countries and clarified that it was due to lack of resources and widespread poverty in the developing countries and not because of any ill-will. He cited an instance of his own country.

The Delegate of Nigeria supported the thrust on the Kampala Declaration and emphasised that development and democracy were inseparable and hoped this aspect would be properly projected at the forthcoming World Conference on Human Rights.

The Delegate of the Libyan Arab Jamahiriya emphasised that there should be no double standards in the application of human rights and supported the Kampala Declaration.

The Delegate of India proposed that the Kampala Declaration should be adopted so that the Secretary General could present it at the World Conference on Human Rights and report on the conference to the Member States.

The Delegate of the Republic of Korea observed that for the easy realization of the universal protection of human rights, the universal acceptance of the International Covenants on Civil and Political Rights and the Economic. Social and Cultural Rights was one of the most essential conditions. He informed the meeting that his country had acceded to these two covenants in 1990; joined the ILO in December 1991 to assist international efforts to ensure fundamental rights relating to trade union activities; ratified the Convention on the Rights of the Child in December 1991; became party to the UN Convention on the status of Refugees; 1951 and its 1967 Protocol, in 1992. He also pointed out that his Government was planning to accede to other International Conventions. He expressed the hope that the forthcoming World Conference on Human Rights would give momentum to enhancing the universal protection and promotion of human rights.

Following these deliberations, the Plenary formally adopted the Report of the Working Group on Human Rights and the attached Kampala Declaration on Human Rights, subject to the reservations of Japan.

The Plenary also formally adopted a decision on this topic, the text of which is reproduced herewith.

(ii) Decision on "Preparation For The World Conference on Human Rights"

Adopted on 6.2.1993

The Asian-African Legal Consultative Committee

Taking note with appreciation of the Brief prepared by the Secretariat on the agenda item (Doc. No. AALCC\XXXII\Kampala\93\11) and the report of the Working Group on the subject set up by the Committee at the present session :

1. **Decides to adopt** the Kampala Declaration on Human Rights, and requests the Secretary-General to submit the Declaration to the Fourth Session of the Preparatory Committee for the World Conference on Human Rights scheduled to be held in Geneva in April 1993;
2. **Urges** Member States of the Committee to speed up their preparatory process and intensify their efforts to ensure a successful conclusion of the Conference;
3. **Approves** the Work Programme concerning the World Conference proposed by the Secretary-General. The suggested measures and actions to be taken in this regard during the year 1993 may include:-

a) continue to monitor the ongoing preparatory process of the World Conference and take an active part in the preparatory meetings and in the Conference itself;

b) prepare a general assessment of the main outcome of the Conference *inter alia*, their legal implications, and follow-up legal aspects, as appropriate, of the programmes to be launched after the Conference;

c) make further studies on the development of international law in the field of human rights, including the refugee and humanitarian law;

d) render appropriate legal assistance to the member States of the Committee at their request in the area of national legislation concerning the promotion and protection of human rights.

4. **Decides** to put the item, "World Conference on Human Rights and its Follow-up", on the agenda of its Thirty-third Session.

(iii) Secretariat Study : The State of the Preparation For the Conference

As far as the process of the preparation for the World Conference on Human Rights is concerned, the attention is drawn to the major items under consideration by the Prepcom at its previous sessions. They are : Dates and Venue of the Conference; Draft rules of procedure for the Conference; Provisional agenda for the Conference and documentation, including the question of the final outcome; Regional preparatory meetings; Preparation of publications, studies and documentation for the Conference; participation of representatives of least developed countries in the preparatory meetings and the Conference. The following is a summary of the present State of the preparation for those items.

Dates, Duration and Venue of the Conference

At its first session, on 13 September 1991, the Prepcom, at the invitation of the Government of Germany, decided to propose that the World Conference on Human Rights be convened in Berlin for a period of two weeks in 1993. The proposal was endorsed by the General Assembly Resolution 46/116 of 17 December 1991. Owing to some new circumstances in February 1992, the Government of Germany withdrew its invitation to host the World Conference. Meanwhile a new invitation was received from the Government of Austria. The Government of Italy also expressed its willingness to consider acting as host to the Conference. The second session of the Prepcom therefore recommended to the General Assembly that it should reconsider the issue concerning the dates and venue of the Conference. On 6 May 1992, the General Assembly adopted decision 46/473, in which

the Assembly, noting with deep satisfaction the decision of the Government of Austria to invite the World Conference to meet at Vienna, decided that the World Conference be convened at Vienna for two weeks in June 1993. During the third Session of the Prepcom, on 14th September 1992, the representative of Austria on behalf of his government proposed that the Conference should take place from 14 to 25 June 1993. The Prepcom took note of this proposal. The final decision on the dates of the Conference will be made by the General Assembly at its 47th Session.

Draft Rules of Procedure For the Conference

As mandated by the General Assembly Resolution 46/116, the Prepcom took up the draft rules of procedure for the World Conference on Human Rights at its Second Session. After a few meetings, the Prepcom reached consensus on most rules of procedure regarding representatives and credentials, officers of the Conference, opening of the Conference, conduct of business, decision-making, subsidiary bodies, languages and records, public and private meetings, other participation and observers, as well as suspension and amendments of the rules of procedure. It was, however, unable to reach an agreement on the number of Vice-Presidents of the Conference and the qualifications of non-governmental organizations' participation at the regional preparatory meetings and the Conference itself. In this context, the Prepcom decided, without a vote, to recommend to the General Assembly that it should adopt the draft rules of procedure proposed by the Chairman of the Prepcom with reservations concerning the number of Vice-Presidents of the Conference and the participation of non-governmental organizations. Those two outstanding issues were left to be dealt with at the third session of the Prepcom.

At its third session, held in September 1992, the Prepcom continued its consideration of the draft rules of procedure for the conference and resolved all the outstanding issues left by the previous session. About the number of Vice-Presidents of the Conference, the Prepcom decided that, following the existing practice of the General Assembly, the number would be 29. The Prepcom further decided to request the General Assembly to decide how these offices should be distributed. With regard to the participation of non-governmental organizations in regional meetings and the Conference itself, the Prepcom recommended to the General Assembly that it should request the Secretary General to invite the following non-governmental organizations to the regional meeting of the Conference : non-governmental organizations with competence in the field of human rights and/or development which have their headquarters in the concerned region.

Consequently, participation of non-governmental organizations in the World Conference was also resolved. It provides that non-governmental organizations with consultative status with the ECOSOC and with competence in the field of human rights, and other non-governmental organizations which participated in the work of the Prepcom or the regional meetings may designate representatives properly accredited by them to participate as observers in the Conference, its main committees and, as appropriate, any of the Committees or working groups, on questions within the scope of their activities.

Finally, on 18 September 1992, the Prepcom adopted by consensus the draft rules of procedure for the World Conference on Human Rights.

Provisional Agenda for the World Conference

Pursuant to the mandate of the General Assembly Resolution 46/116, the provisional agenda for the World Conference on Human Rights and the documentation related thereto, including the question of the final outcome, was taken up by the Prepcom at its second session. A drafting group was established for that purpose. From the very beginning, however, vast diversity of views among the members emerged and remained unresolved. Although intensive debates and consultations, both formal and informal, were held, the drafting group was unable to reach an agreement on a draft provisional agenda for the Conference. The Prepcom thus decided that since consideration of the object subject item had not been concluded it would be carried over to the agenda of the third session of the Prepcom.

The third session of the Prepcom continued to consider as a priority item, the outstanding issues concerning the provisional agenda for the Conference. During the General debate, concrete proposals for inclusion in the provisional agenda were put forward. Some delegations called for consideration of specific problems such as persistent violation of the human rights of women, the plight of refugees and other particularly vulnerable individuals as well as filling the gap between developed and developing countries. Others urged that the provisional agenda should be as broad as possible as that would allow all delegations to pursue the specific issues on which they wanted to focus. When the general debate was concluded, on 15 September 1992, the Chairman of the Prepcom introduced a Working Paper containing a draft agenda for the Conference, which reads as follows:

Working paper submitted by the Chairman of the Preparatory Committee

Draft agenda for the World Conference on Human Rights

(1) Opening of the Conference.

(2) Election of the President.

(3) Adoption of rules of procedure.

(4) Election of the other officers of the Conference.

(5) Appointment of the Credentials Committee.

(6) Establishment of Working Committees

(7) Adoption of the agenda.

(8) Commemoration of the International Year for the World's Indigenous People.

(9) Evaluation of the results achieved and the obstacles to the promotion, full realization and protection of all human rights and fundamental freedoms, (including the right to self-determination, the elimination of foreign occupation, racism, xenophobia, and all forms of racial discrimination, including apartheid,) with emphasis on the implementation of human rights standards and instruments and on the effectiveness of the United Nations machinery.

(10) Consideration of the relationship between development, democracy and the universal enjoyment of all human rights, keeping in view the inter-relationship and indivisibility of economic, social, cultural, civil and political rights.

(11) Consideration, in conformity with the fundamental principles which guide United Nations action, of contemporary trends in and new challenges to the full realization of all human rights, including those of persons belonging to vulnerable groups.

(12) Recommendations to ensure the effective enjoyment of all human rights, noting the variety of contexts and taking into account the universality of these rights and the principles of objectivity and non-selectivity in the implementation of human rights instruments and mechanisms.

(13) Recommendations for strengthening international cooperation in the field of human rights and improving the coordination and effectiveness of the United Nations activities and mechanisms, as well as the relationship between international and regional instruments and mechanisms as appropriate.

(14) Recommendations to secure the necessary financial and other resources for United Nations activities in the field of human rights.

(15) Adoption of the final documents and report of the Conference.

The Prepcom then concentrated its deliberations on the working paper submitted by the Chairman of the Prepcom. The focus of deliberations was whether a list of certain rights and preoccupations, namely, the right to self-determination, the elimination of foreign occupation, racism, xenophobia and all forms of racial discrimination, including apartheid, should be specified in the agenda as did, in square brackets, in paragraph 9 of the working paper.

Two main trends emerged from the debate. Delegations either urged that the human rights or the problems listed in the square brackets be deleted, as the list was far from exhaustive and might give rise to claims of creating a hierarchy of rights or selectivity. The point in this regard was also made that, because the phrase "protection of all human rights" was already included in the paragraph there was no need to list specific human rights issues. Others stressed that the words in square brackets should be maintained, and square brackets be removed, as they reflected the most important human rights concerns facing the world, as well as rights which were considered as sacred to the civilized world. In addition, some delegations proposed that certain additional items such as terrorism and the human rights of women be added to the list.

Many of the speakers underscored the vital importance for the Prepcom to achieve, during the third session, an agreed draft provisional agenda. Otherwise, it would be seriously delaying the preparation for the World Conference.

As a means for resolving the pending issue, the delegation of Canada proposed that the square brackets in paragraph 9 of the Working Paper be removed and that a footnote be added to the provisional agenda which would read as follows : "Nothing in this agenda precludes participants from raising any issue under appropriate agenda item, or from undertaking negotiations with the objective of including particular concerns in the final document." Also in this regard, the delegation of France proposed that the phrase under discussion in paragraph 9 of the Working Paper be deleted and that the Chairman of the Prepcom make a Statement, to be reflected in the report of the third session of the Prepcom, that at the World Conference delegations could raise any thematic issue of interest to them and could also put forward any such issue during the elaboration of the final document. The Chairman asked delegations to think about the French proposal. She

urged them to make every effort to come up with the best solution in order to achieve the highly desired consensus on the draft provisional agenda at that session.

The regional groups then held consultations in private on the question. As the result of those consultations, the Group of Latin American and Caribbean States indicated that, in a further attempt to try to clear the way, they were submitting formally the Working Paper of the Chairman as a draft decision of the Prepcom, entitled "Provisional agenda for the World Conference and documentations, including the question of the final outcome". The Asian Group submitted to the Prepcom a significantly revised draft provisional agenda for the Conference. In doing so, it stressed that this new proposal had a direct relevance to the questions of human rights. Citing such issues as foreign occupation, racial and ethnic discrimination and self-determination, delegations of the Asian Group considered that an official document lacking those points would be a weak one. A detailed document would ease the task of the Conference and clearly set out the issues it should address. The Group of Western countries also indicated they were considering to submit their own proposal on the provisional agenda. Consequently it seemed that at that time, no compromise could be reached in respect of the subject-matter.

In an attempt to reach consensus, at the final moment, on the provisional agenda for the Conference, it was suggested that the Working Paper submitted by the Chairman be adopted by the Prepcom as the decision of the Prepcom, and that all other proposals made by the regional groups be attached as annexes to the decision. This suggestion was considered by many delegations acceptable. There was, however, significant difference of opinion among the delegations on the importance to be attached to the annexes. The delegations of the Asian Group insisted that the proposal of this Group should have the same weight as the Working Paper of the Chairman. Some others disagreed. No consensus or compromise could be reached. Consequently, the Prepcom decided to submit to the 47th Session of the General Assembly the pending issue for its consideration.

Regional Preparatory Meetings

At its first session, on 13 September 1991, the Prepcom decided, in accordance with the objectives and provisions of the General Assembly Resolution 45/155, to recommend that regional meetings be convened for each region that so desired with the assistance of the regional commissions and that those meetings be financed as part of the preparatory work for the

Conference. The recommendation was endorsed by the General Assembly in its resolution 46/116 of 17 December 1991.

Subsequent to the resolution, the Secretary General of the Conference has been notified of the desire of the three groups of Latin America, Asia and Africa to hold regional meetings respectively in San Jose, Bangkok and Tunis. The Secretary General has also been informed by the groups concerned of their wishes in regard to the dates and duration of these meetings. The regional meetings took place in later part of 1992 and early 1993.

As part of the preparatory process for the World Conference, the regional meetings are expected to focus on ways to enhance the implementation of human rights norms at the international, regional and national levels, bearing in mind the human rights aspects considered to be of particular concern to the respective regions. The provisional agenda of the regional meetings would be expected to include *inter alia* issues which relate to the objectives of the Conference from the perspective of the region concerned.

Preparation of Publications, Studies and Documentations

In its resolution 46/116, the General Assembly requested the Secretary-General to prepare the following documentation as soon as possible and to report to the second session of the Prepcom on the progress made on :

(a) A limited number of short, analytical and action-oriented studies on issues referred to in paragraph 1 of General Assembly resolution 45/155, Commission on Human Rights resolution 1991/30 and in particular in paragraph 2 of the annex thereto, and also bearing in mind documentation prepared for, as well as statements made at the first session of the Prepcom;

(b) Reports of meetings that have been organized under the auspices of the UN human rights programme pursuant to General Assembly resolution 45/155;

(c) A reference guide to all UN studies and reports on human rights or related aspects;

(d) An update of the publication of United Nations Action in the Field of Human Rights;

(e) An update of the **Compilation of International Instruments** and the **Status of International Instruments**, including texts of regional instruments on human rights.

An updated report on the status of preparation of publications, studies and documentation for the Conference was presented by the Secretary General

to the Prepcom at its third session held in September 1992. According to the report, as of the date of the report, research and analysis had been initiated to prepare a reference guide to all UN studies and reports on human rights and related aspects, and work on the manuscript of such a reference guide would be completed in the near future. A human rights bibliography has been under preparation by the UN Library at Geneva and the Centre for Human Rights, which would be completed in time for the Conference. The manuscript of the restructured and updated **United Nations Action in the Field of Human Rights** was nearing completion. With regard to **A compilation of International Instruments and the Status of International Instruments**, the collection of materials had been undertaken and was also nearing completion. The new version of the compilation would also include the texts of human rights instruments adopted by regional inter-governmental organizations with institutionalized human rights mechanisms.

Unfortunately, owing to the long deadlock in the consideration of the provisional agenda for the Conference, the studies and documentation related to most substantial objectives of the Conference, including the document of the final outcome have made no great progress.

Public Information Activities Relating to the Conference

In its resolution 46/116, the General Assembly decided that the Secretary General should give the World Conference on Human Rights and the preparatory process thereto the widest possible publicity and ensure full coordination of public information activities in the areas of human rights within the United Nations System.

The Prepcom at its third session had before it a progress report on the subject. The Prepcom was informed that the Centre for Human Rights, the Department of Public Information and the United Nations Information Service at Geneva had been undertaking a comprehensive programme of public information activities, information materials and promotional activities in carrying out the decision of the General Assembly, which included regional and national training courses and workshops, specific information initiatives to enhance public awareness of the Conference and its preparation, elaboration of human rights teaching materials, wide dissemination of legal instruments and other materials related to human rights.

Participation of Representatives of Least developed Countries

To ensure a wide participation by the least developed countries at the

preparatory meetings and the World Conference itself, the General Assembly decided in its resolution 45/155 of 16 December 1990 to establish a voluntary fund for that purpose.

Noting that a number of least developed countries had been unable to send representatives to its first session because of the absence of the voluntary contributions provided for in General Assembly resolution 45/155, on 10 September, 1991, the Prepcom decided to recommend to the General Assembly to reiterate its invitation for contribution of extra budgetary resources to meet the cost of participation of representatives of least developed countries in the preparatory meetings and the Conference itself. It further decided that the General Assembly request the Secretariat to intensify its efforts in this regard.

As of 1 September 1992, the contributions to the voluntary fund were received from the following countries: Australia, China, Czech and Slovak Federal Republic, Denmark, Finland, France, Germany, Ireland, Kuwait, Morocco, Netherlands, New Zealand, Norway, Sweden, United Kingdom. The total amount was US $492743 and FF 200000. The financial requirements of meeting the costs associated with the fund for the remaining meetings in the preparatory process for the Conference and the outstanding balance was approximately US $450 000. At the third session of the Prepcom, the Secretary General reiterated his previous appeals to States that might be in a position to do so to contribute to the voluntary fund.

Organization of Future Session of Prepcom

The fourth and final session of the Prepcom is planned to take place from 22 March to 2 April 1993 at Geneva. It would be expected that the Session would concentrate on the substantial items of the provisional agenda for the Conference, provided it would be adopted by the General Assembly at its ongoing 47th Session, and documentation related thereto, including the documents reflecting the final outcome of the conference. The form and content of the final outcome will have to be decided by the Prepcom at the session.

General Observations

The AALCC attaches great importance to the convening by the United Nations of the World Conference on Human Rights in 1993. It recognizes the full worth of work done by the Organization since its inception in the promotion and protection of human rights throughout the world. It has to realize, however, that the full enjoyment by everyone of all human rights

has yet to become a reality. The major obstacles to this goal continue to exist. Gross and other violations of human rights have frequently taken place. In addition to the old problems affecting human rights, there have emerged many new challenges. There is thus urgent need for evaluation of the past progresses, existing obstacles and new challenges in the promotion, realization and protection of human rights, formulation of guidelines and action plans for the further implementation of human rights, and enhancement of the effectiveness of United Nations activities and mechanisms in the area of human rights. It is obvious that the forthcoming World Conference on Human Rights would provide the international community with a valuable opportunity for this challenge. All States should cooperate in preparing for the World Conference and make every effort to ensure that the Conference is a success.

To ensure a successful conclusion of the World Conference, one of the most important tasks is to prepare a well-oriented agenda for it. In this regard the Secretariat of the AALCC is of the view that the proposal made by India on behalf of the Asian Group during the third session of the Prepcom for the Conference, entitled "Provisional agenda for the World Conference and documentation including the question of the final outcome" (A/Conf. 157/PC/L.4), presented a most acceptable provisional agenda. It featured an appropriate reflection on the objective of the Conference as indicated in the General Assembly resolution 45/155, a clear setting-out of the issues that the Conference should address, and made a direct relevance to the question of human rights, as well as a fair balance among the concerns of different states and state groups. Such a proposal deserves wide support. It would be expected that while discussing the subject at its 32nd Session at Kampala early 1993, the Committee might wish to consider inclusion of a paragraph or paragraphs in its decision related thereto, in which the Committee would *inter alia* give its endorsement to the abovementioned proposed provisional agenda for the Conference, and appeal to all its member states to render their full support in favour of the proposal so that it can be adopted by the Prepcom during its fourth session scheduled to be held in March 1993 at Geneva.

With regard to the preparation for the documentation reflecting the final outcome of the Conference, bearing in mind that a declaration of the World Conference will be expected, the Secretariat of the Committee would like to recommend to the Committee that it adopted a number of general principles on the promotion, realization and protection of human rights, which would be incorporated in the Declaration. To provide a useful basis for and facilitate the Committee's deliberation, the Secretariat wishes to

propose the following general principles:

(1) Human beings are at the centre of the human society. They are, individually and collectively, entitled to enjoyment of all human rights and fundamental freedoms in harmony with the human dignity.

(2) It is a sacred goal/common cause/common concerns of the entire international community to fully realize all human rights for everyone, without distinction as to race, sex, language or religion. All governments, organizations and peoples should be encouraged to make a contribution to the universal respect for promotion and observation of human rights.

(3) All aspects of human rights, political, civil, economic, social and cultural rights, are indivisible and inter-related. Each of them is of the same importance and needs equal attention. The promotion and protection of one category of human rights should never exempt or be an excuse from respecting another. In the present situation, it should be emphasized that the economic, social and cultural rights should not be neglected. Without the realization of these rights, the civil and political rights could not be guaranteed.

(4) Peace and security is a requisite for the full realization of human rights. Efforts should be made to save present and future generations from the scourge of wars and armed conflicts, and to maintain international peace and security in accordance with the Charter of the United Nations.

(5) Universal realization of the right of all peoples under colonial, foreign and alien domination to self-determination is a fundamental condition for the effective promotion and protection of human rights of such peoples. Thus, the right to self-determination should be reaffirmed as an inalienable human right. The target should be set for the elimination of colonialism, foreign occupation and domination, and effective measures therefore should be taken.

(6) The right to development is also an inalienable human right. The vital importance of economic and social development to the full enjoyment of human rights should be further recognized and underscored. It is undoubted that the existence of widespread poverty is a main reason causing the insufficient enjoyment of human rights by the majority of the humanity. Therefore all States should cooperate in the essential task of eradicating poverty as an indispensable requirement for universal realization of human rights.

(7) Democracy and development are intrinsically linked, and should

not be considered in isolation from each other. While there can be no development without democracy neither can there be democracy without development. Democracy cannot be merely an abstract concept, it should be promoted and strengthened through and in the process of social and economic development.

(8) The promotion and protection of the rights of vulnerable groups such as women, children, refugees, disabled, migrant workers and minorities, should be given special attention and priority.

(9) The current main obstacles to the further progress in the full realization of all human rights could be identified to include *inter alia* the followings: threat to peace and security, foreign aggression and occupation,colonialism, racism, racial discrimination, apartheid, terrorism, xenophobia, ethnic and religions intolerance and human rights abuse thereof, denial of justice, including torture, unfair and unjust international economic order, widespread poverty and illiteracy, worsening economic situation of many developing countries, including the disastrous heavy burden of external debts. Effective action plans and concrete measures at the international, regional and national levels to overcome such obstacles should be sought, adopted and implemented.

(10) The promotion and protection of human rights at the international level must conform with the principles enshrined in the Charter of the United Nations, particularly the principles concerning self-determination, sovereign equality and non-interference in the internal affairs of other countries.

(11) All people have the right freely to determine, without external interference, their social, political, economic and judicial systems, and to pursue their economic development. The systems so determined should be fully respected by others.

(12) The principle of universality, objectivity and non-selectivity of all human rights should be established, with a view to avoiding politicalization of human rights issues, creating of double-standard, interference in the internal affairs of other countries under the pretext of human rights and use of human rights as a condition for economic aids.

(13) Human rights standards suitable to one or some countries may not necessarily be applicable to other countries. The application and implementation of human rights standards should take into account the existing conditions of each country, including its specific historical, political, judicial, economic, social, religious and cultural

tradition and reality, as well as the level of economic development. This, however, does not imply the dilution of universal human rights.

(14) Efforts should be made to improve the universal acceptance of major multilateral human rights treaties, in particular the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The World Conference should come out with a clear recommendation that urges all States that have not yet done so to ratify or accede to the Covenants and other international human rights conventions.

(15) The public awareness and concerns of human rights should be enhanced. Citizens should have appropriate access to information concerning their rights, and opportunity to participate in decision-making process. States should encourage and facilitate the public awareness and participation.

(16) Non-Governmental organizations in the field of human rights have an important role in the promotion of human rights. Their ideals and activities could be mobilized into the process of realization of human rights.

(17) With regard to the question of the human rights institutional mechanism, although necessary new and additional financial and other resources might be needed, the importance of the most efficient and effective use of existing resources an mechanisms within the United Nations system could never be over emphasized. The emphasis on the consideration should be put on the improvement of the existing institutional mechanisms and on the enhancement of their better cooperation and coordination.

(18) Any dispute among States arising from concerns of human rights should be settled through negotiation, consultation or other peaceful means in accordance with the Charter of the United Nations. The instruments to be adopted by the World Conference should include appropriate provisions for the peaceful settlement of disputes.

Since the adoption by the General Assembly of the resolution to convene World Conference on Human Rights in 1993, almost two years have passed. Time is running out. Now time available to the preparatory process of the Conference is very limited. In view of the serious situation as mentioned earlier, States should be urged to speed up their preparation and make every effort to ensure the successful conclusion of the Conference. To this end, political will and cooperation as well as a harmonious atmosphere are of vital importance.

The Kampala Declaration on Human Rights

The Asian-African Legal Consultative Committee

Having held its 32nd Session in Kampala, Uganda, from 1-6, February, 1993;

Recalling the provisions of the Charter of the United Nations and the Universal Declaration of Human Rights as well as other international instruments in the field of human rights;

Mindful of General Assembly Resolution 45/155 of December 18, 1990 which *inter alia* called for the convening of the World Conference on Human Rights in 1993;

Mindful also of General Assembly Resolution 46/166 and appreciative of the work of the Prepcom of the World Conference on Human Rights during the preceding Sessions;

Bearing in mind the forthcoming final Session of the Prepcom preparing for the World Conference on Human Rights to be held in Vienna in June 1993;

Declares That

1. The Universal Declaration of Human Rights proclaims a common understanding of all the peoples of the world in the field of human rights and gives help, guidance and inspiration to humanity in the promotion of human rights and fundamental freedoms.
2. Since the adoption of the Universal Declaration of Human Rights, the United Nations has through the adoption of various international instruments made much progress in defining standards for the promotion, enjoyment and protection of human rights and fundamental freedoms. It is an obligation of the members of the international community to ensure the observance of these rights and freedoms.
3. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to colonial countries and peoples, the International Convention on the Elimination of All Forms of Racial discrimination, Declaration on the Right to Development as well as other conventions, declarations, proclamations, decisions, principles and resolutions in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and regional intergovernment organizations, have created new standards and obligations to which all countries should conform.
4. All States that have not yet ratified or acceded to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other international human rights conventions should make every effort to do so.
5. It is the obligation of all members of the international community to ensure that the principles enshrined in the Charter of the United Nations and in other international human right instruments are enforced. All Governments, organizations and peoples should promote the universal respect and observance of human rights.
6. Peace and security are not only Human Rights in themselves but are also a necessary prerequisite for the full realization of all other inalienable and indivisible human rights. Efforts should be made to save present and future generations from the scourge of wars and armed conflicts, and to maintain international peace and security in accordance with the Charter of the United Nations.
7. The validity and universality of human rights, whether civil, political, economic, social or cultural is indispensable and these rights must be protected, upheld and promoted by all. To this end, all governments have a special duty to ensure that the constitutions and laws of their States that relate to human rights are in compliance with international human rights standards and are observed and respected.
8. The right to development is an inalienable human rights. The vital importance of economic and social development to the full enjoyment of human rights, should be further recognized and underscored. It is undoubted that the existence of widespread poverty is a main reason resulting in the insufficient enjoyment of human rights by the majority of humanity. Therefore, all States should cooperate in the essential task of eradicating poverty as an indispensable requirement for universal realization of human rights.
9. Sustainable Development and the Environment are intrinsically linked and should not be considered in isolation from each other. Sustainable Development cannot be merely an abstract concept and should be promoted and strengthened through the process of social and economic development. The human rights to a clean and salubrious environment requires to be progressively developed and codified.

10. The principle of the indivisibility and interdependence of human rights has been recognized and must be given effect in policy formulation and implementation. Civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and the satisfaction of economic, social and cultural rights are a guarantee for the enjoyment of civil and political rights. None of these rights should be given precedence over the others.

11. The primary responsibility for implementing and giving effect to human rights is at the national level. Consequently, the most effective system or method of promoting and protecting these rights has to take into account the nation's history, culture, traditions, norms and values. These is no single universally valid prescription model or system. Whilst the international community should be concerned about the observance of these rights, it should not seek to impose or influence the adoption of their criteria and systems on developing countries. It should be sensitive to the unique aspects of each situation and establish impartiality and genuine concern on human rights problems by objective and acceptable factual analysis of events and situations.

12. The promotion and protection of the rights of vulnerable groups such as women, children, refugees, disabled, migrant workers and minorities should be given special attention and priority.

13. The international community should devise effective action plans and concrete measures to overcome the current obstacles to the full realization of human rights, namely, threat to peace and security, foreign aggression and occupation, colonization, racism, racial discrimination, apartheid, terrorism, xenophobia, ethnic and religious intolerance and human rights abuse thereof, denial of justice, torture, unfair and unjust international economic order, widespread poverty and illiteracy, worsening economic situation of developing countries and heavy burden of external debts.

14. The rule of law and the administration of justice in every country shall be inspired by the principles enshrined in the Universal Declaration of Human Rights and other international human rights instruments relating to the administration of justice.

15. The international community recognizes the importance of the rule of law, the independence of the Judiciary and the administration of justice in the development process. To this end, governments, regional and international financial institutions and the donor community are called upon to give necessary financial resources and assistance to enable those entrusted with the administration of justice to carry out their tasks.

16. The international community affirms that training, equipment and incentives be provided to those State agencies involved in the Administration of Justice within the developing countries on the basis of their need and request. To this end, governments, regional and international financial institutions and the donor community are urged to give the necessary resources.

17. The international community calls upon States to ensure that Law Enforcement Officials shall in the performance of their duties respect and protect human dignity and maintain and uphold human rights of all persons in accordance with international standards enshrined in the Universal Declaration of Human Rights and international human rights instruments regarding arrest, prosecution, detention, imprisonment, protection against torture, cruel, inhuman or degrading treatment or punishment.

18. Cooperation between national, regional and international organizations in the field of human rights should be encouraged by all peoples of the world.

19. Non-governmental organizations in the field of human rights have an important role in the promotion of human rights. Their ideals and activities could be mobilized into the process of universal realization of human rights.

20. The public awareness and concerns of human rights should be enhanced. Citizens should have appropriate access to information concerning their rights, and opportunity to participate in decision-making process. States should encourage and facilitate the public awareness and participation.

21. The United Nations system in the field of human rights is urged to use existing mechanisms and resources effectively and efficiently. The improvement of existing institutional mechanisms and the enhancement of their better cooperation and coordination should be undertaken. All the members of the international community are called upon to contribute additional financial and other resources for human rights activities.

VI. Responsibility and Accountability of Former Colonial Powers

(i) Introduction

The item 'Responsibility and Accountability of Former Colonial Powers' has been on the agenda of the Committee since the Twenty-ninth Session held in Beijing in March 1990. The subject was taken up following a reference made by the Government of Libyan Arab Jamahiriya. At that session, the Committee mandated the Secretariat to examine the legal issues involved in the consideration of the item. The Secretariat in consultation and co-operation with the Libyan Government officials prepared a study which focussed on the Libyan situation in the context of remnants of war and traced the development of international law in that respect. At the Thirtieth Session, held in Cairo, in April 1991, the item could not be discussed due to lack of time.

During the Thirty-first Session, held in Islamabad from 24 January to 1 February 1992, the item was taken up for consideration at the fourth Plenary Meeting. After a brief introduction by the Secretary-General, the delegates of Libyan Arab Jamahiriya, DPR Korea, Uganda, Palestine, Ghana, Egypt, Sierra Leone, Japan and the observer for Italy took the floor. The views expressed in these interventions differed in regard to approach and future course of action.

A view was expressed that since the Committee had exhausted its discussion on the topic, the time was ripe to affirm the AALCC's position in the form of a resolution stipulating among other things the norms of international law which should govern the responsibility and liability of the former colonial powers to pay compensation for the damage caused to those countries which were under colonial rule. Another view, while recognising the vastness of the subject, underlined a cautious approach to deal with the complex issues. Still another view questioned the legal basis

of such claims and advocated a bilateral approach to find a viable solution.[1]

No consensus could be reached. However, the Committee in its decision[2] adopted on the concluding day reaffirmed the right of all peoples formerly under colonial rules to receive compensation for damage suffered as a result of colonial rule. It called on former colonial powers to fully and effectively co-operate with the former colonial people in eliminating the consequences of colonial rule and providing information on those exiled or detained during the colonial rule. Further, it called upon the colonial powers to return to their rightful owners the cultural heritage which was illegally plundered and removed by colonial Powers. Lastly, the Secretariat was asked to continue its detailed study on the topic.

In view of the time constraint and inadequate information, the Secretariat was not in a position to prepare a detailed study for consideration at the AALCC's Thirty-second Session. However, a brief note tracing the legal developments relating to return or restitution of Cultural Property to the Countries of Origin is set out in the next part of this Chapter.

Thirty-second Session:- Discussions

The Secretary-General while introducing the above item gave brief account of the background information and the progress of work in regard to this topic. He pointed out that since the Organization of African Unity (OAU) had a similar item under study as this one, the AALCC intends to work in consultation with the OAU. This proposal was placed before the Committee for its approval. Another issue raised in the Secretariat Note¾Return or Restitution of Cultural Property to the Country of Origin was taken up. It was stated that there existed already an international convention dealing with certain aspects of this matter, concluded in 1970 under the auspices of UNESCO and about 26 AALCC Member States were a party to this convention, individually. The Secretary General observed that there was a move to prepare another international convention as a supplement to the 1970 Convention. He expressed the view that these two conventions together may provide sound basis to establish legal claims in regard to the return and restitution of cultural property. Views of Member Governments were invited on this issue as well.

1. See the Report of the Thirty-first Session, held in Islamabad, from 25th January to 1 February 1992, PP (172-176). Also, the Verbatim Records PP (132-152).
2. See the Report of the Islamabad Session, Page 113. The delegation of Japan expressed their reservation on this decision stating that the subject was of highly political nature and was not appropriate to be dealt within a multilateral legal forum like the AALCC.

The **Delegate of the Libyan Arab Jamahiriya** referred to the Islamabad resolution, recognising the responsibility of colonial powers and the right of the people under colonialism to demand compensation, return of their cultural heritage and to obtain information about the destiny of those who had been exiled during the colonial period and observed that this subject was of great concern to the third world countries, as the OAU also has this topic on its agenda.

He recalled the statement by President Museveni during the inaugural session, emphasising the importance of this subject in particular and highlighting the fact that there were many people from Asia and Africa who had been transported or transferred to other countries to be used as slaves or forced labourers. Earlier Nigeria had also requested the colonial powers for compensation for using a large number of her people, taken as slaves by those countries.

The **Delegate of Japan** reiterated his Governments position on this item as stated in previous sessions and placed on record the reservation of his delegation to the text of the resolution. He stated that since the topic was of a highly political nature, it was not appropriate to be dealt with in a multilateral forum like the AALCC especially when the AALCC Agenda already is too heavy.

The Committee took note of the reservation of the Delegation of Japan and formally adopted the text of the decision, which has been reproduced herewith.

(ii) Decision on "Responsibility & Liability of Former Colonial Powers"

(Adopted With Reservation of Japan On 5.2.1993)

The Asian-African Legal Consultative Committee.

Taking Note of the Brief Note on the Responsibility and Accountability of Former Colonial Powers contained in Document No. AALCC\XXXII\Kampala\93\9;

1. **Requests** The Secretary-General to hold consultations with the Organization of African Unity on the preparation of a joint study on issues concerning Responsibility and Liability of Former Colonial Powers.
2. **Calls upon** the Member Countries to provide relevant instructions to the Secretariat relating to their claims in regard to the restitution of their cultural property.
3. **Requests** the Secretariat to prepare an analytical study on the ongoing work in this field as well as the need for wider participation in the 1970 UNESCO Convention; and
4. **Decides** to include in the agenda of its Thirty-third Session an item entitled "Responsibility and Liability of Former Colonial Powers"

(iii) Secretariat Study : Responsibility and Accountability of Former Colonial Powers

Secretariat Note :

Legal Developments relating to Return or Restitution of Cultural Property to the Countries of Origin

Over the last two decades the issues concerning return or restitution of Cultural Property to the countries of Origin have been discussed extensively in the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the General Assembly of the United Nations.[1] It was under the auspices of UNESCO, that an International Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted in Paris on 14 November 1970. The UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to the countries of origin or its Restitution in case of Illicit Appropriation. This Committee since its establishment in 1980 has met seven times and discussed the issues concerning Promotion and the implementation of the 1970 Convention.

The United Nations has been seized with these issues since 1973, when at the initiative of Zaire, an item entitled "Return or Restitution of Cultural Property to the Countries of Origin" was placed on the agenda of the

1. The UNEP has briefly dealt with some aspects of Protection of cultural heritage. The International Law Commission has examined these issues in connection with its work on Succession to State Property. As for the regional organisations, the Council of Europe adopted the European Convention on the Protection of the Archaeological Heritage signed in London on 6 May 1969. This Convention was subsequently revised on 3 October 1985 and 16 January 1992 (Valetta Convention).

Twenty-eighth Session of the General Assembly. In the ensuing discussions, it was recognised that the Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property could play a major role in combating illicit traffic in cultural property. Although the sphere of its application has been international, the main thrust of the Convention, however, has been to promote bilateral approach on this matter. There are several instances where the two Parties to the Convention through bilateral negotiations have either successfully resolved the issue or established the negotiating process.[2]

The Convention has also encouraged State parties to adopt or strengthen their national legislation with regard to Protection of their national heritage. It has helped wider dissemination of information among the State Parties and provided assistance to establish national inventory of the cultural objects of historical importance. More recently, two important initiatives have been taken to strengthen the implementation of the 1970 Convention. The first one is the preparation of a draft model bilateral treaty for the prevention of crimes against cultural heritage. The second one in cooperation with the International Institute for the Unification of Private Law (UNIDROIT), which envisages preparation of a preliminary draft convention on Stolen or illegally exported cultural objects with the objective to supplement the Private law provisions of the 1970 Convention.

As of today there are 71 States which are parties to the 1970 Convention. Among them are the following AALCC Member States: Bangladesh, China, Cyprus, D.P.R. Korea, Egypt, India, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Mauritius, Mongolia, Nepal, Nigeria, Oman, Pakistan, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sri Lanka, Syrian Arab Republic, Turkey and Tanzania.

The AALCC Secretariat is of the view that the Member States which had not yet become parties to the 1970 Convention may consider doing so. The Secretariat would continue to monitor progress in the UNIDROIT and other forums and prepare further studies without duplicating the ongoing work.

The Committee may also wish to consider establishing an Expert Group which could meet during the intersessional period to examine the relevant issues in the context of Asian-African region and make necessary recommendations which could provide inputs for the UNIDROIT and UNESCO meetings on this issue.

2. For instance negotiations between Turkey and Germany for the return of a Sphinx to Turkey and Islamic Republic of Iran and Belgium for return of archaeological collection from necropolis.

With regard to the matters relating to the responsibility of former colonial powers, the issues involved are complex and need to be examined extensively both from the historical perspectives and the emerging international law on State responsibility. Since the Organisation of African Unity (OAU) also has on its agenda a similar item, it would be desirable to work in concert with that Organisation. The recently concluded co-operation Agreement between the AALCC and the OAU provides a good basis to take such an initiative to prepare a joint programme on this agenda item.

VII. Work of the International Law Commission (ILC)

(i) Introduction

Under Article 4(a) of the Statutes, the Committee is required to examine questions that are under consideration by the International Law Commission (ILC) as well as to consider the report of the Commission and to make recommendations thereon to the Member Governments. This traditional function of the Committee had led to very close working relations between the Committee and the Commission. It has been the practice that the Chairman of the Commission attends the Committee's annual sessions. The Secretary-General also represents the AALCC during the annual sessions of the Commission in Geneva.

The cooperation between the Committee and the ILC during the last three decades has greatly strengthened. The AALCC has played a supportive role in fulfilling the ILC's mandate in the codification and progressive development of international law, through its constructive comments.

The member states of the Committee have been able to formulate common view point with regard to the ongoing process of reviewing and examining the customary international law which indeed, needed updating in many areas. The ties between the two organizations have been fruitful.

Over the years the Committee has endeavoured to promote and develop legal cooperation among its members with a view to harmonising their efforts not only from the perspective of the Asian-African states but also in ensuring that the interests and wider concerns of the AALCC member states are integrated in the formulation of international legal rules.

This item has regularly been taken up at the Committee's annual sessions.

The Commission held its Forty-fourth Session in Geneva from 4th May to 24th July 1992. There were five substantive topics on the agenda of this

session, namely :

(i) The Draft Code of Crimes against the peace and security of mankind;

(ii) The law of Non-Navigational Uses of International Water Courses.

(iii) State Responsibility.

(iv) International liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law; and

(v) Relations between States and International Organisations.

Thirty-second Session : Discussions

At the Thirty-second Session of the AALCC the Chairman of the International Law Commission Mr. Christian Tomuschat recalled the long standing cooperation between the AALCC and the ILC and said that the ILC had at its Forty-fourth Session heard the statement of the Secretary-General of the Committee on matters of mutual concern. Referring to the work of the Commission at its previous session he said that it had three items on its agenda viz the Draft Code of Crimes Against the Peace and Security of Mankind, State Responsibility and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law. The Commission had decided to accord priority to the question of the establishment of an International Criminal Court. The work on that subject, he said, had proceeded in two phases. In the first phase, the Plenary of the Commission had considered at length, the report of the special Rapporteur Mr. Doudou Thiam and after due deliberation had appointed a Working Group. In the second phase, the Working Group on the Establishment of an International Criminal Court under the chairmanship of Mr. A. Koroma had debated on several aspects of the question. The Working Group had considered such diverse issues relating to the establishment of the proposed court as the mode of its establishment, its jurisdiction, the substantive law applicable, the procedural aspects of the cases to be brought before it etc. At the end of the deliberations the need for the establishment of an International Criminal Court had been established and the Commission had endorsed the recommendations of the Working Group.

Professor Tomuschat sketched the progress of work relating to the other two items on its agenda viz. State Responsibility and International Liability for Injurious Consequences Arising of Acts not Prohibited by International Law. He pointed out that the Commission had not considered the two items : the Draft Code of Crimes Against the Peace and Security of Mankind and the Non-Navigational Uses of International Watercourses as the Commission awaited comments of Member States of the UN on the

draft articles adopted by the Commission on first reading at its Forty-third Session.

The **Delegate of China** stated that the establishment of an International Criminal Court (ICC) would be a desirable development in further strengthening international cooperation to curb and combat the scourge of international and transnational crimes. In his opinion, the establishment of such a court would forestall international disputes arising from diversity of national criminal jurisdictions. In his view however, there were numerous issues concerning establishment of an International Criminal Court including the need to uphold the principles of the Charter of the United Nations. He urged the International Law Commission to study all aspects of the question before adopting the text of the statute of the proposed International Criminal Court.

The **Delegate of Japan** said that his delegation believed that the ILC should place greater emphasis on progressive development of International Law rather than the codification of customary International Law. The Commission, in his view, would be expected to address the newly emerging legal issues of rapidly changing international society. He recalled in this regard that the AALCC at its Islamabad Session had requested the Commission to address the question of the legal regime of Environment.

Referring to the proposed International Criminal Court he said that its establishment was quite desirable. His delegation favoured the mandate given by the General Assembly to the Commission to proceed with the drafting of the Statute of an International Criminal Court. He urged the Commission to ensure that the procedure to be followed by the proposed court would ensure due process, independence and impartiality.

Turning to topic of State Responsibility, he expressed the hope that the Commission would expedite the drafting process. In his view, countermeasures would remain an effective instrument to deal with internationally wrongful acts in the absence of the enforcement mechanism of International Law and that it would be appropriate to regulate them rather than shying away. The extent to which countermeasures might be allowed to be resorted to would be related to the dispute settlement regime.

As regards the topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, his delegation noted that the Commission had decided that the topic should be understood as comprising both issues of prevention and of remedial measures and that the Commission would give precedence to considering the issue of prevention over the question of remedial measures. His delegation while recognising the importance of prevention believed that provisions relating to remedial

measures should form the core of the topic.

The **Delegate of Kenya** stated *inter alia* that the question of the establishment of an International Criminal Court was not merely an exercise in jurisprudence but was replete with many political questions. Such questions as the jurisdiction and competence of the proposed court could be resolved only after crossing the political hurdle. The universal acceptance of the statute of the proposed International Criminal Court was one of the political considerations, he said.

He raised points for consideration relating to the jurisdiction, rules of procedure and the substantive law to be applied by the proposed court. He emphasised that the jurisdiction of the court must be universally accepted and be applicable uniformly.

The **Delegate of the Democratic People's Republic of Korea** expressed the view that formulation of the proposed Code of Crimes against the Peace and Security of Mankind required to be dealt with continuously. It should ensure that the mechanism to check criminal acts should have a universal character.

The **Delegate of Syria** referred to the item "Non-Navigational uses of International Watercourses" on the agenda of the ILC which had not been given consideration by the Commission at its Forty-fourth Session. He emphasised the concern of his delegation on the draft articles on 'obligation not to cause appreciable harm', "obligation to cooperate"; and the "Regular Exchange of Date and Information" as adopted by the ILC on first reading. He pointed out that his delegation had also expressed their concern on the matter at the Islamabad session (1992) of the Committee.

The **Delegate of Tanzania** stated that the establishment of an International Criminal Court was an intricate issue which required consideration of some basic principles of criminal justice such as violation of a specific law, the maintenance of peace and preservation of law and order, the rules of procedure, the rules of evidence; the right to defence and above all questions relating to both original and appellate jurisdictions. He expressed the view that the Commission be given more time to further scrutinise these issues.

The **Delegate of the Libyan Arab Jamahiriya** expressed his reservation relating to the establishment of an International Criminal Court, its jurisdiction and competence and the law to be applied.

The **Delegate of India** stated*inter alia* that the Commission should carefully delimit the scope of the topic "International Liability for Injurious Consequences arising out of the Acts not Prohibited by International Law.

On the question of State Responsibility, the delegate stated that the Commission should carefully provide for the role of peaceful settlement of disputes, proportionality test, relevance of interim measures and the powers and functions of multilateral instruments and bodies in the maintenance of international peace and security of mankind.

At the end of the deliberations, the Plenary formally adopted its decision on this topic which has been reproduced herewith.

(ii) Decision on the "Work of the International Law Commission at its Forty-fourth Session"

Adopted on 4.2.1993

The Asian-African Legal Consultative Committee

Having listened to the comprehensive statement of the Chairman of the International Law Commission;

Further, having taken note with appreciation of the report of the Secretary-General on the work of the ILC at its Fourth-fourth Session. (Doc. No. AALCC\XXXII\Kampala\93\1).

1. **Express** its felicitations to the International Law Commission on the achievements of its Forty-fourth Session;
2. **Acknowledges and appreciates** the contributions of the Chairman of the International Law Commission, Professor Tomuschat and thanks him for the lucid and succinct report that he has presented;
3. **Expresses** its appreciation to the Secretary-General for his report on the work of the International Law Commission at its Forty-fourth Session, and particularly the progress made on the question of the Establishment of an International Criminal Court;
4. **Requests** the Secretary-General to bring to the attention of the International Law Commission the views expressed during the Thirty-second Session of the AALCC; and
5. **Decides** to inscribe on the agenda of the Thirty-third Session of the Committee an item entitled "The Report on the work of the International Law Commission at its Forty-fifth Session".

(iii) Secretariat Study: Report on the work of the International Law Commission at its Forty-fourth Session

Background

The International Law Commission (hereinafter called the Commission or ILC), established by General Assembly Resolution 174 (III) in 1947, is the principal organ to promote the progressive development of international law and its codification. The Commission held its Forty-fourth Session in Geneva from 4th May to 24th July 1992. There were as many as five substantive topics on the agenda of the said Session of the Commission. These included:

(i) The Draft Code of Crimes Against the Peace and Security of Mankind;

(ii) The Law of Non-Navigational Uses of International Watercourses;

(iii) State Responsibility;

(iv) International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law; and

(v) Relations Between States and International Organisations (Second Part of the Topic).

In view of its practice not to hold a substantive debate on draft articles adopted on first reading until comments and observations of Governments thereon are available, the Commission did not consider the item, on the *Law of the Non-Navigational Uses of International Watercourses*. The Commission, however, appointed Mr. Robert Rosenstock as Special

Rapporteur for the topic. The Commission also did not consider the item "Relations Between States and International Organizations (second part of the topic). The discussion of the first part of the topic dealing with the status, privileges and immunities of representatives of States to international organizations had culminated in the adoption of a set of draft articles which had formed the basis of the **Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975.** States had been slow to ratify the aforementioned convention and doubts had arisen as to the advisability of continuing the work undertaken in 1970 on the Second part of the topic, dealing with the status, privileges and immunities of International Organisations and their personnel. These issues the Commission observed, were to a large extent covered by existing agreements between States and International Organization. Further while eight reports had been presented by two successive Special Rapporteurs and a total of 22 draft articles contained therein had been referred to the Drafting Committee, the latter had not taken any action on them. Besides neither in the Commission nor in the Sixth Committee had the view been expressed that the topic should be more actively considered. The Commission therefore, decided, subject to the approval of the General Assembly, not to pursue further, during the current tenure of its members the consideration of the topic.

It will be recalled that the General Assembly had by its Resolution 46/54 invited the Commission to consider further, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, and to analyse the issue concerning the question of international criminal jurisdiction or other international criminal trial mechanism as outlined in the Commission's Report on the work of its Forty-second Session so as to enable the General Assembly to provide guidance on the matter.

The Commission held substantial discussions on the issue of an international criminal jurisdiction or other international trial mechanism; the topics on State Responsibility and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law. Some notes and Comments on these items which were subjected to detailed discussions during the forty fourth session are contained herein.

It may be emphasised that the Asian-African Legal Consultative Committee attaches particular importance to the question of Non-Navigational Uses of International Watercourses as this topic is also under consideration by the Committee. The topic of the Draft Code of Crimes Against the Peace and Security of Mankind is also one to which the AALCC

Secretariat attaches great importance in view of the current international situation.

Draft Code of Crimes Against the Peace and Security of Mankind: The establishment of an International Criminal Court

At the Forty-fourth Session the Commission considered the Tenth Report of the Special Rapporteur[1], Mr. Doudou Thiam, which dealt with the possible establishment of an international criminal court or other international trial mechanism.[2]

It is important to note that the Commission had in 1991 adopted a set of Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind. On first reading it was envisaged that the draft articles would be applied by national courts. Article 6 (which deals with the obligation of States Parties to try or extradite persons accused of crimes against the Code) however provides:

"6 (3) The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court".

Article 9, dealing with the principle *non bis in idem* also contemplates the possible establishment of an international criminal court.

Scope of the Tenth Report

The Special Rapporteur's tenth report discusses in some detail the issue of possible establishment of an international criminal court. The report comprises of two parts. Part I (paras 7 - 20) deals with certain objections to such a jurisdiction. Part II (paras 21 - 86) considers certain specific issues which would arise in the course of establishing such a jurisdiction. These dealt with the following issues :-

(A) The law to be applied (paras 21 - 46);

(B) The jurisdiction of the court *ratione materiae* (paras 47 - 56);

(C) Complaints before the court (paras 57 -66);

(D) Proceedings relating to compensation (paras 67 - 75);

(E) The "rendition" of an accused person to the court and its relationship to extradition (paras 76 - 83); and

(F) The question of appeals i.e. "the double hearing principle (paras 84 - 86).

1 See Doc. A/CN/4/442.

2 General Assembly Resolution 46/54. The Report was prepared in pursuance of 9.12.1991 operative paragraph 3.

The draft proposals on these issues were according to the Special Rapporteur, put with the idea of stimulating a debate.

The report was discussed in the Commission in two parts. First, a general debate on Part I and thereafter a specific discussion on each of the questions covered in Part II.

The discussions on Part I dealt with a simple question which had to be answered by the Commission: was it possible to establish an international criminal court? On this point the debate had revealed three trends: ¾ A substantial majority of the members of the Commission had spoken in favour, although with some qualifications, of establishing an international criminal court. They pointed out ¾ on the basis of examples as diverse as the trial of General Noriega in the United States of America, the Gulf War, the attacks on aircraft in which Libya was being singled out and the Touvier case in France ¾ that the lack of an international criminal court was leading States to take unilateral measures which were considered by many to be unacceptable. They urged that such a situation, which could only benefit the strong States, might result in a denial of justice when a State, or one of its courts, refused to try a case because it involved one of its powerful nationals. An international criminal court would fill such a gap.

The second trend was represented by the members of the Commission who pointed out the political and technical problems concerning which the establishment of an international criminal court would give rise. In their view that they would prefer the Commission to move towards a more flexible mechanism which was more compatible with State sovereignty. Some proposals had been made to that effect. One member, for example, had referred to the possibility of the participation of active observers in proceedings instituted before national courts or the possibility of requesting Advisory Opinion from the International Court of Justice. But this opinion according to the Special Rapporteur would not be effective. Trials were in principle public and open to any observer who wished to be present and the establishment of a mechanism composed solely of observers would thus not be a crucial innovation. He had further pointed out that the Advisory Opinion which could be requested from the International Court of Justice could not constitute the "trial mechanism" referred to in General Assembly resolution 46/54. Another member had suggested the establishment of an Ad Hoc Court, but was nevertheless suspicious of such courts, which would be of the Nuremberg type which would established after the Commission of the alleged crimes. This thinking was more in terms of an institution along the lines of the Permanent Court of International Arbitration. However such a court would involve choosing judges from a list and determining the

applicable law, which might be appropriate for arbitration but not for International Criminal Law. The proposal however nevertheless deserves further consideration and possible clarification.

State sovereignty has been described as a major insurmountable political problem. But in modern day world, political *interaction*, necessitated giving up some national prerogatives and was making headway. This would be discerned in the European Community for example. The Commission should not ignore that trend. With regard to technical problems, one member, for example, pointed out that criminal responsibility involved the responsibility of the individual. It was sometimes difficult to determine the responsibility of those in Government or Parliament since the responsibility of the members of a Government was collective. That was the solution adopted by the Nuremberg Tribunal in connection with the theory of conspiracy even where a particular minister did not agree with a decision of the Government.

Concerning aggression, the problem of jurisdiction of the Security Council and of the future International Criminal Court, had to be discussed. The problem would only arise if the International Criminal Court adopted a decision contrary to that of the Security Council. If the Security Council made a ruling, the International Criminal Court would have to consider the appropriateness of the decision it might be called upon to make to avoid being at odds with the Security Council. If the Security Council, determined that there had been an act of aggression and the International Criminal Court concluded otherwise, there might be some difficulties between the plaintiff State and the defendant who might shelter behind the Security Council's decision. The problem was undoubtedly delicate and it was up to the Commission to arrive at an acceptable solution.

The third trend, was in favour of maintaining the status quo. In view of the AALCC Secretariat the second trend, if properly developed further would satisfy the requisite requirements of establishing an international jurisdiction.

Ultimately, besides the problem of national sovereignty, the establishment of an International Criminal Court depends on the existence of political will of States. All the outstanding issues could easily be resolved through drafting in the Commission. A clearly affirmed political will by the member States for the creation of such a Court is a condition *sine qua non* to enable the Commission to make any headway in its work.

The Special Rapporteur recalled that, in 1950, the Commission had appointed two Rapporteurs to study the advantages and drawbacks of establishing an international criminal court. Having considered their reports, the Commission had concluded that it was in favour of such a Court. The

Commission was naturally free to change its mind after 40 years, but if it did so, it would have to indicate reasons therefor. In his view, the recent developments in the international situation did not justify such a reversal. He proposed that if the Commission maintained a possible position, it might set up a Working Group entrusting it with preparing a draft which would be submitted to the General Assembly. If on the other hand the solution seemed premature, the Commission might continue to review all the aspects of the question in plenary. If such a Working Group was established, it would, be necessary for it to compile all the arguments in favour of establishing the court and to prepare a document along those lines which would reflect the consensus.

The Discussion on part two of the Special Rapporteur's Report in the plenary of the Commission

The discussions in the Commission concentrated on the question of the Law to be applied and the jurisdiction with regard to the law to be applied. The first question raised was whether it should be confined to the proposed draft code of crimes. Consensus emerged that the applicable law should not be limited to the Code. The Code was still at the draft stage and it only covered certain categories of international crimes i.e. ¾ crimes against the peace and security of mankind and other most serious crimes. One member for instance observed that there was little chance of the Code, becoming an instrument that could be applied. Relevant conventions in view of many member States should be referred to. If the Code was to take the form of a convention it would become part of that category of sources of the applicable law. If not the international criminal court could still be an institution that was possible for acceptance by the international community.

The Special Rapporteur had provided for Alternative B, "The court shall apply :

(a) international conventions, whether general or particular, relating to the prosecution and prevention of crimes under international law;

(b) international custom, as evidence of a practice accepted as law;

(c) the general principles of law recognized by the United Nations;

(d) judicial decisions and doctrines of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;

(e) internal law, where appropriate.

The elements listed in alternative B of the draft provision gave rise to considerable controversy. The members of the Commission had generally

stated that they were in favour of referring to International Conventions. It was however true that all International Conventions could not serve as the basis for a criminal action, since not all of them were universally accepted. Apartheid, for example, had been included, after lengthy discussion, in the list of crimes against the peace and security of mankind, not in accordance with the International Convention on the suppression of punishment of the crime of *Apartheid*, but in accordance with the peremptory norms of international law.

Custom was the most disputed element and some have gone so far as to say that the *nullem crimes sine lege* principle ruled out any possibility of basing a criminal action on custom. But it was impossible to detach custom from the applicable law, particularly in international law, which was essentially customary.

Referring to the general principles of criminal law recognized by States, some members of the Commission pointed out that since the Hague Conventions of 1899 and 1907 in respect to the laws and customs of war on land, a similar provision analogous to the 'Martens Clause' had been used in all the relevant codification instruments. General principles should therefore not be ignored.

Several members also pointed out that jurisprudence was a source of law in many legal systems and played a particularly important role in the common law countries.

In connection with internal law, the generally accepted principle on the issue under consideration was that of the conferment of jurisdiction. The International Criminal Court in the view of some members of the Commission could not take cognizance of a case unless the States concerned ¾ the State in whose territory the crime had been committed, the victim State, the State of which the suspected perpetrator of the crime was a national and the State on whose territory the suspected perpetrator was found ¾ had recognized its jurisdiction. However, the possibility could not be ruled out that one of those States might make the conferment of jurisdiction on the court subject to the application of its internal law, provided, of course, that the latter was not in conflict with the general principles of criminal law. It was difficult to believe that the international criminal court would never be called upon to apply internal law in a given case, even though it would obviously have to apply international law.

Jurisdiction of the court was a much debated topic, and a middle of the road approach will have to be adopted.

The list of crimes for which the court would have exclusive and

compulsory jurisdiction was not final but it could be made shorter or longer. The Special Rapporteur had proposed a dual regime of jurisdiction: exclusive jurisdiction and optional jurisdiction. He had intended to be cautious, but his proposal for solely optional jurisdiction had been rejected at the preceding session. However such an approach seemed to be generally accepted at the current session.

The question of complaints before the court (section c) had concentrated on paragraph 1 of the draft provision. This provision dealt with principle, not procedure, and its purpose was to provide, on the one had, that only States, and not individuals, were empowered to bring a complaint before the court. On the other hand all States would be concerned irrespective of whether or not they were parties to the Statute of the Court. Thus in the view of some the right to bring a case should not be confined to States parties, since, by referring a matter to the court, a non-party State was, in a sense, showing that it had confidence in the court. What had to be ascertained was in which capacity a State which was not a party to the Statute of the court could bring a complaint before the court. A State which had been a victim of an international crime, whether or not the act had been committed in its territory and whether or not the alleged perpetrator was one of its nationals might be granted the right to institute proceedings.

Furthermore, in our view, it would be undesirable for a prosecutor to be entitled to refer a case to the Court, as some members of the Commission have proposed. The role of the prosecutor could be envisaged in several ways in the event of proceedings being instituted before the international criminal court. The prosecutor should not, in our view, refer cases to the court himself. His role should be to receive complaints, and if necessary to initiate inquiries and to draw up the indictment.

As to the role of International Organizations, they too might have certain interests to protect. An International Organisation might itself have been a victim of aggression against its property or its agents, in which case it might be more appropriate for the organization and not for the State to bring a complaint. In our view International Organizations should be regarded as legal persons under public law with interest separate from those of their members States. They should therefore be able to refer a complaint to the court in the same capacity as States.

With proceedings relating to compensation (Sec. D) in internal law, it frequently occurs that a criminal court has to rule in criminal proceedings and at the same time in the civil proceedings which arose out of them. Therefore there is no reason why an international criminal court could not do likewise. This view however is not generally shared.

The draft provision on the surrender to the court of the alleged perpetrator of the crime (Section E) has given rise to many reservations which are justified in particular by the need to take account of the basic human rights which are protected by extradition treaties. A view was expressed that surrender to the court of the alleged perpetrator of the crime should be automatic; it was an obligation of all States parties to the Statute of the Court. The Court could also conclude extradition agreements with States that were not parties to the Statute. In any event, if an international criminal court was established, it was necessary to have confidence in it, to allow it to perform its function and not to paralyse its action by provisions that would render it ineffective and futile. The principle of surrender should, therefore not be open to question.

Some members were hesitant with regard to the draft provision on the principle of two-tier jurisdiction (Sec. F). It is true that since the court would be the highest international criminal body, it would be anomalous for its decisions to be reconsidered on appeal. In most legal systems, no appeal lies against decisions handed down by the highest national courts. The decisions of the International Criminal Court would be intended to be final. Consequently no appeal should lie, either on point of fact or on a point of law, against the decisions of the international criminal court. Some ideas however were expressed on the possibility of the case being heard by a bench of judges with appeal to the full bench.

After the above discussions in the plenary a working group on an International Criminal Court was formed under the Chairmanship of Mr. Abdul G. Koroma. The mandate of the Working Group was :-

> "To consider further and analyse the main issues raised in the Commission's Report on the work of its 42nd Session concerning the question of an International trial mechanism and to that end take into account the Ninth (Part II) and Tenth Reports of the Special Rapporteur. So as to draft concrete recommendations with regard to various issues which the Working Group may consider and analyse within the framework of its mandate".

Discussions in the Working Group:

The Working Group identified 5 areas for study :

(i) the basic structure of the court or the other options for an international trial mechanism;

(ii) the system of bringing complaints and of prosecuting alleged offenders.

(iii) the relationship of the court to the United Nations system, and especially the Security Council;

(iv) the applicable law and procedure, the issue of ensuring due process to accused persons; and

(v) prosecution and related matters.

The basic structure of the court or the other options for an 'International Trial Mechanism'

The method of creation of a court:- This can be done through a resolution of the General Assembly. The best way for creation of any international institution would however be by a statute agreed to by states parties. Created this way it would have assurance of a sufficient degree of international support to work effectively.

The composition of the court:- It is assumed that the court or other trial mechanism would not be a full-time body, but an established mechanism that can be called into operation when required. The court would be constituted according to procedure determined by the statute, on each occasion it is required to act. The President of the court alone would act in full-time capacity. This would substantially reduce the costs, and help to ensure that suitably qualified persons were available to act as judges.

It was suggested that each state party to the statute would nominate for a prescribed term, one qualified person to act as a judge of the court. Person would be qualified, if they held, or had held, judicial office on the highest criminal trial court of a state party, or were otherwise experienced in penal law (including, where possible, international penal law). States parties would undertake to make judges readily available to serve on the court. The states parties would elect by a secret ballot, from among the judges so nominated, a person to act as President of the court for a prescribed term, and four other judges who with the President would constitute a "bureau" for the Court. When a Court was required to be constituted, the "bureau" would choose five judges to constitute the Court, and in doing so would take into account prescribed criteria (nationality of the accused etc). Under the statute judges of the court would, act independently of any direction or control of their state of origin.

(2) **The system of Bringing Complaints and of Prosecuting Alleged Offenders**

The ways by which a state might accept the jurisdiction of the court: The court should not have compulsory jurisdiction i.e. the state party to the statute is not obliged to accept *ipso facto* and without further agreement the jurisdiction of the proposed court. By becoming party to the statute a state party would have certain administrative obligations. But merely becoming a party would not itself entail the acceptance of jurisdiction of the Court over particular offences or classes of offences. It was suggested that a menu of crimes be presented out of which state could choose. This would have to be done by a separate act. The jurisdiction of the court would not be exclusive but concurrent with state courts. States which are not parties to the statute can nevertheless accept jurisdiction of the Court on an *ad hoc* basis, since the basic purpose of the court is to find solutions to problems involving serious offences of an international character.

The subject matter jurisdiction (jurisdiction ratione materiae) of the court: The court's jurisdiction should extend to specified existing international treaties creating crimes of an international character. This should include the code of Crimes against the Peace and Security of Mankind (subject to its adoption and entry into force), but it should not be limited to the Code. The treaties which can be included are certain war crimes, the Genocide Convention, the *Apartheid* Convention, Convention on hostage taking, hijacking of ships and aircraft etc.

Another issue to be resolved is whether the competence of the court should extend to the crimes against general international law, which have not yet been incorporated. It is suggested that the list of crimes need not be a long one.

The personal jurisdiction (jurisdiction ratione personae) of the court: This issue was dealt with by the Special Rapporteur in his Ninth Report[3]. The broadest possibility would be to build on the exiting principle of universal jurisdiction under various treaties. The court would try individuals i.e. natural persons rather than states. The court should have jurisdiction over offences which themselves have an international character. It could be provided that the Court has personal jurisdiction in any case where a state party to the Statute has lawful custody of an alleged offender. It has jurisdiction to try the offender under the relevant treaty or under general international law, and it consents to the Court exercising jurisdiction instead. In the first phase of operation, the essential need is to establish and reinforce the confidence of states in the court as a possible means of dealing with certain special cases. Another area which needs to be considered is whether an accused person should be able to rely on personal immunity (e.g. as a diplomatic agent). The ideal solution would be to require in every such case

[3] A/CN. 4/435 and Corr. 1.

the consent of the state in question and to treat that consent as a waiver of the immunity.

Three conditions would have to be met for the court to have jurisdiction over a case :

(i) the case must involve an alleged crime falling within the subject-matter of *jurisdiction materiae;*

(ii) the state or states which, under the provisions dealing with personal jurisdiction, are required to accept the court's jurisdiction must have done so, either in advance or *ad hoc;*

(iii) the alleged crime must fall within the terms of their acceptance of jurisdiction.

The relationship between a court and the code of crimes:

Though the draft code of crimes against the peace and security of mankind and the establishment of an international criminal court are two independent projects within the Commission, it is clear that they are inter-related. It would be unfortunate if some states did not ratify the Code because of the lack of appropriate means of implementation. Similarly it would be unfortunate if states did not adhere to the Statute of the Court, because of a perceived lack of objective jurisdiction in the absence of the code.

The essential point, if a court is to become a reality, is to maximize the level of support it can receive from states. When drafting the Statute of the Court however, the possibility should be left open, that a state could become a party to the statute without thereby becoming a party to the Code, or that a state may confer jurisdiction on the Court with respect to the Code, or with respect to one or more crimes of an international character defined in other conventions, or on an *ad hoc* basis. The criteria should be that of maximum flexibility as regards the jurisdiction *rattone materiae* of a court, but this is most readily achieved if the Code and the Statute of the Court are *separate instruments*.

There was general agreement that the proposed Court should not be limited to offences contained in the Code. The Court could have an independent utility, especially if it was widely supported by states. It should be established under its own Statute.

(3) The Relationship Between the court and the United Nations systems, Specially the Security Council.

An important issue which the 1953 Committee left open was whether

the Court should be a part of the United Nations System or should operate as an independent entity. If the Court is world wide in its scope it should be associated with the United Nations. If it is to operate on a regional basis, it can be associated with the relevant regional organization. The Court as envisaged is to be a modest mechanism rather than a standing institution with a substantial staff. The ordinary costs of the Court would be borne by parties to the statute. For any actual trial, it would depend on its length and complexity, but the costs would be borne by states making use of the court.

One idea that may have real potential relates to the concern expressed about the trial of major drug-traffickers. Where this problem is special to a particular region, it may be that a *regional trial court*, established by the countries concerned in cooperation with the United Nations would be one way of resolving such a problem. Such a court need not be part of the United Nations system although technical and other assistance by relevant United Nations programmes or other relevant regional international organizations could be made available.

Other aspects which need to be looked into are the relationship between the Court and the Security Council. Whether the Court has to abide by the Security Council decision which may be political or it should act independently as a judicial organ is still to be resolved.

(4) Applicable Law and Procedure, the issue of ensuring due process to the accused person

In drawing up provisions dealing with law to be applied by an international criminal court, account must be taken of the specific nature of the proceedings before that body, which is, of course, judicial in character. The trial of an individual charged with committing a crime coming within the jurisdiction of such a court is not an international dispute between two subjects of international law. Rather, an international mechanism would be employed to bring to account persons accused of a serious crime of an international character falling within the jurisdiction of the court. A Court would not be created to deal with minor matters, or matters falling exclusively within the domestic jurisdiction of any State. (The Tenth Report of the Special Rapporteur paras (21-46) dealt with this aspect).

A formula along with lines of Article 38 of the Statute of the International Court of Justice would not suffice. It would need to be supplemented by a reference to other sources such as national law, as well as to the secondary law enacted by International Organizations, and in particular the United Nations.

Applicable procedure: The Statute of a Court, or rules made thereunder, should specify to the greatest extent possible the procedural rules for the trial.

(5) Prosecution and Related Matters

The Working Group also outlined some possible solutions to the general question of how proceedings could be initiated before an international criminal court. Such a court would not try *defendants* in *abstentia*. In this context Article 14(3) (d) of the International Covenant on Civil and Political Rights refers to the right of an accused person "to be tried in his presence". In the case of an international criminal court, the requirement that the defendant be in the custody of the court at the time of trial is also important. Other points discussed in the Working Group were: (a) the system of prosecution; (b) the initiation of a case; (c) bringing defendants before a court; (d) international judicial assistance in relation to proceedings before a court; (e) implementation of sentences and (f) relationship of a court to the existing extradition system.

The system of prosecution: Essentially there are three options (1) a complainant state as prosecutor; (2) an independent standing prosecutional organ; and (3) an independent prosecutor appointed on an *ad hoc* basis. An independent *ad hoc* prosecutional system seems best preferable whereby on the occasion of a trial a prosecutor would be appointed on basis agreed. One option would be for the court to appoint a prosecutor, after consultations with the state making the complaint and any state concerned. In the case of a complaint of aggression, for example, the prosecutor could be nominated by the Security Council.

The initiation of a case: In the initiation of a case by complaint, it will be necessary first to identify an official or body to whom such complaint is to be made. This could be the President of the court.

The next question is which state could bring a complaint? In view of the AALCC Secretariat, the right to bring a complaint should extend to *any state party* which has accepted the court's jurisdiction with respect to the offence in question as proposed by the Working Group merits consideration. Consideration need also to be given to a victim state's right to bring a complaint. Another state which could have the right to initiate complaints is a state which has custody of the suspect and which would have jurisdiction under the relevant treaty to try the accused for the offence in its own courts. Co-operation of that state would necessarily be required if a trial was to proceed.

When the complaint is lodged, it would be examined by an independent prosecutor appointed on an *ad hoc* basis. The prosecutor will, where appropriate, issue a formal accusation charging the alleged offender with the commission of a specific crime which falls within the subject matter and personal jurisdiction of the court.

Bringing defendants before a Court: This process would definitely be different from the extradition procedures. The means by which transfer, of the accused, could be requested will in part depend on the nature of the prosecution arrangements. Such a request must be from an authority expressly designated in the Statute. It must be in writing, must contain as accurate a description as possible of the person sought, and must specify the offence and evidence which should be *prima facie* sufficient to justify putting the accused on trial. The requested state would be empowered, and if necessary required, to place an accused person under provisional arrest pending completion of the process of transfer.

International judicial assistance in relation to proceedings before a court: Assistance shall include, but not be limited to:

(a) ascertaining the whereabouts and addresses of persons;

(b) taking testimony or statements of persons in the requested state or at the court;

(c) effecting the production or preservation of judicial and other documents, records, or articles of evidence;

(d) service of judicial and administrative documents; and

(e) authentication of documents.

Other provisions in the treaty could relate to:-

(i) the identification of a central authority in the requested state and an officer of the court to whom and by whom requests for assistance would be made;

(ii) the execution of the request for assistance and the law governing execution;

(iii) the contents of the request;

(iv) the circumstances in which a person who is in custody in the requested state may appear as a witness at the court;

(v) costs;

(vi) confidentiality of information;

(vii) rules governing testimony;

(viii) the language in which requests are to be made; and

(ix) the safe conduct or immunity from prosecution of persons who, pursuant to the treaty, could give testimony before the Court.

Implementation of sentences: The most common form of sentence will be imprisonment, and this raises the question of the place where sentence of imprisonment will be served. The most obvious solution would be for sentences to be served in the penal institutions of the complaining state, under conditions not less favourable to the prisoner than those provided in the United Nations minimum standard Rules for treatment of prisoners.

Relationship of a court to the existing extradition system:

A state party to the statute should at least be under an obligation to give "special consideration" to trial in the international court at the request of another state party.

An International Criminal Trial Mechanism other than a court:-

General Assembly Resolution 46/54 (1992) requested the Commission to examine, *inter alia* "proposals for the establishment of an international criminal court or *other trial mechanism*. One view suggested that these additional words implied the possibility of the creation of a very flexible mechanism, albeit at the international level¾a simple mechanism, essentially voluntary in character on which affected states could call in case of need. According to this view, what was envisaged, at the level of criminal process, was something more like the Permanent Court of Arbitration than the Permanent Court of International Justice or its successor, the International Court of Justice. The Working Group also considered a very flexible system such as a legal mechanism constituted in advance of the occasion for its possible use.

The second option was to reinforce the exercise of national criminal jurisdiction. Such mechanisms night reduce the need for an international trial mechanisms or they might be supplementary or alternative. One possibility would be a mechanism which helped to ensure that a national court, in dealing with an international character, duly applied the provisions of international law. An example of such a mechanism is the reference procedure established under Article 177 of the European Economic Community Treaty.

The third option focused on some form of preliminary international procedure whereby it would be established that a state had committed a given international category a crime termed as a crime against the peace and security of mankind (e.g. aggression, intervention). After that finding

the trial of individuals for their involvement in the activity could take place at national level. The international procedure would however be a necessary prerequisite to a trial, or it could be optional.

Other suggestions included a system of international inquiry or fact finding, in some way linked to the trial of persons involved in a national court. But these options in view of the Working Group would not suffice for international criminal jurisdiction.

Recommendations of the Working Group

The basic propositions recommended by the Working Group were:

(a) Any international criminal court or other mechanism should be established by a statute in the form of a treaty agreed to by states parties;

(b) In the first phase of its operations, at least, a court or other mechanism should exercise jurisdiction only over private persons, as distinct from states;

(c) The Court's jurisdiction should be limited to specified international treaties in force defining crimes of an international character. This should include the Code of Crime against the Peace and Security of Mankind (upon its adoption and entry into force). But it should not be limited to the Code. A State should be able to become a party to the Statue without thereby becoming a party to the Code;

(d) The Court or other mechanism would be essentially a facility for states parties to its statute (and also, on defined terms, other states). It should not have compulsory jurisdiction, in the sense of a general jurisdiction which a state party to the statute is obliged to accept *ipso facto* and without further agreement; and

(e) The court or other mechanism should not be a standing full-time body. On the other hand, its constituent instrument should not be a mere draft or proposal, which would have to be agreed on before the institution could operate. Thus the statute should create an available legal mechanism which can be called into operation when and as soon as required.

The Commission adopted the recommendations of the Working Group and decided to Annex it to the Report.

The Commission concluded:

(a) that though the ninth and tenth reports of the Special Rapporteur on the topic "Draft Code of Crimes against the peace and security of

mankind"[4] and the debates thereon in the plenary, and through the report of the Working Group, it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism" entrusted to it by the General Assembly in 1989;

(b) that the more detailed study in the Working Group's Report confirmed the view, expressed earlier by the Commission, that a structure along the line of that suggested in the Working Group's report could be a workable system;

(c) that further work on the issue *required a renewed mandate* from the Assembly, and needed to take the form not of still further general on exploratory studies, but of a detailed project, in the form of a draft statute; and

(d) that it was now a matter for the Assembly to decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis.

Conclusion

The idea of a court or other trial mechanism needs to be dealt with carefully from the point of view of the *AALCC member states*. There are, no doubt, various flexible forms of international juridical assistance which might help some countries, specially smaller countries with limited legal and judicial resources. These might include the secondment of experienced judges from related neighbouring legal systems; co-operative regional courts of appeal; assistance with judicial education and training.

Before the General Assembly authorizes the preparation of a Statute (as the Working Group recommended) there are certain fundamental points which need to be clarified :

i) Under the present system of universal jurisdiction which provides for trial or extradition, perpetrators do not always get punished because states are either unwilling or unable to comply with the conventional provisions which in any case are not universal. The establishment of an International Court will not overcome this problem unless there is political will to overcome this hurdle.

ii) Where would the seat of the Court be? Whether it be a permanent court or an *ad hoc* mechanism there should be some identifiable seat for such an important body.

4. It may be recalled that Part III of the Eighth Report of the Special Rapporteur considered by the Commission in 1990 was of the nature of a questionnaire dealing with the possible establishment of an international criminal court. See Doc.A/CN.4/430/Add.

iii) Certain states are reluctant to go into such a venture which in effect circumvents extradition procedures. There are often disparities in different legal systems. Some states have abolished death sentence, some others still have it. For the same crime there is also no uniformity of punishment. The principle of proportionality not withstanding, these are some reasons why certain states are reluctant to extradite and might also not be willing to hand over their nationals for trial before an International Court. If the court is to function properly the rules of its procedure should either be framed now or provisions made for giving the Court powers to make such rules and to amend them when required.

iv) While Article 38 of Statute of the International Court of Justice has largely been accepted as the source of applicable law, it is not in our view necessary to exclude writings of publicists as an additional source.

v) Last but not the least, in taking up such an important task as the preparation of a statute of the proposed Court, it is essential that political will exists at all levels. If this is missing, even if the Commission succeeds in framing a Statute which satisfied all requirements, the danger of its being just another Convention like many already existing whether in force but not abided by should not be overlooked. Therefore, before embarking upon any further activity, it is necessary first and foremost to establish that the international community is ready and willing to have an international criminal court.

Nevertheless, the Commission needs to be commended for a job well done. Its conclusions reflected in para 57 are fully supported by the AALCC Secretariat and merit careful consideration by the General Assembly.

International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law

At its Forty-fourth Session the Commission had before it the Eighth Report of the Special Rapporteur[1] Mr. Julio Barboza. The Report, of the Special Rapporteur, reviewed the status and purpose of the draft articles he had hitherto proposed and further, indicated that apart from the text of the first nine draft articles presently before the Drafting Committee the text of other draft articles that he had proposed thus far were merely explanatory. This however, he pointed out, did not apply to the text of draft article 10 on

1. See A/CN. 4/433 and Corr. 1.

the principle of non-discrimination since the principle of non-discrimination had generally been supported by the Committee.

The Eighth Report comprising four parts including an Annex (on Recommendatory Provisions of Prevention) and an Appendix (Development of Some Concepts in Draft Articles Appearing in Previous Reports) thus presented a more extensive examination of the development of the principles of prevention and included the text of nine draft articles thereon. The Appendix was an attempt to define the concept of risk and harm more clearly. The Appendix also proposed the amendments to some other terms.

Introducing the Report, the Special Rapporteur stated *inter alia* that the Chapter which the Commission needed to re-examine in light of discussions both at the Commission as well as at the Sixth Committee was one relating to prevention which was earlier to comprehend now that several international instruments on the matter had been drawn up and further there was a growing corpus of legal literature. In this regard he cited several instances which illustrated the intense legal activity in the field in several fora. He pointed out that the draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment drawn up by the Council of Europe, was perhaps one instrument which came closest to the work of the Commission since unlike most of the other Conventions it covered all kinds of dangerous activities and was not restricted in its scope of application to any one type of activity.

The main purpose of the Report, the Special Rapporteur stated, was to transform the obligation of prevention into simple guidelines for Governments. Whereas reparation had to do with risk, risk could not be linked with prevention for the simple reason that the kind of responsibility called for by activities involving risk was a form of strict liability.

Chapter I of the Eighth Report dealt with the question whether the draft articles should include obligations of prevention together with obligations of reparation. Obligations of prevention dealt with procedural obligations. As a majority in the Commission was against keeping procedural obligations in the text, the Special Rapporteur had incorporated them in an annex as guidelines for Governments.

Although some members preferred to keep unilateral measures of prevention as 'real' obligations, the Special Rapporteur believed that obligations of that kind were primary rules whose breach gave rise to state responsibility. The introduction of State Responsibility, however, made for a two-fold problem; on the one hand, Governments were extremely reluctant to become parties to instruments containing clauses on State responsibility. On the other hand, the difficulties of a procedural nature relating to the

method for the settlement of disputes and to the court competent to decide cases concerning relations between States and individuals could not be ignored. Therefore he had eliminated all obligations of prevention from the instrument.

The Special Rapporteur stated that whatever the nature of the annex to which such obligations were confined the question that needed to be addressed was whether prevention measures should be treated jointly or separately. There was only one important difference between measures relating to a particular activity; the content of the consultation. In the Rapporteur's view, all the measures could be jointly treated, Unilateral measures and legislative and administrative measures imposed on the State the same kind of burden, regardless of the type of activity concerned. Because activities with harmful effects caused transboundary harm in the course of their normal operation, they should not be permitted unless there was some form of prior consent between the affected States. Activities involving risk which had been authorised by the State of origin would not require the prior consent of the States likely to be effected provided that the State of origin was prepared to compensate them if damage occurred and to do so within the framework of a regime which recognized, in principle, the liability of the operator for damage.

An important condition for the legality of an activity which caused or created the risk of causing transboundary harm as a result of environmental interference was mentioned in the report of the Experts Group on Environmental Law of the World Commission on Environment and Development. For an activity to be lawful, the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risks must far exceed in the long run the advantage which such prevention or reduction would entail. That statement referred to activities which were not prohibited, regardless of the harm they caused or the risk they created, because they were useful or even necessary to the l life of modern societies, or if one preferred, to the balance of interests test.

Chapter II of the Eighth Report entitled '*Annex-Recommendatory Provisions of Prevention* comprised of the text of nine draft articles on the principles of prevention. Introducing Part II of his Report the Special Rapporteur said that those members of the Commission who preferred the annex approach may wish to express their views on the system proposed in this part. Draft article addressed to *Preventive Measures* sets out the first duty of the State in respect of activities that risk causing or activities causing transboundary harm, and places a State under a duty to assess the potential transboundary harm of any activity falling within the scope of the

topic. It *establishes a basic principle : viz. activities having a risk of causing or activities causing transboundary harm require the prior authorization of the State under whose jurisdiction or control they are to be carried out.*

The views of members on this draft article were divided. While one group found the draft article superfluous, the other supported its retention. In the view of the AALCC Secretariat there is considerable merit in the second approach.

According to the first view draft article 1 stated the obvious. Activities of the kind covered by the topic also posed threats to the environment, life and property in the territory of the State of origin itself. Because of these possible domestic remifications, States normally permitted undertaking such activities within their territory only with their prior authorization. Such authorization would normally be granted only after making a careful assessment of the socio-economic as well as environmental impacts of those activities. Proponents of this view found two other difficulties with draft article 1 viz. (1) the requirement of States adopting special legislative, administrative or enforcement measures interfered with the internal affairs of States; and (ii) it is not always possible to assess correctly the transboundary impact of some activities, it is therefore inappropriate to impose a well-nigh impossible task on the States.

In the view of the members of the Commission supporting the retention of draft article 1, it was only fair to require States to allow activities that had the potential of causing transboundary harm to be conducted only after reviewing their environmental impact assessment. The permit to conduct such activities should not be viewed as a wholly internal matter where it posed transboundary potential for harm.

Draft Article 2 on *Notification and Information* requires notification and information to States that might be affected by transboundary harm. The Special Rapporteur believed, that the draft provision did not impose an unreasonable burden on the States; since information did not entail an additional effort to investigate beyond what the State had already done. Where it found it difficult to discern the extent of the probable effects of that activity, the State of origin, the draft article stipulates, should seek the assistance of an international organization with competence in the area.

Divergent views were expressed about the main thrust of this draft article. According to one view draft article 2 stipulated a duty to inform those who might be harmed by the consequences of one's activities, a principle which already existed in internal law. The members who supported draft article 2 agreed, with the Special Rapporteur, that the duty to inform

was closely linked to the duty to notify and that it was reasonable to require that the notification and information procedure should be followed in cases where transboundary harm was certain or probable. The provision was applicable to both activities involving risk and those with harmful effects. This seems to us as a reasonable approach to mutual danger. However, some preferred the treatment of these two types of activities separately in respect of measures of prevention. Some members felt that the requirement of notification and information under article 2 should become mandatory.

The other view did not see any utility of draft article 2 and found it impractical and felt that if an activity had a risk of significant transboundary harm, it would be a wrongful act and the State of origin should refrain from committing it. The practicality of the provision was also doubted, as it was felt that it would be unreasonable to expect States to refrain from undertaking lawful activities because their assessment of those activities revealed a possible transboundary harm.

Divergent views were also expressed on the requirement that the State of origin should seek the assistance of competent international organization. While some members expressed the view that its practicallity was doubtful, others felt that such a requirement was most helpful. According to the latter view both regional and international organizations might, in some cases, be in a better position to supply the States, particularly the developing States, with technical and financial assistance in respect of, for example, preventive measures to be adopted. Organizations such as UNIDO, IAEA and the Indian Ocean Commission were mentioned as examples of useful international and regional organizations. It was suggested that the provision defining the role of the international organizations might well be modelled on Articles 202 and 203 of the United Nations Convention the Law of the Sea. It was also proposed that this topic should anticipate preferential treatment for developing States.

Draft article 3 dealing with *National Security and Industrial Secrete* incorporates a safeguard clause permitting the State of origin to withhold information vital to its national security or to the protection of industrial secretes. The draft article relies on the good faith cooperation by the State of origin with other States in transmitting any information that it could provide, depending on the circumstances.

This provision may prove to be useful and a positive element in the draft and might even encourage States to accept the instrument as a whole.

Draft Article 4 dealing with *activities with harmful effects; prior consultation* represents the first instance of a separate provision relating only to activities with harmful effects. The draft article is addressed to

those activities which, in their normal course of operation cause transboundary harm. Where such harm is avoidable, the State of origin is obliged to require the operator to take the necessary preventive measures. However where such harm is unavoidable, no further steps may be taken without some consultation with the affected States. Affected States may make counter-proposals regarding the conduct of the activity "with a view to establishing a legal regime for the activity in the question that is acceptable to all the parties concerned".

The members of the Commission who commented on draft article 4 found the purpose of the draft article unclear. According to one view, expressed in the Commission if the State of origin was aware that an activity was going to have harmful effects, it ought to refrain from undertaking or authorizing it. According to another view, the planned activity with harmful effects could be very important to the development of the State of origin and that State might not have any other way to reduce or minimize the transboundary harm to its neighbours. In such a situation no purpose would be-served by holding consultations between the State of origin and the affected State since such consultations are unlikely to lead to any agreed regime.

If the purpose of prior consultations in respect of activities with harmful effects, provided for not only in draft article 4 but also in draft articles 5 and 7, is to arrive at an agreed regime which would permit such activities notwithstanding their harmful effects, it should be expressly stated. It need also be indicated that such prior consultations might involve either modification of the original scheme proposed by the State authorizing the activities or possibly, even some element of compensation for the interests in other State that would be harmed by those activities. It was suggested that draft article 4 should make clear that the case of activities whose harm could be avoided, the object of the consultations was to obtain the agreement of the affected State regarding the establishment of an acceptable legal regime of prevention, since the term "consultation" was very often used in cases where there was no obligation to obtain consent. Draft Article 4 must specify the characteristics of "a legal regime" for which the consent of the affected States was requested in the case of avoidable harm. In the view of the AALCC Secretariat this draft proposall while useful might result in agreed regime and needs careful consideration.

Draft Article 5 on *Alternatives to an activity with harmful effects* is the second article dealing specifically with activities with harmful effects where it is abundantly clear that transboundary harm is unavoidable under the conditions proposed or that such harm cannot be adequately compensated.

In such cases, the potentially affected States may ask the States of origin to request from the operator to put forward alternatives which may make the activity acceptable. This article is an intermediate step between consultations and prohibition.

Some members felt that the draft article did not sufficiently protect the interest of the affected State and pointed to the ineffectiveness of the options that were open to it. They expressed the view that where transboundary harm was unavoidable or where it was established that such harm could not be adequately compensated, simply authorising the injured State to request the State of origin to review "alternatives which may make the activity acceptable" was too mild. The draft article should state that if the operator was unable to put forward acceptable alterna...es, the State of origin could not authorize the proposed activities. The Secretariat of the AALCC is of the view that a final decision of this provision would require a careful reading of the stipulations of draft Articles 4 and 7 as well.

Draft Article 6 on *'Activities involving risk consultations on a regime'* attempts to address the specific situation of activities involving risk of causing transboundary harm. This article makes clear that one of the main differences between activities with transboundary harmful effects and those with the risk of causing transboundary harm is the purpose of the duty of consultations. Under Draft Article 6, the States concerned, if necessary, are to consult in order to determine the amount of potential transboundary harm, any possible modification of the planned activity, or preventive measures or contingency plans in case of harm. Draft Article 6 also provides that liability for any transboundary harm caused will be subject to the articles of the main text of this topic, unless the parties could agree on a special regime for compensation.

Draft Article 7 on *Initiative by the Affected State* provides an opportunity for the affected State to take initiatives when it has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm of creating a risk of causing it such harm. The affected State may request the State of origin to comply with the provisions of draft Article 2 of the present Annex. Such a request would be required to be accompanied by a technical explanation, setting forth the reasons for such a belief. If the activity proves to be one of those mentioned in draft article 1 of the main text, the State of origin should pay for the cost of the study.

Views expressed on this draft article indicated general support for the idea underlying it. Several members deemed it useful to allow a State potentially affected by an activity to initiate consultations, both before or after the authorization by the State of origin, and even when the activity in

question had already started or damage was becoming apparent. But the right of the potentially affected State to invoke Article 2 seems unhelpful. Instead, the potentially affected State should only be entitled to call for consultations, which would then be carried out as if they had been initiated by the State of origin.

Draft Article 8 addressed to *Settlement of Disputes* was drafted with the view that a speedy resolution of differences between the parties, in respect of matters dealt with in these articles, is essential. Draft Article 8 addresses a situation where the State of origin and the affected States cannot resolve their differences through consultation. Procedures for peaceful settlement of disputes are to be provided for and are to be attached to this part of the draft articles.

Members of the Commission believed that a provision of this nature was useful and indeed necessary. Such a draft article should recall the general obligation of the peaceful settlement of disputes and if necessary, refer to an annex providing for a particularly flexible and speedy means of settlement. This, in turn, might stimulate more serious consultations. But any procedure for the settlement of disputes should specify precisely under which articles a settlement procedures obligation could be involved. If the provisions were not mandatory, it would be difficult to institute that type of procedure.

The main purpose of the draft article on *factors Involved in a Balance of Interests* is to provide a Framework in which the parties can resolve or reconcile their various interests in undertaking activities with a risk of causing or causing transboundary harm. It is hoped that within this framework, the parties can succeed in balancing their various interests. Article 9 introduces factors that could assist the parties themselves or a third party decision-maker in that effort.

Two different views were expressed by the members who addressed themselves to draft article 9.

According to one view, draft article 9 of the Annex, was one of the most attractive features of the draft and the concept embodied was extremely helpful. To improve the provision further, it was suggested that a distinction should be made between those factors relevant to balancing interests in respect of activities involving harm and those in respect of activities posing a risk of causing harm. These two types of activities involve different issues and most likely involve different factors which the parties negotiating should take into account. It was also suggested that the balance of interests test in draft article 9 should not be limited only to consultations among the State, but should also give due consideration to that balance as possibly

constituting an exception to the establishment of prevention regimes, as called for under draft articles 4 and 6.

According to another view, even though it could be important to indicate to States what could serve as the basis for their consultations, it should be made clear that the factors in article 9 were only recommendatory and were provided simply as guidelines for States. Those factors should, therefore, be moved to an annex, to a commentary on one of the articles on consultations, or removed from the draft altogether.

In the last part of his report the Special Rapporteur explained that since draft article 2 on use of terms had been referred to the Drafting Committee, further developments had taken place outside the Commission in formulating instruments dealing with activities involving risk of causing or causing transboundary harm in respect of certain specific activities. Views in the Commission and in the Sixth Committee also indicated a preference for a more precise definition or risk or even a list of activities to be covered by these articles. For these reasons, he had attempted to provide a clearer definition for *risk and for harm* for the benefit of the Drafting Committee, where article 2 was pending. The Special Rapporteur indicated that from a review of the various definitions of risk in the more recent legal instruments, he had concluded that any such definition should take into account three criteria; (i) *magnitude* of the activity undertaken, (ii) *location* of the activity in relation to areas of special sensitivity or importance (such as wetland, national parks, sites of special scientific interest or of archaeological, cultural or historical importance); and (iii) *effect* of a particular activity on human beings or on the potential use of certain important resources or areas. He therefore proposed another definition of risk for draft article 2.

The proposed new definition reads as follows :

> "Risk means the combined effect of the probability of occurrence of an accident and the magnitude of the harm threatened. Activities involving risk, for purposes of the present articles, are activities in which the result of the above combination is significant. This situation may arise when the effects of the activity threatening, as when dangerous technologies, substances, genetically modified organisms or micro-organisms are used, or when major works are undertaken, or when their effects are accentuated by the location of the sites at which they are carried out, or by the conditions, ways or media in which they are conducted"

The Special Rapporteur noted that there had been a number of recent legal instruments where the concept of harm was defined more precisely.

Having taken into account those definitions and the views expressed in the Commission as well as in the Sixth Committee, the Special Rapporteur proposed the new definition for the concept of harm. He also recommended further changes in the definition of terms in draft article 2.

The other changes in draft article 2 proposed by the Special Rapporteur related to the definitions of the terms *'Damage', Restorative Measures and Preventive Measures*. The proposed definitions read as follows :-

A new paragraph will be added to read :

"Damage" means: (a) any loss of life, impairment of health or any personal injury; (b) damage to property; (c) detrimental alteration of the environment, provided that the corresponding compensation would comprise, in addition to loss of profit, the cost of reasonable reinstatment or restorative measures actually taken or to be taken; (d) the cost of preventive measures and additional harm caused by such measures".

Paragraph 1 would be replaced by :

"Restorative measures" means reasonable measures to reinstate or restore damaged or destroyed components of the environment, or to reintroduce, when reasonable, the equivalent of those components into the environment".

Paragraph (m) would read :

"Preventive measures" means reasonable measures taken by any person following the occurrence of an incident to prevent or minimize the damage referreu to in paragraph... of this article".

The Special Rapporteur, Mr. Julio Barboza, also redefined the concept of a "transboundary harm" to read

"the harm which arises in the territory or other areas under the jurisdiction or control of a State as a physical consequence of an activity under article 1 which is conducted under the jurisdiction or control of another State".

The proposed amendments to the definitions to be incorporated in draft article 2 were not the subject matter of much debate and only a few members commented on them. They are expected to be debated upon in the course of the next session of the Commission. The Secretariat of the AALCC would comment on these draft articles at that time.

The open-ended Working Group established by the Commission to consider some of the general issues relating to the scope, the approach to be taken, and the possible direction of the future work on the topic adopted the following recommendations :

(i) With respect to the scope of the topic the Working Group noted that although the Commission, had in the course of several years of its work on this topic, identified the broad area and the parameters of the topic it has not yet taken a final decision on its precise scope. In the view of the Working Group, such a decision at this time might be premature. It recommended, however, that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to esublish priorities for issues to be covered.

(ii) The Working Group also recommended that the topic should be understood as comprising both issues of prevention and of remedial measures. It proposed, that priority should be given to prevention and only after having completed its work on that first part of the topic, should the Commission proceed to the question of remedial measures. The Working Group proposed that remedial measures may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) The Working Group suggested that attention be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm. The articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it could decide during the next stage of the work, whether to continue with a similar exercise in respect of activities causing transboundary harm.

(iv) On the matter of the approach to be taken with regard to the nature of the articles or of the instrument to be drafted the Working Group took the view that it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from the work of the Commission on this topic. The Working Group thought it prudent to defer such a decision, until the completion of the work on the topic. The Commission should examine and adopt the articles proposed for

this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area.

(v) On the question of the title of the topic in view the ambiguity in the title of the topic as to whether it includes "activities" or "acts" the Working Group recommended that the Commission adopt as a working hypothesis that the topic deal with "activities". However, any formal change of the title should be deferred, for in the light of the further work on the topic additional changes in the title may be necessary. The Commission should therefore wait until it is prepared to make a final recommendation on the changes in the title.

The Working Group took note of the previous reports of the Special Rapporteur in which the issue of prevention had been examined in respect of both activities having a risk of causing and those causing transboundary harm. It recommended that for the next year, the Special Rapporteur in his report to the Commission, should re-examine the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a complete and a final set of draft articles to that effect.

After due consideration of the recommendations of the Working Group the Commission *inter alia* noted that in the last several years of its work on the topic while it had identified the parameters of the topic it had not taken a final decision on its precise scope. The Commission was of the view that such a decision at this time might be premature. In order to facilitate progress on the subject the Commission agreed that it would be practical to approach its consideration in stages and to establish priorities for issues to be covered.

Further to those general observations regarding the scope of the topic the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first, only after having completed its work on that first part of the topic, would be Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

It took the view that at this stage attention should be focused on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, with other activities which in fact cause harm. The articles should deal first with preventives measures in

respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will decide on the next stage of the work.

As regards the approach to be taken with regard to the nature of the articles or of the instrument to be drafted the Commission was of the view that it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It deemed to be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the Articles proposed for this topic, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area.

Apropos the title of the topic the Commission decided to continue with its working hypothesis that the topic deals with "activities" and to defer any formal change of the title, since in the light of the further work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation.

Finally it requested that the Special Rapporteur in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect.

State Responsibility

At its Forty-fourth Session the Commission had before it the Third[1] and the Fourth[2] Reports of the Special Rapporteur, Mr. Gaetano Arangio Ruiz. It may be recalled that the Special Rapporteur had presented his third report at the previous session for information, but owing largely due to lack of time the Commission had been unable to consider it. At the current Session the Chairman of the Commission invited the Special Rapporteur to present a summary of that report for the benefit of new members of the Commission. The Secretariat of the Committee had summarized the third report on the State Responsibility as under

1. A/CN.4/440 and Add. 1
2. A/CN. 4/444 and Add. 1 and 2

The third report of the Special Rapporteur comprised of ten chapters addressed to the kind of measures to be considered (Chapter I); An Internationally wrongful act as Precondition (Chapter II); Functions of Measures and Aims Pursued (Chapter III); The Issue of Prior Claim of Reparation (Chapter IV); the Impact of Dispute Settlement Obligations (Chapter V); the Problem of Proportionality (Chapter VI); The Regime of Suspension and Termination of Treaties as countermeasures (Chapter VII); The Issue of so called self-contained Regimes (Chapter VIII); The Problem of Differently, Injured States (Chapter IX); and Substantive limitations issues (Chapter X).

Introducing the report, the Special Rapporteur stated that the regime of countermeasures which constituted the core of Part Two of State Responsibility was one of the most difficult subjects of the whole topic. The codification of the legal regime of countermeasure, he pointed out, was characterised by two features viz. a "drastic reduction, if not a total disappearance of these similarities with the regime of responsibility within national legal systems which make it relatively easy to transplant into international law, in the area of substantive consequences "of private (domestic) law sources and analogies[3]. The second feature of the study of countermeasures was that in no other area did the lack, in the society of States, of an adequate institutional framework have so much influences on any existing or conceivable regulation of the conduct of States. He referred in this regard to two aspects of the sovereign equality of States "Which consist on the one hand of the tendency of any State, large, medium or small, not to accept as a rule any higher authority above itself and on the other hand of the contrast between the equality to which every state is entitled in law and the factual inequalities which tempt stronger States to impose their economic if not military power despite the principle. The fact that this is obvious to the point of appearing trite does not reduce in any measure the difficulties to be faced at this juncture".[4]

The content of the report, the Special Rapporteur said, had been conceived in the light of the peculiarities of the subject-matter and the complexities and preoccupation that they suggest the main perplexities arose in the area of crimes. The main purpose of the report was to identify problems, opinions and alternatives, and to elicit comment and criticism within the Commission and elsewhere on the basis of which more considered suggestions and proposals could be submitted.

3. *See* the third report on State Responsibility. A/CN.4/430 para. 2.
4. *Ibid* para 3.

In the first chapter of the Third Report, addressed to the 'Kinds of Measure to be considered' the Special Rapporteur, *inter alia*, observed that "international practices indicates a variety of measures to which States could resort in order to secure fulfilment of the obligations deriving from the commission of an internationally wrongful act or otherwise react to the latter". The most widely used of such measures were (a) self-defence; (b) sanction; (c) retorsion or restorsions; (d) Reprisals (e) counter measures; (f) reciprocity; and (g) *Inadimplente non est adiplendum* suspension and termination of treaties.

Alluding to the first of these viz. self-defence, he stated that it has to be understood as a "reaction to a specific kind of internationally wrongful act" viz. as a unilateral armed reaction against an armed attack. Such a reaction would consist in a 'form of armed self-help or protection, exceptionally permitted by the international legal order' which contemplates a "genuine and complete ban on the use of force".

Referring to the concept of sanction, the Special Rapporteur said, that it deals with an essentially relative action susceptible of a variety of definitions. In his view a "mere specific, albeit circumscribed, meaning of sanctions seems to prevail in the contemporary doctrine and to find support" *inter alia* in the work of the Commission itself. He pointed out that the Commission seems to have reserved the term sanction to measures adopted by an international body. He accordingly proposed that in conformity with the Commission's choice, the term sanction had better be reserved to designate the measures taken by international bodies and further that in considering the consequences of crimes, and Commission may deem it worthwhile to examine whether the term 'sanction' could be extended to measures which, although emanating from States collectively, would not qualify as measures taken by an international body.

Referring to the concept of restorations he stated that although retorsions are and may be resorted to by way of reaction to an internationally wrongful act they do not give rise to the legal problems which are typical of the other forms of reaction to be considered for the purpose of the draft articles on State Responsibility. Acts of retorsion may nonetheless call for some attention in view of the fact that international practice does not always reflect a clear distinction of measures consisting of violations of international obligations from measures which do not pass the threshold of unlawfulness.

The Special Rapporteur pointed out that reprisal is one of the oldest and most important of traditional concepts and the notion of reprisal had its roots in inter individual systems i.e. the measures used by the aggrieved party as a means of securing direct reprisals.

Most modern authors see a reprisal as a conduct which is "*per se* unlawful in as much as it would entail the violation of the right of another subject, but loses its unlawful character by virtue of being a reaction to a wrongful act committed by that other subject. The term reprisal would thus only cover such reactions to a wrongful act as violate a different norm to that violated by the wrongful act itself. "While reciprocity gives rise to non-performance of an obligation similar (by identity or by equivalence) to the violated obligation, reprisals consist in the non-performance of a different rule".

Apropos "Countermeasures" the Special Rapporteur observed that the term is a newcomer in the terminology of the consequences of an internationally wrongful act. He cited the decisions in the Air Services, *United States Diplomatic and Consular Staff in Tehran and Military and Paramilitary Activities in and Against Nicaragua* cases in this regard. He pointed out that Article 30 of Part One of the draft Articles, adopted on first reading, used the term "measure" in the text and "countermeasures" in the title.

As regards Reciprocity measures, the Special Rapporteur stated that the main issue was whether a distinction may be justified and practically useful between reprisals for the counter measures so qualified, on the one hand and the measures taken, by way of mere reciprocity, on the other hand. According to Roberto Ago "reciprocity meant action consisting of non-performance by the injured state of obligations under the same rule as that breached by the internally wrongful act, on a rule directly connected therewith".

In Chapter Two entitled *An Internationally Wrongful Act as a Precondition*, the Special Rapporteur, Mr. Arangio Ruiz, expressed the view that a lawful resort to countermeasures presupposes an internally unlawful conduct of an instant or continuing character. A few publicists however believed that resort to measures could be justified even in the presence of a good faith conviction, on the part of the acting State, that it has been or is being injured by an internationally wrongful act. Mr. Arangio Ruiz was inclined to think that the prerequisite for a lawful resort to measures is and ought to be of the first kind. He did not think the problem to be of any real relevance for the present purposes.

The question of Functions of Measures and Aims Pursued dealt with in Chapter three, reflected a variety of opinions on the subject and is determined in a considerable part by the general concepts of international responsibility. Referring to the divergence between those who believed that it was exclusively compensatory, and those who believed that it was punitive, he

expressed the view that the Commission should not enter into that argument. Under both national and international law, and in the case of both substantive and instrumental consequences, countermeasures and remedies had the dual function of securing compensation and exacting retribution, though obviously, depending on the nature of the wrongful act, one or other of those two functions would predominate in a particular case. More important than the question of the function of countermeasures, perhaps, was the question of the aims pursued by a State in resorting to such measures. These aims were important, because it was one thing if a State resorted to countermeasures to obtain reparation which had been denied and the wrongdoing State pleaded that there was no case to answer, and another if a State attempted to resort to countermeasures, with a view to either establishing a dialogue between the injured State and the wrongdoing State, or to having recourse to a dispute settlement procedure.

In Chapter IV entitled *The Issue of Prior Claim of Reparation* the Special Rapporteur pointed out that the question whether and to what extent lawful resort to reprisals should be preceded by intimations such as protest, demand of cessation and/or reparation, *sommation* or any other form of communication to the offending State on the part of the aggrieved State or States is frequently evoked but rarely dealt with adequately.

According to the minority doctrine reprisals are the primary and normal sanction of any internationally wrongful act ¾ reparation being, in a sense, just a possible "secondary" consequence. This doctrine seems to maintain, although not without exception, that lawful resort to reprisal is not subject to any intimation, claim or *sommation* of the kind indicated in the preceding paragraph. No demand of cessation or reparation would need to be addressed as a matter of law to the offending State before reprisals are put into effort.

In dealing with *'The Impact of Dispute Settlement Obligations'* in Chapter V of the Report the Special Rapporteur stated *inter alia*, that a distinction had to be drawn between the general obligation concerning peaceful settlement, on the one hand, and any specific agreement between the alleged wrongdoer and the alleged injured party, on the other. In so far as the latter was concerned, a number of publicists took the view that the commitments deriving from specific agreements between the injured State and the wrongdoer should, under given conditions, have a decisive impact on the lawfulness of measures taken. In other words, in given cases, prior recourse to one or more of the procedures envisaged would be a condition of lawful resort to countermeasures.

Chapter six of the Report entitled *"The Problem of Proportionality* dealt with the crucial question of the requirement of proportionality. In

the 1920s, it had been argued that proportionality was not a legal requirement but merely a moral obligation. Contemporary doctrine, however, was decidedly in favour of such a requirement, and the prevailing definitions of proportionality were formulated in negative terms. The International Law Institute, in the 1934 resolution had demanded that the measure should be proportional to the gravity of the offence and the damage suffered. A less strict concept emerged from the *Air Services*[5] award which had referred to "some degree of equivalence" and to the fact that judging the proportionality of countermeasures could at best "be accomplished by approximation", while it had been held in the *Naulilaa*[6] case that reprisals should not be out of all proportion to the unlawful act. The previous Special Rapporteur who had been one of the arbitrators in the *Air Services*[7] award, had seemed to agree that the requirement of proportionality should be formulated in less stringent terms. Mr. Arangio Ruiz was inclined to favour a stricter formulation and considered, (i) that the requirement should be expressed in positive, not negative, terms; and (ii) that proportionality should be a requirement with respect not only to the nature of the act but also to other elements, including the attitude of the wrongdoer and the aim pursued by the reacting State.

In the Seventh Chapter of his report the Special Rapporteur had dealt with the *Regime of Suspension and Termination of Treaties As Countermeasures*. He expressed the view that it was a delicate problem and had not, perhaps, been adequately dealt with so far. The relevant rules of the Law of Treaties covered such matters as the kind of treaty breaches that justified suspension or termination; the conditions in the presence of which a treaty could be suspended or terminated totally or in part; and the requirements with which the injured State had to comply in order lawfully to proceed to suspension or termination. It was for the purposes of codification and progressive development of the rules of general international law that the Vienna Conference on the law of Treaties had adopted article 60 of the 1969 Convention and the auxiliary provisions embodied in articles 65-67, 70 and 72 of that Convention.

The Eighth Chapter of the Special Rapporteur's, Third Report dealt with *'The Issue of So-called Self-contained Regimes.* In the report the Rapporteur had observed, *inter alia*, that the possible "Speciality" of measures consisting in the infringement of treaty rules is the question of the relationship between the general rules on State responsibility on the one

5 International Law Report (ILR), Vol. 54, P. 338.
6 United Nations Reports on International Arbitral Award (UNRIAA), Vol. II P. 1028.
7 ILR, Vol. 54, p. 338 ff.

hand and any *ad hoc* rules that a given treaty or set of treaties may set forth in order to provide for the case of its violation. The problem, he observed, appears to stem in the presence of those conventional system or combination of systems which tend to resolve within their own — contractual and special — context the legal regime of a more or less considerable number of relationships among the participating States, including the consequences of the breaches of obligations of the States participating in the system. Such consequences include — in most cases — special, at times institutionalised, measures against violations. It would follow therefrom that the system in question may affect in a measure, more or less explicitly, "*the faculte* of the participating States to resort to the remedial measures which are open to them under general international law. It appears to be in connection with situations of such a kind and nature that a part of the doctrine of the law of State responsibility speaks of "self-contained" regimes.

The Special Rapporteur was of the view that the most typical example of such regimes is the 'system' set up by the treaties establishing the European Community and the relations resulting thereunder. He pointed out that another example frequently evoked by some is that of the "Conventional" system created by the human rights treaties. A self-contained regime consisting of a particularly obvious combination of both customary as well as treaty rules would be, as per an International Court of Justice *dictum* the law of diplomatic relations".[8]

The question arising with regard to these "regimes" is whether the existence of remedies specifically provided for them — at times more advanced - affect in any measure the legal possibility for the participating States to resort to the measures provided for or otherwise lawful under general international law.

The penultimate chapter of the Third Report of the Special Rapporteur had dealt with the *'Problem of Differently injured States'*. The problem of differently injured States was as perplexing as that of self-contained regimes. In the case of a breach of an international obligation, considerable differences could exist between injured States, as the concept of "injured State" was defined in draft article 5 of part Two : Some States might be affected directly, others might be affected indirectly, while others might fall between those two extremes. The Special Rapporteur did not believe that there was a need for a special article dealing with the case of the indirectly injured State. In his view, the distinction between indirectly and directly injured States was merely a matter of the degree to which a State was affected by a wrongful act and the position of each injured State should be left to

8 See ICJ Reports 1980 p. 38

depend simply on the normal application to that State, based on the circumstances of the specific case, of the general rules governing the substantive and instrumental consequences of internationally wrongful acts.

The last Chapter of the third report was addressed to the *Substantive Limitations Issues*, and included the unlawfulness of resort to force; respect for human rights and other humanitarian values; the inviolability of diplomatic and consular envoys; and compliance with imperative rules and *erga omnes* obligations. In the case of use of force, Mr. Arangio Ruiz extended the scope to include the question of whether all forms of armed reprisals or countermeasures were prohibited, as provided for under the Declaration on Friendly Relations and under Article 2, paragraph 4, of the Charter of the United Nations. Mr. Arangio Ruiz was of the view that the Commission was duty-bound to take that position in view of the fact that the prohibition under the Charter was sacrosanct and did not admit of any exception.

Concerning Inviolability of Specially Protected Persons he expressed reservations about the substantive limitations on resort to countermeasures. In his view the issue had given rise to a certain amount of exaggeration. A distinction needed to be made between the case of the inviolability of the person or the premises of a diplomatic envoy and that of the privileges and immunities of diplomatic envoys, where reprisals might be justified.

Lastly, Mr. Arangio Ruiz expressed his inability to propose a solution to each of the matters dealt with in the report. It was clear, however, that it was unlikely, particularly with respect to delicts, that there would be in the short or even the medium-term, an adequate degree of institutionalization, at least at the international level, of remedies available to injured States. While there were examples of regional institutionalization, those cases were rare. For the time being, the only area in which some modest developments might be expected was that of political and military security. With the exception of infrequent cases or regional or special institutionalization, remedies against "ordinary" internationally wrongful acts were limited to inorganic inter-State measures, a system which could be euphemistrically termed "decentralized".

In view of those considerations, he suggested that the Commission was duty-bound to pursue two objectives i.e. (i) it should be much more generous in its formulation of all the articles relating to countermeasures; and (ii) it should make greater efforts towards progressive development in that area. In pursuing the aforementioned objectives, the Commission had to fulfil two requirements which might not be fully compatible viz. (i) to ensure that countermeasures were not abused by allegedly injured States and (ii) to

define countermeasures which were effective enough to guarantee cessation and reparation.

The introduction to the Fourth Report stated that its object is to submit solutions and draft articles on the various aspects of the legal regimes of countermeasures as identified and illustrated in the third report. The solutions in the draft articles, are based on the study of practice and doctrine. The fourth report accordingly addresses itself to such issues as (i) the conditions and functions of countermeasures; (ii) the Impact of Dispute Settlement Obligations; (iii) Proportionality of Countermeasures; (iv) Prohibited Countermeasures; (v) The so-called Self-Contained Regimes; and (vi) the Problem of a Plurality of Equality or Unequally Injured States.

In the Chapter entitled *Conditions and functions of Countermeasures* the Special Rapporteur had surveyed the doctrine and practice relating to three main issues namely (a) the existences of an internationally wrongful act as a basic condition; (b) the function of countermeasures; and (c) protests, intimation, sommation and/or demand of cessation and reparation. The survey of literature and practice on these matters had inspired the text of draft article 11 entitled '*Countermeasures By An Injured State*'. In his oral presentation the Special Rapporteur stated, *inter alia*, that draft article 11 proposed in the Report comprised of six essential elements. The first was that resort to countermeasures presupposed that an internationally wrongful act had been committed. In other words, there should be no doubt that the actual existence of an internationally wrongful act was a basic condition for countermeasures to be taken.

The second element was that the reference to 'demands under articles 6 to 10 on the part of the injured State served a dual purpose. In the first place, it announced the important condition that a demand for cessation/ reparation must have been addressed to the Law-breaking State. In the second place, it underscored at least one of the differences between countermeasures and self-defence. Obviously, no "demand" would be necessary for resort to self-defence under Article 51 of the Charter.

The third element was an additional negative requirement introduced by the reference in the text to the absence of an "adequate response: from the law-breaking State. He, therefore, tentatively proposed the expression "adequate response" in order to meet the exigency of security for both of the parties involved in the responsibility relationship and the equally important exigency of flexibility. He did not exclude, however, the addition of further requirements, such as timeliness.

The fourth element in the article was the distinct reference to"conditions" and "restrictions". The conditions for the legality of counter-measures are

also listed in draft articles 12 and 13 proposed by the Special Rapporteur in his fourth report. Thus the existence of a damage is certainly a condition for lawful recourse to countermeasures provided that the term 'damage' is understood in the broad sense encompassing legal or moral injury.

The fifth element was to be found in the words "not to comply with one or more of its obligations towards the said State", which stressed the fact that a distinction should be made in principle between the so-called measures of reciprocity on the one hand and other countermeasures on the other. A different position of principle had been taken by the previous Special Rapporteur, Mr. Riphagen, in his draft articles 8 and 9.

The sixth element in articles 11 was his tentative proposal to eliminate the wording contained in earlier drafts; "in order to protect its legal rights" or "in order to obtain cessation and/or reparation". He had eliminated that form of language. As explained in the third report, an effort should be made to learn more from State practice, but, as indicated in the present report that practice did not reveal enough with regard to the finality and purpose of compensation, and in particular whether any punitive element was present. In his view, although the punitive intent was likely to be present in the mind of the State organs which decided resort to counter-measures against a wrongdoing State, it was not appropriate to recognize a corresponding right on the part of the injured State to chastise. On the other hand, it would be equally inappropriate to intimate expressly that no such intent could be pursued. The matter should be left simply to the practice of States, subject of course to the general rule of proportionality. The application of counter measures was fraught with the likelihood of abuse, largely because of power disparities among States. This element received ample attention.

The issue of countermeasures that an injured State could take in response to an internationally wrongful act was important as it involved not merely differences of view on technicalities but also on substantial matters.

In the opinion of one member of the Commission countermeasures were a controversial issue because they were simply power relationships in disguise and did not reflect generally recognised rules of international law. They were, therefore, not suitable for codification or progressive development of international law. In its resolution 46/54, the General Assembly had requested the Commission to indicate those specific issues on which expression of views by governments would be of particular interest. The Commission should consider referring to the General Assembly the question of the suitability of including articles on countermeasures and the settlement of disputes in the draft now being formulated.

In the second Chapter entitled "*The impact of Dispute Settlement*

Obligations" the Special Rapporteur had dealt with such matters as (a) State Practice before the first World War; (b) State Practice During the Inter-war period; (c) Principles and Rules emerging After the Second World War; and (d) State practice since the Second World War. After the survey he concluded that the following inference could be drawn (from the practice) in terms of *lex lata:*

"(i) In the first place an injured State must refrain from unilateral measures that may jeopardize an amicable solution as long as it is not clear that the means of settlement other than negotiation at their disposal have not brought about or are not apt to bring about any concrete result;

(ii) Secondly whenever a settlement procedure susceptible of a binding decision is on the way before an international body, an injured State must refrain from any unilateral measure other than interim measures of protection until the said body has reached its decision and the law-breaking State does not comply therewith. Where the international body in question is endowed with the power to indicate or order interim measures of protection, the injured state must refrain from unilaterally adopting any such measures until the body in question has pronounced itself on its request for interim measures.

(iii) It is instead doubtful whether the injured State is to refrain from unilateral measures also by the fact that it is legally entitled to resort to unilaterally to a (binding or not binding) third party settlement procedure."

The Special Rapporteur pointed out that according to draft article 10 proposed by the former Special Rapporteur Mr. Riphagen, it would be unlawful for the Injured State to resort to reprisals (as distinguished from reciprocity "until it has exhausted the international procedures for peaceful settlement of the disputes available to it". That prohibition excluded "interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedures for peaceful settlement of disputes, has decided on the admissibility of such interim measures of protection" as well as the "measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal". Pointing out that the Commission's reaction had varied the Special Rapporteur stated that in light of the analysis of the practice the Commission may prefer to render the relevant provisions more articulate.

Introducing draft article 12 entitled "*Conditions of* Resort to Countermeasures" the Special Rapporteur said that it could be divided into four closely connected but quite distinguishable parts. The first concerned the question of prior communication in general and was reflected in paragraph 1 (b), which was intended to define, albeit in general terms, a requirement implicit in the wording "demand under articles 6 and 10", in article 11, when there was no "adequate response". Appropriate and timely communication of the injured State's intentions had been considered indispensable not only by Mr. Riphagen but also by the Commission during the debate on Part Three of the draft proposed by Mr. Riphagen. Two points arose in that connection. The requirement of an appropriate and timely communication is an important condition in the context of countermeasures to be included in Part Two instead of being included in Part Three, which was to govern the further problem of the new general obligation relating to the settlement of disputes concerning the interpretation and application of the rules contained in the draft.

The next and most important point was in paragraphs 1 (a) and 2 (a), which dealt with prior exhaustion by the injured State of dispute settlement procedures. The matter had been covered in paragraph 1 of his predecessor's article 10, which provided that "No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6."

The first main difference between that formulation and the one proposed now was the criterion of availability. In the older proposal, a reference was made solely to the purpose of the international settlement procedure, namely "in order to ensure the performance of the obligations mentioned in article 6". In the draft now proposed, the sources of availability were much broader, namely "general international law, the United Nations Charter, or any other dispute settlement instrument to which it is a party". Under the older proposal, *availability was understood to cover, in principle, only third party settlement procedures which could be set in motion by unilateral application. In the new text, availability would expressly include all the procedures listed in Article 33 of the Charter*, from the most simple negotiation to the most stringent forms of judicial settlement before the International Court of Justice. In that way, maximum restraint was imposed on the injured State to prevent it from resorting to reprisals prematurely.

Unlike the older formulations, draft article 12 mentions expressly—in favour of the injured State—the factor represented by the way in which the wrongdoing State reacted to any dispute settlement attempts made by the

injured State via one of the available procedures. Paragraph 2 (a) stipulates that the condition set forth in paragraph 1 (a), namely prior exhaustion of "all the amicable settlement procedures available" did not apply "where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures".

The proposed provision needs to bring some balance into the relationship between the injured State and the wrongdoer in the evaluation of the existence or otherwise of that essential condition for the lawfulness of an act of reprisal, namely the exhaustion of available peaceful settlement procedures. Since the scope of availability had been broadened, it is obviously essential to place some burden upon the wrongdoing State. The condition set forth in paragraph 1 (a) was described as the cornerstone of the concept of countermeasures and of their role in the system devised to redress the situation created by an internationally wrongful act. It was emphasized in the Commission that, in order to prevent the injured State being given too much latitude to act as a judge in a case to which it was a party and in the absence of an adequate institutional framework, it was important to establish that available amicable settlement procedures must be exhausted as a prerequisite to the application of countermeasures. This was especially so in view of the great inequality revealed among States in the exercise of their *faculte* to apply countermeasures and the advantage enjoyed in that respect by powerful States in the absence of adequate third party settlement commitments.

Some members commented on the question of compliance with dispute settlement obligations as a condition of the lawfulness of resort to countermeasures. In this connection, it was said that while the task of enhancing the role and broadening the spectrum of peaceful means for the settlement of disputes would be tackled by the Commission in considering Part Three of the draft, it ought to be kept in mind even during the examination of the conditions of admissibility of unilateral countermeasures. Several members referred in this context to Article 2, paragraph 3 and Article 33 of the United Nations Charter and to regional systems whose members were under an obligation to exhaust all available means for the peaceful settlement of disputes before taking any step that might involve the violation of a rule of international Law. Reference was also made to the 1934 resolution of the International Law Institute which stated, *inter alia* that, where machinery existed for the settlement of disputes, there could be no reason for resorting to reprisals.

The view was also expressed that the obligations concerning the peaceful

settlement of disputes were not the only ones to be taken into consideration and that there was a limitation on the unilateral use of countermeasures in the provisions of Chapter VII of the Charter of the United Nations, in the sense that States were no longer free to resort to countermeasures once the Security Council had decided on sanctions in accordance with Articles 41 and 42 of the Charter.

At the outset of Chapter IV of the Fourth Report dealing with the issue of 'Proportionality of Countermeasures' the Special Rapporteur expressed the view that although the relevance of proportionality in the regime of countermeasures is widely accepted in both doctrine and jurisprudence nonetheless clarification was necessary with regard to the precise content of the principle with regard to its strictness or flexibility and with regard to the criterion on the basis of which proportionality should be assessed.

With regard to the first point viz. the strictness or flexibility of proportionality, the Special Rapporteur was of the view that, in the context of inter-state practice, reference should be made either by the reacting State or by the State against which measures are being taken to equivalence or proportionality in a narrow sense. Given that the function of the principle is to avoid the possible inequitable result of the use of countermeasures it is understandable that a rigid notion of proportionality should have appeared unsuitable. The Special Rapporteur therefore *preferred the negative formulations* of the *Naulilaa* and *Air Service* awards. In this he appears to have changed his stance as compared to the views expressed in the Third Report.

Turning to the question of criterion on which proportionality should be based the Special Rapporteur said that proportionality should be assessed taking into account not only the purely quantitative element of damage caused but also to the qualitative factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach.

Introducing draft article 13 entitled *Proportionality* the Special Rapporteur stated that for the abovementioned reasons that he had deliberately opted for a negative rather than a positive formulation. Although the text did not specify the extent to which countermeasures might be disproportionate nor did it require that they should be manifestly disproportionate, it however provided that, in determining whether counter- measures were not disproportionate, account should be taken of the gravity not only of the internationally wrongful act, but also of its effects.

The opinion on the text of the draft article was, however, divided. Some members held that the principle of proportionality provided an effective guarantee to as much as countermeasures that were out of proportion to the

nature of the wrongful act could give rise to responsibility on the part of the State using such measures. Other members stressed that the principle was difficult to apply in practice.

While some members concurred with the Special Rapporteur that the rule on proportionality should be formulated in negative terms, others expressed preference for a positive formulation of the rule in order to limit the area of subjective assessment. In that respect, it was emphasized that the principle of proportionality should also cover measures of restortion and measures of reciprocity and operate in the strictest possible way to ensure that powerful States could not take advantage of their position to the detriment of weaker States. The view was on the other hand expressed that it was with the grossly disproportionate reactions that the Commission should concern itself.

Several member were of the opinion that a more precise definition of the scope and content of proportionality would be desirable. The criterion of equity for example was viewed as too vague and uncertain since it generally depended on the definition of equity established during a dispute settlement procedure. The AALCC Secretariat subscribes to this view for when lawyers leave too much room for argument there is much room for injustice.

In introducing Chapter V of the Report dealing with *Prohibited Countermeasures* the Special Rapporteur stated that the main issues relating to countermeasures arose from the following viz. (a) the prohibition of the use of force; (b) respect for human rights; (c) diplomatic law; and (d) peremptory and *erga omnes* provision and (e) respect for the right of third parties. He observed that although some of the issues under items (a), (b) or (c) above are covered by imperative or *erga omnes* rules it was preferable to continue to deal with them separately in view of the importance acquired by the prohibition of the use of the force and the protection of human rights.

As regards the prohibition of the use of force he emphasised that the prohibition of armed countermeasures under Article 2, paragraph 4, of the Charter of the United Nations, as elaborated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States and in other United Nations and other instruments, should be expressly provided for in the draft articles, first, because the special character of the relationship between the injured State and the offending State made it advisable to affirm the continued validity of certain general restrictions to the freedom of State and, secondly, because States were particularly tempted to evade their obligations whenever the law was not sufficiently explicit

and exhaustive.

The text of draft article 14 on *Prohibited Countermeasures* as proposed by the Special Rapporteur incorporates all the five principles. Draft article 14 incorporated in Chapter VI of the Report reads as under :-

Article 14

Prohibited countermeasures

1. An injured State shall not resort, by way of countermeasures, to :
   a) the threat or use of force (in contravention of article 2, paragraph 4 of the United Nations charter);
   b) any conduct which :
      (i) is not in conformity with the rules of international law on the protection of fundamental human rights;
      (ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;
      (iii) is contrary to a peremptory norm of general international law;
      (iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.
2. The prohibition set forth in paragraph 1(a) includes not only armed force but also any extreme measures of political economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.

The members of the Commission recognised that the Commission could not admit derogation from the prohibition of armed reprisalss implied in Article 2 paragraph 4 of the United Nations Charter. The members of the Commission also agreed with the restrictions based on respect for human rights. As regards the restrictions, on the recourse to counter- measures, deriving from the inviolability of diplomats and specially protected persons although members of the Commission accepted the provision of draft article 14 paragraph 1 sub-paragraph (b) (ii) the view was expressed that since the purpose of a regime of countermeasures was to resolve and not to aggravate it was important to leave open the normal channels of diplomacy. The norms and rules of diplomatic law, it was stated, had sufficient political basis and purpose so as to place them beyond the regime of the scope of countermeasures. Some members questioned the need for a provision relating

to rules of *jus cogens* on the ground that such rules, as defined in Article 53 of the Vienna Convention on Law of Treaties were by definition peremptory norms from which no departure was allowed. It was pointed out, however, that the concept of *jus cogens* varied over time. Several members felt that the concept of *jus cogens* and obligations *erga omnes* were largely similar in scope and reference was made in this regard to the Convention on the Law of Treaties and to the judgment of the International Court of Justice in the *Barcelona Traction case*. It was stated that in the *Barcelona Traction case* the Court's categorisation was based on the value of the interest concerned, the idea being that when basic interests of the international community were at stake, all States were duty-bound to respect them.

In Chapter VII of the Report the Special Rapporteur had dealt with the "so-called self-contained regimes". In the view of the Special Rapporteur the so-called self-contained regimes were charterized by the fact that the substantive obligations they set forth were accompanied by special rules concerning the consequences of their violation.

> "The question to be addressed," in his view, "was, whether the rules constituting those regimes affected—and, if so, in what way—the right of States parties to resort to the countermeasures provided for under general international law. Although the Luxembourg Court of Justice had confirmed the principle that States members of the European Economic Community did not have the right to resort to unilateral measures under general international law, scholarly opinion was divided. Specialists in Community Law Considered that the system of the European Economic Community constituted a self-contained regime, whereas scholars of public international law argued that the treaties concerned did not really differ from other treaties and that the choice of the contracting States to be members of a "community" could not, at the present stage, be regarded as irreversible."

In the view of the Special Rapporteur, the claim that it would be legally impossible, as a last resort, for States members of the European Economic Community to fall back on the measures afforded by general international law did not seem to be fully justified, at any rate not from the point of view of general international law. As far as human rights were concerned, the Special Rapporteur, relying on both the literature and recent practice, expressed the opinion that neither the system established by the International Covenant on Civil and Political Rights nor the regime embodied in the

1950 European Convention on Human Rights prevented the States concerned from resorting to the remedies afforded by general international law and that no self-contained regime existed in the field of Human Rights. He came to the same conclusion as regards the General Agreement on Tariffs and Trade and also in respect to diplomatic law, a sphere in which restrictions on countermeasures seemed to derive not from any "speciality" of diplomatic law, but from the normal application, in that particular area, of the general rules and principles constituting the regime of countermeasures. The Special Rapporteur expressed doubts as to the admissibility, even in *abstracto*, of the very concept of self-contained regimes as subsystems of the law of State responsibility or, to use the expression employed by the previous Special Rapporteur, "closed legal circuit(s)".

In the opinion of the Special Rapporteur, the exercise of the *facultes* (faculties), unilateral reaction provided for under general international law was and must remain possible, namely in the case in which the State injured by a violation of the self-contained system resorted to the conventional institutional and secured from them a favourable decision, but was not able to obtain reparation through the system's procedures. Similarly in the case in which the internationally wrongful act was an on-going violation of the regime, the injured State would have the right, if the wrongdoing State persisted in its unlawful conduct while conventional procedures were in progress, to resort simultaneously to "external" measures calculated to protect its primary or secondary rights without jeopardizing a "just" settlement of the dispute through the procedures provided for under the system.

The Special Rapporteur explained that article 2 of Part Two as adopted by the Commission was questionable in relation to both customary rules and special rules governing treaties. He pointed out that the aim pursued by States in embodying within a treaty special rules governing the consequences of its violation was not to exclude, in the relations between those States, the mutual guarantees deriving from the normal operation of the general rules on States responsibility but to strengthen the normal, in-organic and not always satisfactory guarantees of general law by making them more dependable, without renouncing the possibility of "falling back" on less developed, "natural" guarantees. He therefore suggested that the article should specify, first, that the derogation from the general rules set forth in the draft derived from contractual instruments and not from unwritten customary rules and, second, that, for a real derogation from the general rules to take effect, the parties to the instruments should not confine themselves to envisaging the consequences of the violation of the regime

but expressly indicate that, by entering the agreement, they were excluding the application of the general rules of international law on the consequences of internationally wrongful acts. He also suggested that in the commentary to the article, it should be made clear that a derogation provided for under a contractual instrument would not prevail in the case of a violation which was of such gravity and magnitude as to justify, as a proportionate measure against the law-breaking State, the suspension of termination of the system as a whole.

Several members took the view that the Commission did not have to pronounce on the question of self-contained regimes because the matter was one of treaty interpretation, more specifically of determining whether the treaty involved a renunciation, on the part of the States concerned, of the right to take countermeasures under general international law, assuming that the measures provided for under the treaty were inadequate. It should be recalled that in the *Hostages case* the International Court of Justice had not considered the 1961 Convention as a self-contained regime but had taken account of the body international law relating to diplomatic immunities, emphasising its customary nature. As regards the particular case of a regime based on customary rules, the remark was made that it had to be determined whether some or all of the rules on which such a regime was based were of a *jus cogens* character, in which case there could be no derogation from them. Doubts were expressed on the appropriateness of trying to provide a general answer to those questions by resorting to the notion of self-contained regimes, in as much as each case would have to be determined on its own merits.

Finally, the Report had dealt with the problem of a plurality of equally or unequally injured States.

The Special Rapporteur observed that, according to the definition of an injured State in article 5, of Part Two of the draft articles, an internationally wrongful act might consist not only in conduct giving rise to unjust material damage but also, more broadly, to conduct resulting in the infringement of a right, such infringement constituting, with or without damage, the injury. He said that although most international rules continued to set forth obligations the violation of which affected only the rights of one or more States, that bilateral pattern did not hold for the rules of the general or collective interest that must be complied with in the interests of all the States to which the rules applied. The violation of obligations arising, for example, under rules concerning disarmament, promotion of and respect for human rights and environmental protection, termed "*erga omnes obligations*", simultaneously injured the subjective rights of all the States

bound by the norm, whether or not they were specifically affected, with the exception, of course, of the subjective right of the State that had committed the violation. In the view of the Special Rapporteur, it was now necessary to establish the consequences of the fact that *erga omnes* obligations had corresponding *omnium* rights and to determine, for example, whether the violation of an *erga omnes* obligation placed all the injured States in the same situation and whether it placed them in the same situation as the violation of a different kind of obligation. In his opinion, the notions of a "third State" and an "indirectly injured State" should both be rejected. Citing an example from the Law of the Sea, he said that the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas, a decision which would affect:

(i) the interests of any State whose ships had been on the point of entering the canal when it was closed to navigation;

(ii) the interests of any State whose ships had been sailing towards the canal in order to cross it; and

(iii) the interests of all other States, because, according to the Law of the Sea, all States were entitled to the free use of the canal.

Since all States *were entitled* to the free use of the canal, they were all legally injured by the decision of State A, even though there might be some difference between them in respect of the extent of the damage sustained or feared. The Special Rapporteur therefore arrived at the conclusion that the distinction between "directly" and "indirectly" injured States did not hold water and that the differing situations were distinguished by the nature or the extent of the injury. The fact remained that the breach of an *erga omnes* obligation injured a plurality of States, which were not necessarily injured in the same way or to the same degree. It must therefore be determined to what extent each of those States was; on the other hand, entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition, and, on the other hand, entitled to resort to sanctions or countermeasures.

In the light of the above, the Special Rapporteur suggested a very tentative draft of a possible article 5 *bis* reading as follows:

"Article 5 bis"

"Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles".

Emphasis was first placed on the need to distinguish between the question

of a plurality of injured States and the question of *erga omnes* obligations. The remark was made in this connection that *erga omnes* obligations were part of *jus cogens* and consequently related to international crimes, whereas the problem of a plurality of injured States arose in connection with any regime of international obligations . Attention was drawn in this context to the distinction made by the Special Rapporteur between obligations *erga omnes* and obligation *erga omnes partes*.

Some members agreed that the question of non-directly affected States was worthy of further consideration. The Special Rapporteur's objections to the concepts of non-directly injured, specially affected and third States were viewed as persuasive particularly in the case of a right to cessation and the general entitlement to reparation. Two separate categories of problems were mentioned in this context. The first related to the balance between reactions by various injured States in a situation where there was more than one such State under the terms of article 5. Assuming that no coordinated, collective ("horizontal") action was undertaken by those States, it was likely that each injured State would be predominantly concerned with its own relationship with the State which had committed the wrongful act. Taken alone, that conduct might seem reasonable. But what if, collectively, the conduct of all the injured States amounted to a disproportionate response? A provision to the effect that each state should respond with due regard to the responses of other injured States was viewed as too vague. The second and more serious category of difficulties lay in the fact that, although all injured States were equal within the meaning of Article 5, one or several States would, in some situations, suffer unquestionably more damage than others. The Special Rapporteur's approach, based not on the direct or indirect character of the injury but on the nature and degree of the damage suffered, was considered by some members as having the advantage of placing the problem on the firmer ground of damage, but as preserving uncertainties about the position of the various injured States towards which there were obligations that had been violated, and about the substantive or instrumental consequences of the wrongful act according to the nature and degree of the damage suffered.

In this connection, disagreement was expressed with the attempt of the Special Rapporteur to show that in the case of a violation of a multilateral obligation concerning human rights or the environment, all States were in the same position. It was pointed out that although, under the Charter, the prohibition of aggression constituted a general rule binding on all States in their mutual relationship, it was the direct victim of aggression which had the primary right of self-defence and that, even though other States could be involved in collective self-defence, the International Court of Justice, in the case concerning *Military and Paramilitary Activities in and against*

Nicaragua, had clearly stated that there existed a difference in legal status between the actual victim of aggression and other States, which, in a somewhat artificial sense, could be said to be "legally affected".

It was stated that draft Article 5 *bis* was welcome on three counts¾for the fact that the notion of an "injured State" did not *ipso facto* imply egalitarian treatment of injured States, for replying on the definition *stricto sensu* of an internationally wrongful act in order to identify the injured State or States, and for establishing, on the basis of that definition along, the rights or *facultes* (faculties) enjoyed by each State. Some members raised the question whether this new provision was really necessary; it was suggested instead to indicate either in the draft articles themselves or in the commentary, first, that the capacity of differently injured States to take countermeasures should be proportional to the degree of injury suffered by the State taking the measures and, second, that if the most affected States disclaimed *restitutio in integrum*, no other State should be able to claim it. Other members believed that, instead of conferring a right of response on indirectly injured States, a better course would be to provide that the violation of an *erga omnes* rule should first and foremost give rise to a collective reaction or to action within the framework of institutional mechanisms".

Three other issues were raised in the present context namely the problem of a plurality of wrongdoing States, the question of collective counter measures, i.e. the case where the most affected State might seek assistance from others, and the question of non-recognition and abstaining from rendering assistance were a particularly appropriate consequence in the case of a plurality of injured States and the question was asked whether the corresponding duties should not find their way into the instrument consequences.

The AALCC Secretariat refrains at this stage, in keeping with its past practice, to comment at length on the draft articles proposed by the Special Rapporteur. The Secretariat will comment on them at length once the Commission has adopted them. Nevertheless we deem it necessary to underscore our conviction that the whole concept of codifying — or progressively developing—the concept of countermeasures is one which should be dealt with utmost caution. It is a facility reserved almost exclusively for the powerful States over the weaker ones and it is fraught with the dangers inherent in unilateral and subjective application. The preliminary issue really is whether such a provision should be the subject of priority consideration by the Commission. This is in no way a reflection of the scholarly work undertaken by the Special Rapporteur and his predecessor.

VIII. Environmental Law
The United Nations Conference on Environment and Development, 1992

(i) Introduction

The United Nations General Assembly, decided to convene the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in June 1992, by a resolution 44/228 of 22 December 1989.

The UNCED mandate as formulated by the above resolution covered the following wide range of major environmental and developmental issues, which had actual or potential legal implications:

(a) Protection of the atmosphere by combating climate change, depletion of the ozone layer and transboundary pollution;

(b) Protection of the quality and supply of freshwater resources;

(c) Protection of the oceans and all kinds of seas, including enclosed and semi-enclosed seas, and of coastal areas and the protection, rational use and development of their living resources;

(d) Protection and management of land resources by *inter alia*, combating deforestation, desertification and drought;

(e) Conservation of biological diversity;

(f) Environmentally sound management of biotechnology;

(g) Environmentally sound management of wastes, particularly hazardous wastes, and of toxic chemicals, as well as prevention of illegal international traffic in toxic and dangerous products and wastes;

(h) Improvement of the living and working environment of the poor in urban slums and rural areas, through eradicating poverty, *inter alia*, by implementing integrated rural and urban development

programmes as well as taking other appropriate measures at all levels necessary to stem the degradation of the environment;

(i) Protection of human health conditions and improvement of the quality of life.

The specific objective of the UNCED was to promote further development of international environmental law, and to examine in this context the feasibility of elaborating general rights and obligations of states, as appropriate, in the field of the environment.

The six major outcomes expected to be brought about from the conference were as follows :

(a) an agreed statement of environment and development principles to govern the conduct of nations and people (Earth Charter);

(b) an agreed programme of work by the international community addressing major environmental and developmental priorities for the initial period 1993-2000 and leading into the 21st century (Agenda 21);

(c) agreement on the financial resources required for implementing the programme;

(d) agreement on access to environmentally sound technologies for developing countries;

(e) agreement on measures to strengthen and supplement existing international institutions and institutional processes; and

(f) specific legal instruments on climate change and biological diversity.

Pursuant to the G.A. Resolution, 44/228, a Preparatory Committee (Prepcom) for the UNCED had been established which held an organizational session and four regular sessions during its preparatory process from March 1990 to April 1992. The Prepcom had created three Working Groups to address the major substantial issues of these, Working Group I had concentrated on the issues concerning the protection of the atmosphere, land resources and conservation of biodiversity. Working Group II had primarily dealt with the protection of the oceans and all kind of seas, freshwater resources and environmentally sound management of wastes. The legal, institutional and related matters had been allocated to Working Group III.

Along with the extensive preparations of the Prepcom for UNCED, the Intergovernmental Negotiating Committee (INC) for a Framework Convention on Climate Change and for a Convention on Biological Diversity

had been established respectively, with a view to preparing the draft texts of such Conventions and submitting them to UNCED for signature.

After more than two years of arduous preparation, the United Nations Conference on Environment and Development (UNCED) was eventually held at a high level in Rio de Janeiro from 3 to 14 June 1992. The Summit segment took place on 12 and 13 June 1992. Delegations from over 160 States participated at the Conference. A large number of UN agencies, intergovernmental organizations and non-governmental organizations were also represented. More significantly, the Heads of State and government from about 120 countries personally attended the first-ever Earth Summit.

The main outcomes of the Rio Conference include the adoption of the Rio Declaration on Environment and Development, Agenda 21, including provisions on implementation, financial resources and mechanisms, transfer of environmentally sound technology, cooperation and capacity building as well as international institutional arrangements and the adoption of a statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests. The signature by 153 countries on the Framework Convention on Climate Change and on the Convention on Biological Diversity is another great achievement of the Conference.

Involvement of the AALCC in Preparation for UNCED and its Follow-Up

For long, the AALCC has been addressing the environmental issues from the points of legal perspective. As early as its Tokyo Session held in 1974, the item "Environmental Protection"was included in the agenda of the Session, and since then, the topic has been under active consideration by the Committee.

After the adoption by UN General Assembly of Resolution 44/228, the Committee at its 29the Session in Beijing (1990) recommended *inter alia* that the AALCC should be actively involved in the preparation for the UNCED and render useful assistance to its member States in this regard.

The Committee's work programme on this subject, included : (1) Promotion of ratification of the 1982 United Nations Convention on the Law of the Sea and its subsequent implementation; (2) Transboundary movement of hazardous wastes and their disposal; (3) Consideration of the issues before the UNCED Prepcom, particularly Working Group III dealing with legal and institutional matters; (4) Assistance in the preparation of the Framework Conventions on Climate Change and Biodiversity; and

(5) Development of legal principles on environmentally sound and sustainable development. The Secretariat prepared and updated a series of analytical studies and relevant recommendations on those issues to assist its Member States and make modest contribution to the success of the Rio Conference.

The Committee's endeavours in respect of the preparation for the UNCED were reinvigorated during its 31st Session held in Islamabad in January 1992. At that Session, a two-day Special Meeting on Environment and Development was convened: Following a series of formal and informal exchange of views, a draft text of the statement entitled "Statement of General Principles of International Environmental Law" was adopted.

It was consequently circulated as an official document in all working languages of the UN under agenda item, *Principles on General Rights and Obligations*, of Working Group III.

The AALCC was represented at the Rio Conference by the then President Mr. Aziz A. Munshi and the Secretary-General Mr. Frank X. Njenga. The Secretary-General of the Committee had the honour to address the Conference.

In view of the long-term nature of environmental protection and sustainable development, the Committee decided to continue its efforts and further pursue its environmental programme after the conclusion of UNCED. The measures and actions to be taken in this regard included :

(a) Prepare a general assessment of the outcome of the Rio Conference concentrating particularly on the issues with legal implications;

(b) Continue to monitor the on-going process of UNCED at its next stage and following-up aspects of its new programmes with legal implications;

(c) Prepare a detailed analysis and comments on the two Conventions on Climate Change and Biodiversity and monitor the developments after the signature of the Conventions and make recommendations to the Member States of the Committee in respect of ratification of the Conventions respectively as deemed appropriate;

(d) Make studies on the further development of international environment law;

(e) Render assistance to the Member States at their requests in the field of national legislation concerning the protection of the environment; and

(f) Strengthen the cooperation with the UNEP.

A study was prepared by the Committee's Secretariat in accordance with the mandate given by the Committee at its 31st Session held in Islamabad in January 1992 and in the context of reference to the concerns and involvement of the Committee in the preparation for the UNCED.

This study concentrated on the major issues with legal implications such as the principles on general rights and obligations of States in the field of sustainable development, international legal instruments and mechanisms and international institutional arrangements as well as financial resources and transfer of environmentally sound technologies.

Thirty-Second Session : Discussions

The Secretary-General introduced the document containing three studies prepared by the Secretariat after the conclusion of the United Nations Conference on Environment and Development, in 1992. The first part sets out a brief assessment of the Rio Summit held in Brazil in June 1992. The second part contains an analysis of the provisions of the Framework Convention on Climate Change and the third part deals with the Convention on Biological Diversity. This document had been placed before the AALCC's Legal Advisers Meeting held in New York on 23rd October 1992. At that meeting a comprehensive statement was made by Mr. Nitin Desai, Deputy Secretary-General of UNCED on the outcome of the UNCED. In addition, the President of the International Court of Justice Sir Robert Jennings had addressed the meeting on "The Role of the International Court of Justice in Peaceful Settlement of Environmental Disputes".

He recalled that following the decision of the General Assembly in its resolution 44/228 of 22 December 1989 to convene the United Nations Conference on Environment and Development, the Committee at its Beijing and Cairo Sessions had mandated the Secretariat to monitor the related developments and prepare studies with a view to assist the Member Governments.

The Secretariat officials participated in the important meetings of the Prepcom, UNCED and the Intergovernmental Negotiating Committee meetings on the Framework Conventions on Climate change and Biodiversity.

The Secretary-General stated that the Rio Summit was an event of great importance. The significance of the adoption of the Rio Declaration, the Agenda 21 containing the detailed programme of activities, including the institutional arrangements and the signing of United Nations Framework Convention on Climate Change and the Convention on Biodiversity during

the Rio Summit could hardly be over-emphasized. These legal instruments have far reaching implications well beyond the present decade. The theme of the United Nations Conference ¾ integration of Environment and Development would continue to be the guiding post for ensuing activities in the field of environment. He drew attention to the general observations on the Rio Declaration.

The principal outcome of the Rio Conference however was the adoption of Agenda 21. The faithful implementation of Agenda 21 was the crux of future activities of the United Nations System, and intergovernmental, governmental and non-governmental organizations. The General Assembly at is Forty-seventh Session took vital decisions to revitalize and enhance the role and functioning of the United Nations System in the field of environment and development. It decided to establish a high-level Commission on Sustainable Development in order to ensure the effective follow-up work.

One of the major tasks of the Commission would be to review the implementation of the commitments contained in Agenda 21 including those related to provision of financial resources and transfer of technology.

He also stated that two other new initiatives or follow-up of the Rio Summit, were the establishment of an Inter-governmental Negotiating Committee for the elaboration of an international convention "to combat desertification in those countries experiencing serious drought particularly in Africa", and the convening of a global conference on the sustainable development of small island developing States in April 1994. It was expected that the international convention to combat desertification will be ready for adoption by June 1994.

The adoption on 9 May 1992 of the United Nations Convention on Climate Change by the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and its signing by more than 150 States during the Rio Summit was a notable achievement. Although the Convention was not a perfect one, it had been considered as a first step in a co-operative response to the common concern of the adverse effects of Climate Change.

Article 21 of the Convention provided that the Intergovernmental Negotiating Committee will continue to function as an interim Secretariat until the completion of the first session of the Conference of the Parties to the Convention. Already initiatives had been taken to plan the programme activities and measures aimed at supporting the entry into force and effective implementation of the convention.

While noting the legitimate concern of some of the AALCC Member

States especially the oil producing States, the Secretary-General considered that their participation in the Convention process was desirable. It would provide them the opportunity to correct the imbalance which had creeped in the Convention and to expose the hypocritical approach, if any, followed by the developed States responsible for the largest emission of CO_2 and other greenhouse gases.

The Secretariat would continue to monitor the developments in this regard. It was also ready to assist the Member States in the preparation of national legislation to implement the provisions of the Convention.

According to the Secretary General, the Convention on Biological Diversity was another significant achievement. It provided a broad legal framework for the conservation use and of biological diversity at national and international level.

The developing countries had vital stake in the successful implementation of the provisions relating to access to and transfer of technology and funding mechanisms. He referred to pages 89 to 119 of the Secretariat brief which besides providing an overview of the Convention also made a few suggestions for consideration which were reflected on pages 118 and 119. These related to preparation of national legislation to implement the Convention, the question of liability and compensation for causing damage to the biodiversity or environment of other states, transfer of technology including bio-technology which are covered by intellectual property rights, financial resources for developing countries and the financial facility.

With regard to the work-programme of the Secretariat in the field of environment, the Secretary-General informed the meeting that monitoring of the progress on ratification of the Framework Convention on Climate Change and the Convention on Biodiversity was one of the priorities. In that context, since the Global Environment Facility (GEF) would be playing a key role in the context of both the Conventions, the Secretariat was engaged in the preparation of a detailed study focusing on the ways and means to improve the democratization and governance of the GEF system. The review of the work of the Commission on Sustainable Development and other institutional arrangements emerging from the decisions of the General Assembly during its *forty-seventh* session would also be the areas for consideration by the Secretariat.

The Secretary-General considered it a matter of satisfaction that the Rio Summit had recognised the need for concerted international action to control desertification by *inter alia* formulation of an international legal instrument. The decision of the General Assembly at its Forty-seventh Session to establish an Intergovernmental Negotiating Committee to elaborate an

International Convention to combat desertification was a crucial step in this direction. The Framework Convention on Climate Change and the Convention on Biodiversity provided good precedents to follow. The AALCC Secretariat's involvement in the preparatory phase of these two Conventions and the UNCED meetings would provide an opportunity to assist the Member Governments in respect of matters concerning the proposed international convention on combating desertification.

The Secretary-General further stated that the conclusion of a co-operation Agreement between the AALCC and the UNEP provided an opportunity to organise and co-ordinate the Committee's activities in the environmental matters in a more productive way. In addition, jointly with the Organisation of African Unity and the League of Arab States, the Committee could make a concerted approach to deal with these problems particularly on desertification. However such endeavour needed support both financial and material from the Member Governments. Any voluntary contribution to the Special Fund on Environment would greatly facilitate its task.

The Representative of the United Nations Environment Programme (UNEP) outlined briefly the programme of work as undertaken by his organisation and also presented an overview of the international legal developments in the arena of environment. While examining the emerging norms of the law of sustainable development against the backdrop of Rio Conference and the principles enunciated therein, *he noted the shift which was taking place from the law of environmental protection to the law of sustainable development.* He termed Agenda 21 as a crucial example to embody this development.

He briefly noted the major International Environmental Conventions which had taken place during the intervening period of Islamabad and Kampala sessions. He mentioned three major conventions, namely, (a) Vienna Convention on the Depletion of the Ozone Layer and its Montreal Protocol; (b) The meeting of Parties to the Basel Convention on Transboundary Movement of Hazardous Wastes held in Piriapolis (Uruguay) and (c) The meeting of parties of the Convention on International Trade in Endangered Species. These Conventions, however, dealt with certain issues which needed further clarifications. Further, he noted two major International Conventions on the environment, namely, the Climate Change and Biological Diversity which had received unprecedented support when opened for signature and the establishment of an Inter-Governmental Negotiating Committee on a Global Convention on Desertification by the General Assembly of the UN.

He informed the plenary about the UNEP's programme, as approved by

the Inter-Governmental Meeting of Officials, for the next ten years for the Development and Review of Environmental Law known as Montevideo Programme. While referring to Agenda 21, he noted the value of national legislation as an instrument of social change. He presented the principal features of Montevideo Programme and hoped to augment the existing cooperation between AALCC and UNEP in realising the objectives embodied in the programme.

The *Delegate of Japan* referred to the scope of the work to be accomplished at the post-Rio Conference with the co-operation of participating governments and international organisations. He stressed that efforts should be made for an early and effective implementation of both the UN Framework Convention on Climate Change and the Convention on Biological Diversity. He called for the strengthening of confidence to provide the basis for a dialogue and his Government's commitment to strengthen overseas technical and financial cooperation in the arena of afforestation and sustainable management of forests. He also referred to the institutional arrangements for the effective implementation of the UNCED. He made it clear that Japan had supported and would support the efforts of developing countries in the area of environment and multilateral cooperation. He outlined objectives set by Japan to disburse ODA of approximately 7-8 billion US dollars during the five-year period from fiscal 1992 in the field of environment. He informed the meeting about the establishment of International Environment Technology Centres of UNEP at Osaka and Shiga in Japan which, *inter alia* would carry out activities to promote the transfer of environmentally sound technologies to developing countries with the special focus on the sustainable development of big cities and the preservation of fresh water resources.

The *Delegate of Republic of Korea* while referring to the Earth Summit, stated that it demonstrated many challenges involved in bridging the differences between nations. According to him, foremost issue would be relating to the financing the necessary measures contained in Agenda 21. He also noted the difficulties and complexities involved in the technology transfer while pursuing environmentally sound development and efforts devising the mechanisms facilitating global technology transfer. He stressed on the necessity for the international community to focus its efforts on the creation of an effective Commission on Sustainable Development (CSD) in order to monitor UNCED follow-up actions. He mentioned briefly as regards his country's national programmes and also the environmental co-operation of the North-East Asian Region, comprising Korean Peninsula, Japan, Russia, China and Mongolia.

The *Delegate of Islamic Republic of Iran* stressed the need for the fulfilment of the right to development for developing countries. He noted two crucial factors which generally received universal acceptance, namely (a) Environmental degradation and its effect on earth; and (b) sustained economic growth and development. He discussed, albeit briefly, diverse causes for environmental degradation and the decision-maker's dilemma in resolving varied conflicting values and priorities. He related these environmental problems to lack of provision of additional financial resources and transfer of technology. He also touched on the problem of desertification and land degradation. In conclusion he emphasized on the need for closer cooperation and the implementation of Agenda 21.

The *Delegate of Jordan* felt that although the Rio Conference had adopted Agenda 21, the outcome of that Conference was not expected to lessen the degradation or destruction of the environment. According to him, the environmental problems affecting the world included (i) the environmental problem in Somalia; (ii) lack of water and food in some of the developing countries; (iii) international organisations spending money on academic research rather than on useful enterprises; and (iv) the non-participation of industrialized countries in many of the international convention regimes such as the Basel Convention. He pointed out that his Government was one of the few developing countries which had prepared a national strategy for environmental protection. To that end, he suggested the initiation of the following measures: (i) Establishment of a Committee to prepare a national strategy for environment; (ii) Preparation of studies on the state of environment in every country; and (iii) Training of technical personnel in the developmental fields.

The *Delegate of China* presented a brief overview of the genesis and outcome of the Rio Conference and stressed that issues relating to environment and development should proceed on in an integrated manner. He outlined the concept of "new global partnership" as enunciated by the Rio Conference for an enhanced international cooperation in the presentation, protection and restoration of the global ecosystem as well as in economic development. He briefly explained the relationship between economic development and environment. He also outlined the five different features of "new global partnership" which included — enhanced international cooperation, respect for basic norms (five principles) of international law, equitable and just order, proper handling of issues relating to financial resources and technology transfer, active and effective participation of the whole international community. Finally, he noted that results of the conference would ultimately depend upon the credibility and effectiveness

of the follow-up.

The *Delegate of Indonesia* recognised the need for the implementation of Agenda 21 of UNCED to save the planet Earth from self-destruction. He briefly addressed the issues of sustainable development. He also pin-pointed the obstacles faced by developing countries in realising the objectives set by the Agenda 21. He recognised the institutional capability of the AALCC to deal with certain legal issues relating to the environment.

The *Delegate of the D.P.R. Korea* recognising the environment as an issue of public concern, related it to the questions of improvement of health protection of humanity. He pointed out that the cooperation between the developed countries and the developing countries in the field of environment protection was not discussed satisfactorily as the document of the Secretariat noted. According to him, the commitment of assistance by the developed countries in this respect was quite inadequate. He stressed the fact that relevant organisations should initiate appropriate steps so that many developing countries could participate in the work of international treaty-making concerning the protection of environment.

The *Delegate of Kuwait* stated that his country was paying great attention to the environment protection, particularly air and water pollution control measures. His country was actively participating in the International Conferences dealing with these matters. With regard to the Rio Summit, he recognised the importance of Agenda 21 and the Rio Declaration. He referred to Principles 23 and 24 which dealt with protection of environment in the time of armed conflict. He said that the AALCC could play an important role in preparation of studies on legal matters concerning the environment protection.

The *Delegate of Uganda* recognised the crucial importance and close relationship between environment and development. The National Environment Action Plan instituted in his country addressed the environmental problems, including review and recommendations concerning institutional arrangements and laws. He referred to the problem of Climate Change and called on countries to look into that issue with a view to achieving stable climate. He urged the developed countries to invest more in technologies that would reduce the introduction of concentrations of greenhouse gases into the atmosphere. He also urged the AALCC Member States to sign and ratify the United nations Framework Convention on Climate Change. Recognising that the Biological Convention and Agenda 21 contained all aspects of livelihood and existence, he called upon the legal community in every State to transform them into municipal law, to educate and sensitize their people on the possible consequences. He expressed

concern that financial and technical resources flowing from the developed countries to the developing countries on environment and development had their specific interests to protect and were often guided by political considerations.

The *Delegate of Pakistan* addressing the issues of UNCED laid stress on the organized political process for the successful accomplishment of the objectives set forth by UNCED. He expressed concern over the prevalence of lack of commitment on the part of the developed countries to help developing countries arrest environmental decay. He agreed that the outcome of the Rio Conference for developing countries was substantial in the current state of political balance and the changing world order and laid stress on the role of NGOs and international media in acting as pressure groups within developed countries.

The *Delegate of Sri Lanka* observed that environment and development issues were of global concern and there was common responsibility to protect the environment. He stressed the need for taking concrete measures on the transfer of sound technologies to the developing countries.

The *Delegate of Tanzania* informed the Plenary that his Government had decided to ratify the following four instruments which essentially concerned environment. Those were (i) The Bamako Convention on the Prohibition of Transboundary Movement of Hazardous Wastes; (ii) The Basel Convention, (iii) The UN Framework Convention on Climate Change; and (iv) The Global Convention on Biological Diversity. He assured that his country would be willing to play its part in ensuring the successful realisation of the objectives of UNCED.

The *Delegate of Libya* recognised that the developed States were mainly responsible for the degradation of the environment by establishing huge factories, nuclear reactors etc.

ii. The *Delegate of India* stated that his Government had signed the Convention on Climate Change and the Convention on Biodiversity and that during the year India had become a party to the Basel Convention on Transboundary Movement of Hazardous Wastes and to the Montreal Protocol on Substances that Deplete the Ozone Layer. He supported the proposal for a special meeting or seminar on the subject in collaboration with UNEP and stressed that the concept of sustainable development required to be operationalised in practical terms. At the legal level this raised the question of further elaboration of the principle of common but differentiated responsibility. But at a practical level, especially for the developing countries, in order that environment and development were evenly matched and

balanced, there were two most important requirements. They were the availability of new and additional resources and access to alternate technologies on fair and non-commercial terms. Pursuant to the Agenda 21 adopted at the Rio Summit, it would be necessary to develop suitable implementational mechanisms.

The *Delegate of Nepal* recognised the role of the AALCC to assist the Member Governments in field of environment.

The *Representative of the Organisation of African Unity* expressed concern over the delay in ratification of the International Conventions. He was pleased to learn that the Government of Tanzania was in the process of ratifying the Bamako Convention. He stated that in the African region, there were four treaties which dealt with the Environment. Among them, was the Bamako Convention, which was adopted by the Ministers of Environment in January 1991. However, that Convention so far had received only four ratifications and needed six more to bring it into force.

(ii) Decision on the item 'Environmental Law' : United Nations Conferences on Environment and Development, 1992

Adopted on 4.2.1993

The Asian-African Legal Consultative Committee

Having considered the Secretariat Document No. AALCC\XXXII\ Kampala\93\10 entitled "United Nations Conference on Environment and Development ¾ Outcome and Follow-up".

Noting with appreciation the follow-up work undertaken by the Secretariat in connection with the United Nations Conference on Environment and Development, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity;

1. *Directs* the Secretariat to continue monitoring the follow-up work in the aforesaid fields and prepare studies aimed at promoting ratifications of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity and the institutional arrangements resulting from the decisions of the General Assembly at its Forty-seventh Session;
2. *Requests* the Secretary-General to initiate preparation of studies on the proposed international convention to combat desertification;
3. *Welcomes* the conclusion of Memorandum of Understanding on co-operation between the Asian-African Legal Consultative Committee and the United Nations Environment Programme.
4. *Approves* the proposal to convene an Expert Group Meeting on Environmental Law jointly with the UNEP;

5. *Invites* the Organisation of African Unity and the League of Arab States to participate and initiate joint programmes on environmental issues in co-operation with the Asian-African Legl Consultative Committee;
6. *Urges* the Member Governments to make voluntary contributions to the AALCC's Special Fund on Environment; and
7. *Requests* the Secretary-General to submit a report on progress on environmental programmes undertaken by the Secretariat during 1993 at the AALCC's Thirty-third Session.

(iii) Secretariat Study : United Nations Conference on Environment and Development — Outcome and Follow-up

The RIO Declaration on Environment and Development

One of the main outcomes of the Rio Conference was the adoption of a historical instrument, the Rio Declaration on Enviroment and Development, better known as the " Earth Charter" through which the Members of the international community have solemnly declared their political commitment to the protection of the Earth's enviroment and to the attainment of sustainable development in the inerest of present and future generations.

Main elements of the Rio Declaration

The Rio Declaration consists of a preamble and 27 principles. The Preambie indicates that the Declaration is built upon the 1972 Stockholm Declaration on Human Enviroment, and that its goal is to establish a new and equitable global partnership through the creation of new levels of Cooperation among States, key sectors of societies and people. The 27 operational principles deal respectively with a wide range of various substantial elements :

1. the fundamental right of human beings;
2. the sovereign right of States over their resources and the corresponding responsibility;
3. the right to development;
4. Intergration of enviroment and development;

5. Eradication of poverty;
6. Special needs of developing countries
7. Common but differentiated responsibilities;
8. Reduction and elimination of unsustainable patterns;
9. Endogenous capacity-building;
10. Public awareness and participation;
11. National enviromental legislation;
12. Environment and trade;
13. Development of Law regarding Liability and compensation for environmental damage;
14. Prevention of relocation of hazardous activities and substances;
15. Precautinary approach;
16. Promotion of the internalization of environmental costs;
17. Environmental impact assesment;
18. Environmental natural disasters and emergencies;
19. Notification and consultation;
20. The role of women;
21. The role of the youth;
22. The right of people under oppression,
23. Domination and foreign occupation;
24. Protection of environment in time of armed conflict;
25. Peace, development and environment;
26. Peaceful settlement of environmental disputes; and
27. International cooperation.

The Rio Declaration first proclaims that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1). So the Declaration lays down a sound foundation for the environmental protection and sustainable development. It then refers to the rights of States in this regard by confirming that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Principle

2) and that the right to development must be carried out in such a manner so as to equitably meet developmental and environmental needs of present and future generations (Principle 3).

In this context the integration of environment and development is emphasized in Principle 4, which points out that in order to achieve sustainable development, environment, protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Subsquently, the eradication of poverty and the special needs of developing countries are stressed by Principles 5 and 6. According to these principles, all states and all prople shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world (Principle 5) the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable shall be given special priority (Principle 6).

The Declaration then, turns to the complicated and controversial issue of responsibility and unsustainable patterns, Under Principle 7, first, States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. Secondly, in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. Finally, the developed countries acknowledge the reponsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. Under Principle 8, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

The endogenous capacity-building for sustainable development is addressed in Principle 9. The means, through which States shall cooperate to strengthen such capacity-building are identified as improving scientific understanding through exchange of scientific and technological knowledge and enhancing the development, adoption, diffusion and transfer of technologies, including new and innovative technologies.

The public awareness and participation as well as the role of certain groups receive special attention in Principles 10, 20, 21 and 22. It is underscored that environmental issues are best handled with the participation of all concerned citizens, at the relevent level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to

participate in decision-making process, States shall facilitate and encourage public awareness and participation (Principle 10). The Declaration further recognizes that women, indigenous people and their communities as well as other local community have a vital role in environmental management and development (Principles 20 and 21) and that the creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership (Principle 21).

Principles 11 and 13 lay down the guidance to the enactment and development of law at the national and international levels. States shall enact effective environmental legislation. Environmental standards, management objectives and priporities should reflect the environmental and developmental context which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social costs to other countries in particular developing countries (Principle 11). States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control or to areas beyond their jurisdiction (Principle 13).

Principle 12 is linked to international economic system. It provides that States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not consitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Transboundary environmental effect and the precautionary approch are addressed in Principles 14, 15, 18 and 19. Under these principles States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health degradation or are found to be harmful to human health (principle 14). They should immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international

community to help States so afflicted (Principle 18). States shall also provide prior and timely notification and relevent information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and consult with those States at an early stage and in good faith (Principle 19). In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reson for postponing cost-effiective measures to prevent environmental degradation (Principle 15).

The rest of the Principles are related to the internationalization of environmental costs, environmental impact assessment, the environment and natural resources of people under oppression, domination and occuption, protection of environment in time of armed conflict, the relations between peace, development and environmental protection, and settlement of environmental disputes. The provisions contained in those principles include that national authorities should endeavour to promote the internationalization of environmental costs and use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution (Principle 16). Environmental impact assessment shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment (Principle 17). The environment and natural resources of people under oppression, domination and occupation shall be protected (Principle 23). States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development as necessary (Principle 24). Peace, development and environmental protection are interdependent and indivisible (Principle 25). It is provided that States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the charter of the United Nations (Principle 26).

Finally, the Rio Declaration proclaims that States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in the Declaration and in the further development of international law in the field of sustainable development (Principle 27).

General observations

First of all, it should be pointed out that the adoption of the Rio Declaration at the Earth Summit was a great and epoch-making event in dealing with by the human beings the challenge of the global environmental degradation. The fact itself that so many leaders of States around the world jointly and publicly committed themselves to the environmental protection

and sustainable development strongly manifest a good beginning of the estalishment of a new and equitalbe global partnership through cooperation for the benefits of present and future generations.

Some countries, non-governmental organizations and people might not be fully satisfied with the description of certain principles contained in the Delaration, since the Declaration failed to make strong commitment concerning the provision of new, additional and adequate financial resources and transfer for environmentally sound technologies on preferential and concessional basis to developing countries, or because some principles that they were reluctant to accept were incorporated in the Declaration. Nevertheless if the Declaration is considered as a whole and in a comprehensive and realistic perspective, the conclusion taking into account that the Declaration was a compromise reached after prolonged, fierce debates and hard negotiations among States and State groups, paricularly between the developing South and the developed North, the current text of the Declaration is the best reflection of the consensus among the States that could be reached at the present level of the human understanding. It must be acknowledged that it constitutes a delicate balance among the different interest groups of States. It should be therefore commendable.

As far as the form and formulation of the Rio Declaration is concerned, it is significant to note certain characteristics that the Declaration has :

(a) The use of the Rio Declaration on Environment and Development as the title of the instrument on elaborating principles of general rights and obligations of States in the field of environment and development aptly reflects the need for the intergration of and the linkage between environment and development, as indicated by the General Assembly Resolution 44/228. It is also the title that the AALCC has proposed.

(b) The Rio Declaration is in its nature not legally binding as a multilateral Convention, but given the fact that it was adopted by over 100 world leaders at the Summit level, it would have very strong moral authority of international community.

(c) The text of the Declaration is quite concise and can be easily understood by the average person. Its language is to a grear extent appealing and inspiring and that is conducive to enhancing wide public awareness of environmental and developmental concerns, and to promoting public participation in the environmental protection.

(d) The Declaration has not only reaffirmed but also developed the ideas and principles contained in 1972 Stockholm Declaration on Human Environment. It thus represents the deepening and

enhancement of human cognition on human kind itself, the nature, and the relationship between them which hopefully will lead to the 21st Century on a new and more enlightened basis.

In the context of the involvement of the AALCC, the member States of the Committee might be satisfied with that most of the basic ideas and principles advocated and upheld by the Committee at the Islamabad Session in February 1992 are to a large extent appropriately reflected and incorporated in the Rio Declaration, including *inter alia* the following :

- The protection and preservance of the global enviroment is the common concern of mankind which should be pursued in full cooperation and global partnership;
- The environment and development are intrinsically and inextricably linked. The need to protect the environment requires to be viewed in a perspective where due emphasis is accorded to promoting economic growth and social development of developing countries, including the eradication of poverty and ignorance, meeting basic needs and enhancing the quality of life;
- The principle of sustainable development should be given due effect, and development shall not be pursued in such a manner as would endanger the environment.
- The responsibility of member States of international community shall be common but differentiated and the application and enforcement of environmental standards by the developing countries shall be in accordance with their respective capabilities and responsibilities;
- The principle of precaution shall also be given due effect. All members of international community shall ensure that no appreciable or significant harm is caused to the environment and the environment does not suffer severe and irreversible degradation;
- The need to protect intergeneration equities within the context of the progressive development and condification of international environmental law and
- The instrument to be adopted by the UNCED should include appropriate provision for the peaceful settlement of environmental disputes.

However, as mentioned before, some member States particularly developing countries might be disappointed in the wording of principles regarding the financial resources and technology transfer. Most of member States of the Committee are of the view that the developed countries,

international and regional organizations and financial institutions should consider, explore and make provision for new, additional and adequate financial resources to the developing countries to meet the objectives of sustainable development and the protection and preservation of the environment. The developed countries should also, in the interest of the common future of mankind, seriously consider making available to the developing countries environmentally sound technologies on a preferential and non-commercial basis. Those points of view are also shared by the Group of 77.

During the final Session of the Prepcom for UNCED held in New York in March 1992, the G-77 renewed its proposal to include into the Rio Declaration the principle which would have provided that in view of their main historical and current responsibility for global environmental degradation and their capability to address this common concern, the developed, countries shall provide adequate, new and additional financial resources and environmentally sound technologies on preferential and concessional terms to developing countries to enable them to achieve sustainable development. This proposal was, however, deemed as unacceptable and thus was rejected by some industrialized countries, particularly by the United States. Through intense negotiation, final compromise was reached to the effect that in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countires acknowledge the responsibilities that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technology and financial resources they command, and thus agree that States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchange of scientific and technological knowledge and by enhancing the development, adaptation, diffusion and transfer of technology including new and innovative technology. It seems that the commitment by the developed countries in this respect is quite weak, and the demands of developing countries have not been fully met.

On the other hand, however, some more inspiring and favourable terms have been included in the relevent chapters of Agenda 21. It provides in Chapter 33 dealing with financial resources and machanism that in light of the global benefits to be realized by the implementation of Agenda 21 as a whole, the provision to developing countries of effective means, *inter alia*, financial reosurces and technology, without which it will be difficult for them to fully implement their commitments will serve the common interest

of developed and developing countries and of humankind in general, including future generations (para 33.3). It is further stated that the implementation of the huge sustainable development programmes of Agenda 21 will require the provision to developing countries of substantial new and additional financial resources (para 33.10). It is further agreed that the provision of new and additional financial resources should be both adequate and predictable (para 33.12). These to some extent go to meet the concern of the developing countries on the important issue of funding mechanism which was a result of very intense negotiations within the Working Group during the Rio Conference under the very able Chairmanship of Ambassador Koh.

With regard to environmentally sound technologies, Chapter 34 of Agenda 21 refers to the need for favourable access to and transfer of such technologies, in particular to developing countries (para 34.4). It also refers to help to ensure the access, in particular of developing countries to scientific and technological information, promote, facilitate and finance, as appropriate, the access to and the transfer of environmentally sound techonlogies and corresponding know-how, in particular, to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, taking into account the need to protect intellectual property rights as well as the special needs of developing countries for the implementation of Agenda 21 (para 34.14). This delicate balance was also arrived at after prolonged negotiations within the Working Group.

It might also be somewhat regretable that the proposal by the AALCC on the protection of the marine environment has not received appropriate reflection in the Rio Declaration despite every effort made by the Secretariat of the Committee. During the whole period of the preparation for the UNCED, the AALCC had, on quite a few occasions, appealed to the Prepcom that the protection of the marine envrionment should be accorded great importance in drafting the Rio Declaration. Emphasis had also been made concerning the critical need for the universal ratification of the 1982 UN Convetion on the Law of the Sea. It was pointed out that this was a Convention which had codified many, if not all, concerns with respect to preservation and protection of the marine environment. It was pointed out that nothing that the Rio Conference could do would be complete until the meticulous provisions on the marine environment contained in Part XII of the Convention became legally binding. It was thus suggested that the Prepcom would come out with a clear recommendation that all States that had not yet done so should ratify or accede to the Convention. Furthermore, at the Fourth Session of the Prepcom for UNCED, the delegation of the

AALCC further proposed in cooperation with the Prepcom for the International Seabed Authority, to include a new paragraph in the Rio Declaration, which would read as follows:-

"All States and people shall protect and preserve the marine environment. They shall facilitate international communication and shall promote the peaceful use of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study of the marine environment. For doing so a universal adherence to the United Nations Convention on the Law of the Sea, which contains a comprehensive global framework and lays down fundamental rules for all relevent ocean-related activities would solidify those already widely accepted principles."

Unfortunately, this was deemed as unacceptable by some countries, and therefore was not inserted in the Rio Declaration. Nevertheless, the AALCC will resolutely continue its endeavours to promote the universal adherence to the 1982 UN Convention on the Law of the Sea.

In conclusion, the Rio Declaration is a crystallization of political wisdom and diplomatic skill of leaders of States and their negotiators, which has opened a new era in respect of combating global environmental degradation. It is perhaps the best agreement that could be reached at the present stage. In addition, it maintains a fair balance, taking into account the views and interests of different States and State groups. So it should be treated as an integral package. After the Rio Conference, the more important thing is to effectively carry out the principles embodied in the Rio Declaration.

Tribute for the success of the Rio Conference must first and foremost be paid to the inspiring vision of the Secretary-General of UNCED Mr. Maurice Strong whose unwavering vision since the Stockholm Conference twenty years ago has served as an inspiration to the entire international community. At the beginning of the process of negotiations few were convinced that within such a short period of first two years, the conflicting interests of States over such diverse and far reaching issues could be resolved. Even at the conclusion of the fourth and final session of UNCED in April 1992 in New York some fundamental and seemingly intractable issues particularly on funding mechanism and transfer of technology remained outstanding and had the potential of derailing the Rio Conference. That these issues were resolved in time for the adoption of the Agende 21 on the conclusion of the Rio Conference is first and foremost due to inexorable diplomatic skills of Ambassador Tommy Koh, who with indefatigable perseverance and unfailing wit presided over the Working Group throughout the duration of the Conference, through many lengthy sessions including long night session on each working day and over the

weekend. His contribution was recognized by the Conference during the final session where he was accorded a standing ovation.

Agenda 21

The main principal outcome of the Rio Conference was the adoption of Agenda 21, which addresses the pressing problems of today and also aims at preparing the world for the challenge of the next century. It is thus a century blueprint to save our fragile planet earth. Being a comprehensive and dynamic programme, running to over 800 pages, Agenda 21 consists of a preamble, four sections, and 40 chapters. It covers wide range of programme areas, including social and economic dimensions, conservation and management of resources for development, strengthening of the role of major implementing groups and the means of implementation.

Among the issues addressed by Agenda 21, are the issues related to the legal instruments, institutional arrangements and financial resources as well as transfer of environmentally sound technologies. These issues have also been the main areas of concern and consideration by the AALCC. The discussion below will focus on the legal instruments and institutional arrangements. The financial resources and technology transfer will be separately discussed in connection to the Framework Convention on Climate Change.

International Legal Instruments and Mechanisms

The progressive development and codification of international law in the field of the environmental protection and sustainable development is designated as one of main means of the implementation of Agenda 21, and is the subject of Chapter 39, entitled "International Legal Instruments and Mechanisms".

The programme areas that constitute Chapter 39 are described in terms of the basis for action, objectives and activities.

Basis for Action

Under this rubric, it is recognized that the following vital aspects of the universal," multilateral and bilateral treaty-making process should be taken into account :

(a) The further development of international law on sustainable development, giving special attention on the delicate balance between environmental and developmental concerns;

(b) The need to classify and strengthen the relationship between existing international instruments in the field of environment and relevant social and economic instruments, taking into account the special needs of developing countries;

(c) The essential importance of the participation in and the contribution of all countries, including the developing countries to treaty-making. Many of the existing international legal instruments or agreements in the field of environment have been developed without adequate participation and contribution of developing countries, and thus may require review in order to reflect the concerns and interests of developing countries and to ensure a balanced governance of such instruments or agreements;

(d) Developing countries should also be provided with technical assistance in their attempts to enchance their national legislative capabilities in the field of environmental law;

(e) Future projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the international Law Commission;

(f) Any negotiation for the progressive development and codification of international law concerning sustainable development should, in general, be conducted on a universal basis, taking into account special circumstances in the different regions.

Objectives

According to the provisions of Chapter 39, the overall objective of the review and development of international environmental law is to evaluate and promote the efficacy of that law and to promote the integration of environment and development policies through effective international agreements or instruments taking into account both universal principles and the particular and differentiated needs and concerns of all countries.

The specifiec objectives include the following:-

(a) To identify and address difficulties which prevent some States, in particular developing countries from participating in or duly implementing international agreements or instruments and, where appropriate, to review and revise them with the purposes of integrating environmental and developmental concerns and laying down a sound basis for the implementation of these agreements or instruments;

(b) To set priorities for future law-making on sustainable development at the global, regional or sub-regional level, with a view to enhancing the efficacy of internatinal law in this field;

(c) To promote and support the effective participation of all countries concerned, in particular developing countries in the negotiation, implementation, review and governance of international agreements or instruments;

(d) To promote, through the gradual development of universally and multilaterally negotiated agreement or instruments, international standards for the protection of the environment that take into account the different situations and capabilities of countries;

(e) To ensure the effective, full and prompt implementation of legally binding instruments, and to facilitate timely review and adjustment of agreements or instruments by the parties concerned, taking into account the special needs and concern of all countries, in particular developing countries;

(f) To improve the effectiveness of institutions, mechanisms and procedures for the administration of agreements and instruments;

(g) To identify and prevent actual or potential conflicts, particularly between environmental and social/economic agreements or instruments, with a view to ensuing that such agreements or instruments are consistent. Where conflicts arise they should be appropriately resolved;

(h) To study and consider the broadening and strengthening of the capacity of mechanisms, *inter alia* in the United Nationas system, to facilitate, where appropriate and agreed by the parties concerned the identification, avoidance and settlement of international disputes in the field of sustainable development, duly taking into account the existing bilateral and multilateral agreements for the settlement of such disputes.

Activities and Means of Implementation

Activities and means of implementation in this regard will be considered in the light of the above basis for action and objectives.

A. Review, assessment and fields of action in international law for sustainable development

While ensuring the effective participation of all countries concerned,

parties should at periodic intervals review and assess both the past performance and effectiveness of existing agreements or insturments as well as the priorities for future law making on sustainable development. This may include an examination of the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development. Furthermore, large-scale destruction of the environment, in times of armed conflict, that cannot be justified under international law, should be addressed. The efforts should also be made to conclude the ongoing negotiations for a nuclear safety convention in the framework of the International Atomic Energy Agency.

B. Implementation mechanisms

The parties to international agreements should consider prodedures and mechanisms to promote and review their effective, full and prompt implementation. To that effect, States should *inter alia*:

(a) Establish efficient and practical reporting systems on the effective, full and prompt implemenation of international legal instruments;

(b) Consider appropriate ways in which relevant international bodies might contribute to the further development of such mechanisms.

C. Effective participation in International Law-Making

The effective participation of all countries, in particular developing countries, should be ensured through appropriate provision of technical assistance and/or financial assistance. Developing countries should be given "headstart" support not only in their national efforts, to implement international agreements or instruments, but also to participate effectively in the negotiation of new or revised agreement or instruments and in the actual international operation of such agreements or instruments.

D. Disputes avoidance and settlement

In this area, States should further study and consider methods to broden and make more effective the range of techniques available at present. This may include mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other States in the field of sustainable development and for effective peaceful means of dispute settlement in accordance with the Charter of the United Nations including, where appropriate, recourse to the International Court of Justice, and their inclusion in treaties relating to sustainable development.

Comments and Observations

While going through the text of Chapter 39, it might be concluded that the basis for action, objectives and activities regarding international legal instruments and mechanisms in the context of the implementation of Agenda 21 are quite well identified and considered. *Inter alia* issues concerning the importance and means of further development of international law on sustainable development, of the integration of environmental and developmental concerns, and adequate and effective participation of developing countries in the negotiation, implementation, review and governance of international legal instruments are appropriately addressed. It is thus a valuable guidance to the future work in this regard.

The overall objective of the review and development of international environmental law, as indicated by Chapter 39, includes two aspects. The first is to evaluate and promote the efficiency of that law. The second is to promote the integration of environment and development policies through effective international agreements or instruments. These two aspects are intrinsically linked, and cannot be pursued in isolation from each other. An effective instrument of environmental law must be one that successfully integrates the environment and development. Therefore the review of existing international legal insturments and future law-making on environment should in principle, be closely linked with the need to embody the principles contained in the Rio Declaration and to effectively implement Agenda 21, taking into account the special needs of developing countries.

When evaluating the past performance and effectiveness of existing international agreements or instruments concerned, some basic criteria should be used: whether or not and to what extent does is an agreement or instrument under the evaluation:

(a) meet the need to integrate the environment and development and is conducive to the promotion of sustainable development;

(b) take into account the special needs and concerns of developing countries;

(c) have adequate incentives to encourage the participation of developing countries; and

(d) implemented and complied by the contracting parties, and the existence of appropriate mechanisms for the enforcement of the agreement and for the settlement of disputes over the implementation.

As regards the future law-making process, benefitting from the past experiences, it is important to avoid the proliferation of new agreements or

instruments without making concrete arangements for their realistic implementation. It is equally important that the effective paritcipation of all countries concerned and in particular developing countries, in negotiation and governance should be ensured and necessary and appropriate technical and financial assistance should be provided for this purpose.

While the adoption of some new convention may indeed be necessary, such as the one envisaged on nuclear safety in the framework of the International Atomic Energy Agency, more efforts should be made to bring into force a large number of existing international multilateral or regional treaties that have not yet become effecive through identification and addressing difficulties which prevent some States, in particular developing countries, from participating in those treaties, and where appropriate reviewing and revising them with a view to promotion of their wider participation and more effective implementation.

The role of the International Law Commission in the progressive development and codification of international environmental law should be underscored and further strengthened. The AALCC has made a proposal requesting the International Law Commission to include an item related the protection of environment in its long-term work programme and take it up as a priority item. This may include an elaboration of legal norms on general rights and obligation of States in the field of the environmental protection and sustainable development, including development of law regarding liability and compensation for the victims of environmenal damages. It is understood that the International Law Commission is sympathetic to this request.

With regard to the settlement of environmental disputes, the AALCC member States believe that the principle of peaceful settlement of international disputes including environmental disputes, is a matter of great significance in the international community today. Besides political settlement through negotiation and consultation, the judicial settlement of legal disputes, particularly the recourse to the International Court of Justice, is becoming all the more important. The members of the International Community should take advantage of the growing confidence in the International Court of Justice, and make efforts to facilitate the judicial settlement of environmental disputes through ICJ. In this regard, the initiative undertaken by the Secretary-General of the United Nations in establishing a trust fund to assist States in recourse to the ICJ for disputes settlement should be appreciated and supported.

Finally, the Secretariat of the Committee wishes to express its willingness to render legal assistance, as appropriate, and on request to the Member

States of the Committee in the field of national legislation regarding the environmental protection and sustainable development.

International Institutional Arrangements

The Important issues regarding international institutional arrangements in the follow-up to the Rio Conference are addressed in Chapter 35 of Agenda 21 in terms of the basis for action, objectives and the envisaged institutional structure.

In light of the provisions of Chapter 38, the institutional arrangements shall be guided by the following principles.

(a) The intergovernmental follow-up to the UNCED process shall be within the framework of the UN system, with the General Assembly being the *Supreme Policy-making forum* that would provide overall guidance to Governments. At the same time, Governments as well as regional economical technical cooperation organizations, have a responsibility to play an important role. Their commitments and actions should be adequately supported by UN system and multilateral financial institutions;

(b) There is a need for institutional arrangements within the UN system in conformity with, and providing input into the restructuring and revitalization of the UN in the economic, social and related fields, and the overall reform of the UN. Implementation of Agenda 21 and other conclusions of the Rio Conference shall be based on action and result-oriented approach and consistent with the principles of universality, democracy, transparency, cost-effectiveness and accountability;

(c) The UN system is uniquently positioned to assist Governments to establish more effective patterns of economic and social development with a view to achieving the objectives of Agenda 21 and sustainable development;

(d) All agencies of UN system have a key role to play in the implementation of Agenda 21 within their respective competence. To ensure proper coordination and avoid duplication, there should be an effective division of labour, and all bodies of the UN should be required to elaborate and publish reports of their activities on the implementation of Agenda 21 on a regular basis. Serious and continuous review of their policies, programme, budgets and activities will also be required;

(e) The continued active and effective participation of non-governmental organizations, the scientific community and private sectors as well as local groups and communities is important in the implementation of Agenda 21; and

(f) The institutional structure will be based on agreement on financial resources and mechanisms, technology transfer, the Rio Declaration and Agenda 21.

The overall objective of the institutional arrangements is the integration of environmental and developmental issues at national sub-regional, regional and international levels.

The specific objectives are as follows:

(a) To ensure and review the implementation of Agenda 21 so as to achieve sustainable development in all countries;

(b) To enhance the role and functioning of the UN system in the field of environment and development;

(c) To strengthen cooperation and coordination on environment and development in the UN system;

(d) To encourage interaction and cooperation between the UN system and other intergovernmental and non-governmental sub-regional, regional and global institutions and non-governmental organizations in the field of environment and development;

(e) To strengthen institutional capabilities and arrangements required for the effective implementation, follow-up and review of Agenda 21;

(f) To assist in the strengthening and coordination of national, sub-regional and regional capacities and actions in the areas of environment and development.

(g) To establish effective cooperation and exchange of information between the UN organs, organizations, programmes and the multilateral financial bodies, within the institutional arrangements for the follow-up of Agenda 21;

(h) To respond to continuing and emerging issues relating to environment and development;

(i) To ensure that any new institutional arrangements would support revitalization, clear division of responsibilities and the avoidance of duplication in the UN system and depend to the maximum extent possible upon existing resources.

Guided by the abovementioned principles and objectives, the overall

institutional structure as envisaged, the main elements of which consist of the following:

(a) *The General Assembly:* The General Assembly is designated to be the principal policy-making and the appraisal organ on matters relating to the follow-up to the Rio Conference. The General Assembly would organize a regular review of the implementation of Agenda 21. It could consider the timing, format and organizational aspects of such a review, and consider holding a special Session not later than 1997 for the purpose of overall review and appraisal of Agenda 21, with adequate preparation at a high level.

(b) *The Economic and Social Council:* The ECOSOC would assist the General Assembly through overseeing system-wide coordination, overview on the implementation of Agenda 21 and making recommendations in this regard. The ECOSOC would also undertake the task of directing system-wide coordination and integration of environmental and developmental aspects in the UN policies and programmes and make approapriate recommendation to the General Assembly, specialized agencies concerned and member States. Appropriate steps should be taken to obtain regular reports from specialized agencies on their plans and programmes related to the implementation of Agenda 21, pursuant to Article 64 of the Charter of the United Nations. The ECOSOC should organize a periodic review of the work of the proposed Commission on sustainable Development, as well as of system-wide activities to integrate environment of system-wide activities to integrate environment and development, making full use of its high-level and coordination segments.

(c) *Commission on Sustainable Development:* A high-level Commission on Sustainable Development should be established to serve as the intergovernmental mechanism, in accordance with Article 68 of the Charter of the United Nations. The Commission should consist of representative of States elected as members, with due regard to equitable geographical distribution. Its main functions should include the monitoring of progress in the implementation of Agenda 21; to consider information provided by Governments; to review the progress in the implementation of the commitments contained in Agenda 21; to receive and analyse relevant imput from competent non-governmental organizations, in the context of the overall implementation of Agenda 21; to enhance the dialogue; and to provide appropriate recommendations to the General Assembly

through the ECOSOC. The Commission would report to the ECOSOC. The first meeting of the Commission should be convened not later than 1993. The General Assembly, at its 47th Session, should determine specific organizational modalities for the work of the Commission.

(d) *The Secretary-General:* Strong and effective leadership on the part of the Secretary-General is considered vital.

(e) *Inter-agency coordination mechanism:* There is a need for a high-level inter-agency coordination mechanism under the direct leadership of the Secreatary-General. The task is proposed to be given to the Administrative Committee on Coordination (ACC) headed by the Secretary-General, ACC would thus provide a vital link and interface between the multilateral financial institutions and other UN bodies at the highest administrative level. All heads of agencies and institutions of UN should be expected to cooperate with the Secretary-General fully.

(f) *Advisory Body:* It is suggested to establish high-level advisory board consisting of eminent persons knowledgeable about environment and development, appointed by the Secretary-General in their personal capacity.

(g) *Secretariat support structure:* It should provide support to the work of both intergovernmental and inter-agency coordination mechanisms. Concrete organizational decisions fall within the competence of the Secretary-General.

(h) *Organs, programmes and organizations of the UN system:* All relevant bodies of the UN system, such as UNEP, UNDP, UNCTAD, and specialized agencies, will have an important role within their respective areas of expertise and mandate in supporting and supplementing national efforts.

(i) *Regional and sub-regional cooperation and implementation:* The regional Commissions, regional development banks and regional economic and technical cooperation organizations can make contributions in this regard. Particularly, the regional Commissions as appropriate, should play a leading role in coordinating regional and sub-regional activities by sectoral and other UN bodies and shall assist countries in achieving sustainable development.

(j) *National Implementation:* States may wish to consider setting up a national coordinational structure responsible for the follow-up on Agenda 21.

(k) *Cooperation between UN bodies and international financial organizations:* The Secretary-General and Heads of UN Programmes, organizations and multilateral financial organizations have a special responsibility in forging effective cooperation between UN bodies and multilateral financial organizations, not only through the UN high-level coordination mechanism, but also at regional and national level.

(l) *Non-governmental organizations:* Relevant non-governmental organizations, the private sectors, various groups etc., should be given opportunities to make their contributions and establish appropriate relationship with the UN system.

In assessing the institutional arrangements envisaged above, the member States of the Committee would be pleased to hear that many of their propositions and proposals on the institutional follow-up to the Rio Conference are appropriately reflected in the provisions of Chapter 38 of Agenda 21. *Inter alia* those on the importance of the most efficient and effective use of the existing financial and human resources and non-proliferation of new institutions; on the supremacy of the General Assembly and the role of the ECOSOC in the institutional structure, on the establishment of a more comprehensive inter-governmental Committee based on restructiurig several existing Committees of ECOSOC, and set up of a special expert advisory group, as well as the strengthening of the UNEP have been endorsed.

It has been the view of the AALCC that the institutional follow-up to the Rio Conference should ensure the improvement and strengthening of existing institutional mechanism within the United Nations system with the General Assembly as the Supreme policy-making forum in the context of the integration of environment and development and the effective implementation of Agenda 21. New institutional arrangement should ensure the full and effective participation of all countries, in particular developing countries in the policy-making process, make full use of existing institutions of the UN system, and promote better cooperation and coordination among States, UN bodies specialised agencies and other organizations involved in the field of environment and development.

Therefore, the member States of the Committee may wish to consider using abovementioned elements as some of the criteria for the evaluation of the feasibility and effectiveness of the institutional structure proposed by Chapter 38 of Agenda 21.

As regards the General Assembly, it is important that its principal function in the political deliberation and policy guidance related to

environment and development should be further enhanced and reinforced. In this context it may be suggested that one main committee of the General Assembly be designated as responsible. In addition the General Assembly may decide to convene meetings at the ministerial-level for the purpose of overall review and appraisal of Agenda 21.

With respect to the ECOSOC while the restructuring and revitalization of the United Nations in the economic, social and related fields has been underway, the institutional need for the integration of environment and development and for the effective implementation of Agenda 21 should be fully taken into account and be given priority. The vital role of the ECOSOC in this regard should be greatly strengthened and enhanced.

ECOSOC should welcome the agreement on the establishment of the Commission on Sustainable Development as the main inter-governmental mechanism. The AALCC has proposed that the Commission could be constituted through combining and restructuring a number of existing Committees of ECOSOC dealing closely with related matters. About the composition of the Commission, it is necessary to further underscore the importance of wider involvement and participation of developing countries and the preservation of the democratic principle in the decision-making process of the Commission.

To establish an effective and efficient inter-agency coordination mechanism in the field of the environmental protection and sustainable development is undoubtedly crucial in the implementation of Agenda 21 and achieving the objective of sustainable development. The efforts should be made to have all the relevant organizations or institutions, particularly the multilateral financial institutions involved in the coordination mechanism and to ensure the best cooperation in a team spirit.

United Nations Convention on Climate Change - A Preliminary Study

I. Introduction

By its Resolution 45/212 of 21 December 1990, the General Assembly established the Inter-governmental Negotiating Committee for a Framework Convention on Climate Change (INC) and madated it to prepare an effective Framework Convention on Climate Change containing appropriate commitments, and any related instruments as might be agreed upon. At the subsequent session, the General Assembly reviewed the progress thus made in the INC and urged it "to expedite and successfully complete the negotiations as soon as possible and to adopt the Framework Convention on Climate Change in time for it to be opened for signature during the United Nations Conference on Environment and Development."

The Inter-governmental Committee for a Framework Convention on Climate Change held five sessions, the last one in two parts. The second part of the fifth session was held in New York from 28 April to 9 May 1992. At the beginning of that session, the Chairman of the INC introduced a set of Working papers which were prepared after consultations with the INC Bureau and a number of delegations. These Working papers were the focus of hectic deliberations for the whole week. On 9th May 1992 the INC adopted the final text of the "United Nations Framework Convention on Climate Change" and recommended that it be opened for signature at the United Nations Conference on Environment and Development scheduled to be held at Rio de Janeiro from 3 to 14 June 1992. it also adopted a resolution which *inter alia* provided for certain follow-up measures during the interim period between the signing of the Convention and its entry into force.

The following part of this Note contains a preliminary analysis of the Convention. it is mainly descriptive in nature. At some places, a few observations have been made to elaborate the intent and content of certatin provisions in the Convention.

The Framework Convention consists of a Preamble, 26 Articles and two Annexes. Articles 1 to 3 contain general provisions such as definition, objective and principles. Article 4 is the key article dealing with the commitments. Articles 5 and 6 further elaborate commitments specifically in respect of research and systematic observation, education, training and public awareness. Articles 7 to 11 deal with the institutional arrangements, including the financial mechanism. Article 12 is another article dealing with commitments concerning communication of information related to implementation of the Convention. Articles 13 and 14 provide for amicable settlement of any disagreement or dispute. Articles 15 to 20 and 22 to 26 stipulate provisions concerning final clauses such as amendments, adoption of protocols, signature, entry into force, reservation, withdrawal etc. Article 21 entiteld interim arrangements, deals with the arrangements prior to the coming into force of the Convention. Annex I containes the list of countries which includes 25 members of the OECD and 11 countries that are undergoing the process of transition to market economy. Annex II contains the list of OECD members.

II. Analysis of the Provisions of the Convention

Preamble

The Preamble is rather lengthy containing 23 paragraphs. In paragraph 1, it is acknowledged that change in the Earth's Climate and its adverse effects are a "common concern of mankind". It would have been ideal to place this paragraph in substantive Article 3 dealing with Principles. The concept of 'Common Concern of Mankind' is gaining currency as one of the legal norms governing the emerging environmental law.

Paragraph 2 expresses concern over the substantial increase in the atmospheric concentrations of greenhouse gases, it is noted that the largest share of historical and current global emissions has originated in the developed countries. It is however acknowledged that since per capita emissions in developing countries are still relatively low, their share of global emissions would grow keeping in view their social and development needs (para 3).

Paragraph 4 recognises the role and importance of terrestrial and marine ecosystems as sinks and reservoirs of greenhouse gases. Paragraph 5 recognises the difficulties in making correct assessment because of the uncertainities in predictions of climate change particularly with regard to the timing, magnitude and regional patterns thereof. Paragraph 6 stipulates one of the most important themes of the Convention. While calling for the widest possible co-operation by all countries and their participation in an effective and appropriate international response to meet the threat of climate change, it recognises that such action would correspond to common but differentiated responsibilities on the basis of respective capabilities of the developed and developing countries, taking into account their social and economic condition. This theme has been further elaborated in Articles 3 and 4 dealing with Principles and commitments respectively.

Paragraphs 7 and 8 recall the pertinent provisions of the stockholm Declaration of 1972. The closely related cardinal principle of sovereignty of States in international co-operation in matters concerning climate change, is reaffirmed in Paragraph 9. During the negotiations in the INC Sessions, many delegation particularly from the developing countries strongly expressed the view that instead of placing this paragraph in preamble, it should have been included in Article 3 dealing with Principles.

Paragraphs 11 and 12 recall the relevant resolutions of the General Assembly addressed to Climate change. Paragraph 13 recalls the Vienna Convention for the Protection of Ozone Layer 1985, the Montreal Protocol on Substances that Deplete the Ozone Layer 1987 as amended in 1990.

Paragraph 14 takes note of the Ministerial Declearation of the Socond World Climate Conference adopted on 7 November 1990. Paragraph 15 recognises the valuable work being carried out by any States and the contribution of the United Nations and its Agencies such as WMO and the UNEP.

Paragraphs 10, 16 to 18, 21 and 22 recognise the important of flexible but integrated approach involving legislative, administrative and other measures to be taken in the context of climate change and lay down general guidelines.

Paragraph 19 recognises the vulnerable situation of low-lying and other small island countries, countries,with low lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification and developing countries with fragile mountainous ecosystems. It is an attempt to encompass all special situations in different regions and countries.

Paragraph 20 recognises the special difficulties of those countries whose economies are particularly dependent on fossil fuel production, use and exportation, as a consequence of any action on limiting greenhouse gas emissions. This is meant to recognize the special situation of oil-producing countries in particular.

Finally, paragraph 23 expresses the determination of the States parties to the Convention to protect the climate system for present and future generations. This is another affirmation of the emerging principle of intergeneration equities.

It should be pointed out that the INC during its negotiating sessions devoted very little time for the consideration of the text of the Preamble. Indeed, it was at the second part of the fifth and final session in New York during which the text was finalized and that too in haste. The result is, it is rather too long and repetitive. Some of the Prargraphs find expression more or less in identical language in other articles of the Convention.

Article 1

Article 1 on use of terms contains a set of definitions of nine terms which are frequently used in various articles in the text of the Convention. Among them, the definitions of "Adverse effects of Climate Change", "Climate change", "Climate system", "Emissions", Greenhouse gases", "Reservoir", "Sink", and "Source", have been agreed upon in consultation with the Inter-governmental Panel on Climate Change (IPCC) which has been instrumental in providing the best scientific and technical advice on these matters.

The definition of "Regional Economic Integration organisation" has been lifted from the Vienna Convention on Protection of Ozone Layer, 1985. Accordingly, it is "an organisation constituted by Sovereign States of a given reason which has competence in respect of matters governed by this Convention or its Protocols and has been duly authorised, in accordance with its internal procedures, to sign ratify, accept, approve or accede to the instruments concerned". There are three elements in this definition which deserve close examination. First, the concerned organisation should be constituted by Sovereign States of a region. Second, it should have competence in respect of matters governed by this Convention or its Protocols. Third, it should be duly autorised in accordance with its internal procedures to sign, ratify, accept, approve or accede to the instruments concerned.

At present, the European Economic Community (EEC) is the sole regional organisation which enjoys this status. However, there are other regional organisations such as the Organisation of African Unity (OAU), the League of Arab States, the Organisation of American States (OAS) and the Organisation of Petroleum Exporting Countries (OPEC) which might also fall in this category in the future. Environment is an important agenda in their programme of work. The representatives of these organisations have actively participated in the UNCED and INC Negotiations. The AALCC Secretariat is of the view that the Principal Consideration to judge the competence of any organisation to claim the status of a regional economic integration organisation as defined in Article 1 paragraph 6 of the Framework Convention on Climate Change should be whether the constituent instruments and the internal procedures of that organisation contain such authorisation. This question will assume greater importance in the practical implementation of the Framework Convention on Climate Change. The Convention contains serveral provisions which directly or indirectly envisage co-operation and crucial role for the regional organisations.

In this context, it may be pertinent to quote the Declaration made by the delegation of Egypt at the time of the adoption of the Final Act of the Conference of Plenipotentiaries on the Protection of Ozone Layer on 21st March 1985. The Declaration *inter alia* relating to the definition of "Regional Economic Integration Organisation" provides that "While concurring with the consensus on Article 1 of the Convention, the delegation of Egypt understands paragraph 6 of that article as being applicable to all regional organisations, including the Organisation of African Unity and the League of Arab States, provided they fulfil the conditions laid down in that article, namely, that they have competence in respect of matters governed by the

Convention and have been duly authorised by their member States in accordance with the internal rules of the procedure."

Article 2

Article 2 stipulates the long-term objective of the Convention. it provides that the ultimate objective of the Convention and any related instruments adopted subsequently by the Conference of Parties is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. There is no indication about the time-frame within which this objective should be achieved. However, it is understood that while aiming to achieve such a safe level sufficient time would be necessary to (i) allow ecosystems to adopt naturally to climate change; (ii) ensure that food production is not threatened; and (iii) to enable economic development to proceed in a sustainable manner.

The text of this article is borrowed from the Declaration of the Second World Climate Conference held in 1989. During the discussions in the INC, there was hardly any controversy on this article. At the Second part of the INC fifth Session in New York at the instance of the United States delegation the word 'Principle' was replaced with 'Provisions' in the text submitted by the Chairman.

As for the substantive aspects, issues relating to sustainable development are of vital importance. The close relationship between environment and development is well recognised and it finds ample expression in the Agenda 21 adopted by the United Nations Conference on Environment and Development held in Rio in June 1992. The objective of the Framework Convention on Climate Change cannot be achieved independently without taking these factors into consideration.

Article 3

During the INC Sessions, the very idea of inclusion of an article on 'Principle' was questioned by some of the developed countries. On the other hand, the developing countries considered it as an essential part of the Convention, which while it may not create legally binding norms, would nevertheless establish the guidelines to follow in the implementation and subsequent development of the Convention. At the initial stage of negotiations, there was a long list of principles. At the final stage the list was brought down to five and that paved the way for general agreement to place them in the text of the Convention. Article 3 of the Convention which

sets out the five principles is in effect a compromise between the developed and developing countries and to achieve this, the developing countries had to accept deletion of several important principles such as reference to sovereignty, right to development and 'polluter pays' principle.

The Chapeau of Article 3 states that in their actions to achieve the objective of the Convention and to implement its provisions, the parties to the Convention would among other things, be guided by these five Principles.

Principle 1 subsumed three fundamental elements. Firstly, inter-governmental responsibility to protect the climate system for the present and future generations of human kind. Secondly, common responsibility of all parties to protect the climate system and the differentiation between those responsibilities for the developed and the developing country parties. Thirdly, the developed country parties should take the lead in combating climate change and the adverse effects thereof. It would be noticed that the first two elements find place in the Preamble as well. As regards the third one, it is the basic approach which is further elaborated in Article 4 of the Convention.

Principle 2 draws attention to the specific needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change. In addition, it recognises the need to give full consideration to the situations faced, especially by those developing country parties which would have to bear a disproportionate or abnormal burden under the Convention.

Principle 3 is concerned with the precautionary approach and its relation with the cost-effectiveness. The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. The lack of full scientific certainty should not be used as a measure to defer their action, but the policies and measures so determined either individually or in co-operation with other parties should be cost-effective and comprehensive, based on different socio-economic conditions, comprising all economic sections and relevant sources, sinks and reservoirs of greenhouse gases and adaptation.

Principle 4 besides recognising the right to promote sustainable development, lays down that policies and measures to protect the climate system should be an integral part of the national development programmes and should take into account specific conditions of each Party.

Principle 5 focusses on the link between measures to control climate change and international trade. In advocating promotion of an open international economic system, it cautions against any measures taken to

combat climate change, including unilateral ones, which would lead to arbitrary or unjustifiable discrimination or disguised restriction on international trade.

Article 4

Article 4 is the principal article dealing with commitments. During the INC negotiations discussion on matters concerning commitments was focussed on three separate articles namely (i) general commitments, (ii) specific commitments and (iii) special situation. In the final text, all the three articles were combined and put together under Article 4 entitled 'Commitments'. However this amalgamation has not changed the pattern followed earlier.

Paragraph 1 contains commitments for all Parties to the Convention. Such commitments would be based on their common but differentiated responsibilities and take into account their national and regional development priorities, objectives and circumstances.

Sub-paragraph (a) deals with the commitment concerning preparation of national inventories. In order to have an assessment of the situation, it would be essential for the States Parties to prepare their national inventories of anthropogenic emission by sources and removals by sinks of all greenhouse gases except those controlled by the Montreal Protocol. It is expected that prior to the convening of the first session of the Conference of Parties, a comparable methodology to serve as a guide would be ready for adoption at the Session. Article 12 lays down the time schedule within which the developed and developing countries are required to submit their national inventories to Conference of Parties. Further, it is envisaged that the Parties would periodically update their national inventories and make it available for publication.

Sub-paragraph (b) is a follow-up of the preparation of national inventories. The Parties to the Convention would prepare and regularly update their national strategies containing programmes and detailed measures to mitigate, facilitate and adapt to climate change. Such programmes would also include measures for their implementation. Where appropriate, a group of states from a region could consider formulating regional programmes. Like the national inventories, the Parties also agree to publish their national strategy.

Apart from above two commitments at the national levels, there are other commitments which basically underscore the importance of co-operative action. Sub-paragraphs (c) to (i) envisage commitments by the Parties to

the Convention to promote and co-operate in areas such as:

(i) the development, application and diffusion, including transfer of relevant technologies in the energy, transport, industry, agriculture, forestry and waste management sectors (sub-paragraph c)

(ii) conservation and enhancement of sinks and reservoir of all greenhouse gases, including biomass, forests, oceans and other terrestrial, coastal and marine ecosystems (sub-paragraph d)

(iii) Adaptation to the impacts of climate change and development of appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought, desertation and floods (sub-paragraph e).

(iv) Formulation of impact assessments with a view to minimizing adverse effects on the economy, public health and environment of projects and measures undertaken to mitigate or adapt to climate change (sub-paragraph f)

(v) Scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effect, magnitude and timing of climate change and the economic and social consequences of various response strategies (sub-paragraph g)

(vi) Full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to climate system and climate change (sub-paragraph h)

(vii) Education, training and public awareness related to climate change (sub-paragraph i)

It is evident from the above account that the Convention sets out a comprehensive strategy for promoting co-operation among the parties to the Convention. Since the majority of the developing countries do not have the capacity and the financial resources to initiate and actively participate in such co-operative programmes, it would be essential to provide them assistance to implement their commitments.

Paragraph 2(a) deals with the specific commitments of the developed country Parties. It provides that the developed country parties and other parties named in Annex I would undertake specific commitments to adopt national policies and measures on the mitigation of climate change by limiting the emissions of greenhouse gases and enhancing greenhouse gas sinks and reservoirs. It is envisaged that such policies and measures would

demonstrate their resolute efforts towards taking a first step either individually or jointly with other parties in modifying longer term trends in those emissions and achieving to return by the end of the present decade to earlier levels.

Paragraph 2(b) refers to the commitment of the developed country parties on reporting to the Conference of Parties within six months of the entry into force of the Convention detailed information on their policies and measures, with the aim of returning individually or jointly to their 1990 levels. The Conference of Parties would review such reports at its first session and periodically thereafter as determined by it at that Session.

Paragraph 2(c) provides that while calculating emissions by sources and removals by sinks of greenhouse gases account would be taken of the best available scientific knowledge, including the effective capacity of sinks and respective contributions of such gases to climate change. The Conference of Parties at its first session, would consider and agree on the methodologies for these calculations and review them regularly.

Paragraph 2(d) further elaborates the task of the Conference of Parties in this regard. At its first Session, the Conference of Parties would review the adequacy of abovementioned commitments in the light of the best available scientific information and assessment on climate change and its impact, as well as relevant technical, social and economic information. if it is considered necessary, the Conference of Parties may adopt appropriate amendments effecting the commitments of the developed country parties. A second review would be carried out not later than 31 December 1998 and thereafter at regular intervals as determined by the Conference of Parties, until the objective of the Convention are met.

At its first session, the Conference of Parties would also decide the criteria for joint implementation as stipulated in sub-paragraphs (a) and (b).

Under paragraph 2(e), each of these parties would, as appropriate, co-ordinate with other parties in developing relevant economic and administrative instruments to achieve the objective of the Convention. It would identify and periodically review it own policies and practices to encourage activities leading to reduction of emissions of greenhouse gases at greater levels.

Paragraphs 2(f) and 2(g) deal with matters concerning annexes I and II as set out in the Convention. Annex I contains a list of countries which includes 28 OECD conutries (including the European Community) and the eleven countries that are undergoing the process of transition to market economy. These are: Belarus, Bulgaria, Czechoslovakia, Estonia, Hungary,

Latvia, Lithuania, Poland, Romania, Russian Federation, Ukraine, Annex II contains the list of OECD countries including the European Community. Paragraph 2(f) provides that the Conference of Parties would review the two lists in the light of available information. Such review would be done before 31 December 1998. After such a review, the Conference of the Parties, if necessary, would consider appropriate amendments to the two annexes. Such amendments however, would be done with the approval of the Party concerned.

It may be of interest to note that the strict legal interpretation of sub-paragraph (f) might lead to some anomalous situation. Article 16(1) provides that annexes to the convention would form an integral part of the Convention. Accordingly, annexes I and II could only be amended in accordance with the procedure laid down in Article 16. In an hypothetical situation, a party desirous of deleting its name in one of the annexes might seek such amendment as provided in sub-paragraph (f) and other parties might not support such a move. What would be the position in that situation ? It may be recalled that during the INC negotiations many developing countries did not favour such an artificial categorisation of states which might create difficulties in the implementation of the Convention. The inclusion of two annexes in the Conventions text became widely known to most delegations at the very last stage of the INC meeting. It is hoped that in the implementation of the Convention, there will be no such practical problems which might defy solution even before the Convention witnesses the light of day.

Paragraph 2(g) opens another door for the amendment of Annex I of the Convention. Annex I contains a list of 35 countries. Any Party which is not among these countries, and is desirous of accepting the obligations envisaged in paragraphs 2(a) and 2(b); may notify the Depositary of its intention either at the time of submitting its instrument of ratification, acceptance approval or accession, or subsequently. The Depository would inform the other signatories and parties of any such notification. Would such notification by implications be only a proposal for amendment to annex I ? And, if so, should it be treated in the light of the provisions laid down in Article 16 of the Convention, or should it be taken as an automatic amendment to the Annex? These are some of the issues left hanging in the Convention.

Paragraph 3 stipulates one of the key commitments. It provides that the developed country parties and other developed parties included in Annex II would provide new and additional financial resources to meet the agreed full costs incurred by developing country parties in complying with their obligations concerning communication of information envisaged in Article

12, paragraph 1. Further, it is envisaged that these Parties would also provide such financial resources including for the transfer of technology, needed by the developing country parties to meet the agreed full incremental costs of implementing measures stipulated in Article 4, paragraph 1 and Article 11. The last sentence of this sub-paragraph contains three important elements which should be taken into account in the implementation of these commitments. First, the financial resources provided by the developed country parties should be adequate. Second, there should be predictability in the flow of such funds. And third the importance of appropriate burden sharing among the developed country parties should be recognised.

It may be noted that this key provision is not free from ambiguity. It stipulates crucial commitments for the developed country parties and other developed parties included in Annex. II. As for the developed parties included in Annex II, the list is clear since all of them are members of the OECD. It is however not clear which are the other developed country parties. It is regrettable that such a key provision is reflected in such a vague and casual manner.

Paragraph 4 stipulates additional commitments of these parties to assist developing country parties which are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects. These include the small island developing countries which are threatened by the sea level rise need special assistance to develop a strategy for adaptation. The Inter-governmental Panel for Climate Change (IPCC) has done valuable work in highlighting the need for taking urgent and effective measures. That would require a sound planning and adequate financial resources to implement those measures. Thanks to the initiatives of countries like Australia, France, Japan, the Netherlands, the United Kingdom and the United States which have sponsored , on a bilateral basis, more than two dozens case studies in such developing countries, the experience gained would provide a good basis for planning effective strategies for adaptation.

Paragraph 5 contains another key element, particularly relevant to the developing country parties to the Convention. It deals with 'transfer of technology' or 'technology co-operation'. The developed country parties and other developed parties included in annex II commit themselves to take all practicable and appropriate steps to promote, facilitate and finance the transfer of, or access to, environmentally sound technologies and know how to other parties, particularly developing country parties to enable them to implement the provisions of the Convention. In addition, these countries would also support the development and enhancement of endogenous

capacities and technologies of developing country parties. Lastly, other parties and organisations in a position to do so, may also assist in facilitating the transfer of such technologies.

This short paragraph is loaded with many issues which are of vital importance to the developing countries. It may be recalled that the twin issues-the availability of financial resources and technology transfers, were the barometers for measuring ups and downs in the INC Negotiations. Unlike the financial resources, which happily finds a separate place in Article 11 in the text of the Convention, the placing of issues relating to transfer of technology in such abbreviated paragraph has fallen far short of the expectations of the developing countries. While attempt has been made to meet their concerns, it leaves much to be done in the implementation of the Convention.

The basic issues governing the transfer of technologies in preferential and non-commercial terms has not been spelt out. It mainly deals with the commitments in respect of promotion of technology co-operation. The omission of the word 'safe' in between 'environmentally sound' was regretted by many developing countries at the INC Sessions. The development of both the indigenous and endogenous capacities of developing countries is the prime objective of the Convention. How far it would encourage and facilitate such development will be the crucial factor in the successful implementation of the Convetion. As for the transfer of technology, certain extraneous issues which crept in during the INC negotiations but which have not been spelt out in this paragraph. But their invisible role can not be underestimated. While the agenda of the Conference of Parties for its first session includes several issues, it would be in the fitness of things if some initiative could begin, to prepare a Protocol on technology transfer which would elaborate the provision of paragraph 5 and bridge the gaps left in the text of the Convention. Such an initiative would encourage the developing countries and enhance the credibility of the developed countries on their eagerness to promote the concept of co-operative framework.

Paragraph 6 is in line with the flexible approach followed in the convention. In order to accommodate the interests of the parties included in Annex I which are undergoing a process of transition to a market economy, the Conference of Parties would allow a certain degree of flexibility while reviewing the commitments of those countries specified in paragraph 2, particularly in respect of historical level of emissions choses as a reference.

Paragraph 7 contains an element of crucial importance. It is not a commitment but a consequence arising from the implementation of the commitments undertaken by the developed country parties. It provides a

litmus test to determine whether the developed country parties have effectively implemented their commitments related to financial resources and technology transfer. Based on such determination it would be judged, to what extent the developing country parties should effectively implement their commitments keeping in view their priorities in areas such as poverty eradication, economic and social development.

Paragraph 8 deals with the Special situations which need to be considered in the context of the implementation of the commitments. Although, it is addressed to all the Parties to the Convention, the developed country parties are however required to take the lead. It is envisaged that full considerations would be given to develop necessary measures including funding, insurance and the transfer of technology to meet the specific needs and concerns of developing country parties arising from the adverse effects of climate change and/or the impact of the response measures especially to the categories of countries, such as:

a) Small island countries;
b) Countries with low-lying coastal areas;
c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay;
d) Countries with areas prone to natural disasters;
e) Countries with areas liable to drought and desertification;
f) Countries with areas of high urban atmospheric pollution;
g) Countries with areas with fragile ecosystems, including mountatinous ecosystems;
h) countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and
i) landlocked and transit countries.

Details as to how these considerations would be effected are however not elaborated. This is another area where further efforts could be exerted before the Conference of Parties.

Paragraph 9 urges all the parties to the Convention to take full account of the specific needs and special situations of the least developed countries in their actions specially in regard to funding and transfer of technology.

Lastly, paragraph 10 draws attention to the serious difficulties being faced by those countries in switching to alternatives, whose economies are

highly dependent on income generated from production, processing and export, and/or consumption of fossil fuels and associated energy intensive products and/or the use of fossil fuels. The situation of these parties would need to be taken into consideration in the implementation of the Convention.

Generally speaking the text of article 4 as a whole is lengthy and repetitive. Because of the last minute push, it could not be properly streamlined. As for the substance, paragraph 2(a) on specific commitments in particular is a big set back to the whole process of negotiations of the Framework Convention on Climate Change. From the very start of the INC negotiations, the objective set was to arrive at specific commitments from the industrialized countries on time-tables and targets for limiting emissions of greenhouse gases. Instead of any binding legal commitments, the Convention provides for what can only be considered as a 'Code of ethics' couched in such a loose and ambiguous manner that it has lost its teeth. No wonder, it was described by the delegate of India as a "linguistic strip-tease". The Secretary-General of the AALCC in his statement at the Rio Conference observed-"The final text fell short of expectations of developing countries particularly in respect of each of the commitments of the developed countries on the core issues of stabilization and reduction of emission of greenhouse gases and the financial resources to support the implementation of the objective of the Convenstion. In these aspects the Convention can hardly be regarded as anything more than a code of conduct upon which hopefully more binding commitments can be established"

It may be recalled that according to the Inter-governmental Panel on Climate Change (IPCC) stabilising greenhouse gas concentrations would require reduction of 60 percent in global emissions of carbon dioxide. Even at the second part of the INC's fifth session, the European Economic Community Members and Japan were willing to undertake commitments to stabilize carbon dioxide emissions at 1990 levels by the year 2000. However, the United States consistently took a different approach. Their view was that carbon dioxide stabilization would be expensive. They could achieve the similar objective without fixing any target and would prefer to follow the measures currently envisaged by themselves. Ultimately, the United States view prevailed. The Convention only contains obscure phrases indicating the desire to achieve the objective of CO2 stabilization at a certain period of time.

It is, however, interesting to note that the delegations of several European countries and Japan at the Rio Summit, reiterated their policy intention to reduce and stabilise CO2 emissions at 1990 levels by the year 2000.

Article 5

Article 5 entitled "Research and Systematic Observation" is an elaboration of Article 4, paragraph 1(g). It recognises in particular the role of the Inter-governmental and International Non-governmental Organisations in developing programmes and networks aimed at defining, conducting, assessing and financing research, data collection and systematic observations. Such co-operation is considered desirable to minimize duplication of effort. It envisages that there would be increasing support to develop and strengthen the capacities and capabilities of the developing countries in these activities. It calls for promotion of access to and the exchange of data and analyses obtained from areas beyond national jurisdiction. Lastly, it draws attention to the particular concerns and needs of developing countries and recognises the need to promote co-operation in improving their endogenous capacities and capabilities to participate in such activities.

Article 6

Article 6 entitled "Education, Training and Public Awareness" envisages that the parties to the Convention would promote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with their national laws and regulations, and within their respective capacities, educational and public awareness programmes related to climate change and its effects. They would also endeavour to promote public participation, arrange training programmes and provide public access to information on climate change and its effects. In this regard, they should also seek to promote, at the international level, such programmes and measures and strengthen the national institutions. Lastly, they should promote exchange or secondment of personnel to train experts in this field, in particular for developing countries.

Article 7

Article 7 provides for the establishment of the Conference of Parties as the supreme body of the Convention and entrusts it with the overall responsibility of the effective implementation of the Convention and any related legal instruments that may be adopted subsequently. Paragraph 2, contains a detailed list of functions of the Conference of Parties. The Conference of Parties is the major decision-making body. Periodic examination of the obligations of the Parties and the establishment of necessary institutional arrangements to implement the Convention are its

key functions. In order to carry out these functions, it has been given tools to review and assess the information furnished by the Parties to the Convention and the reports submitted by the subsidiary bodies. In addition to its 'Watch-dog' functions, the Conference of Parties has been entrusted with the promotional role in the areas such as exchange of information furnished by the competent international organizations and the measures adopted by the parties to the Convention including comparable methodologies for the preparation of inventories of greenhouse gas emissions by sources and removals by sinks. Unfortunately, the financial authority of the Conference of Parties is rather limited. There are no clear provisions to have its own financial resources. The Conference of Parties is only authorised to "seek to mobilize financial resources" as provided in Articles 4 and 11 of the Convention.

Concerning the organizational functions, Paragraph 3 provides that the Conference of Parties shall at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention. This procedure will cover decision-making procedures, including specified majorities required for adoption of particular decisions. The first session will be convened by the interim Secretariat referred to in Article 21 within one year after the entry into force of the Convention. Thereafter ordinary sessions will be held every year.

Paragraph 5 makes provision for convening Extraordinary Sessions of the Conference of Parties as and when necessary. Such an initiative has to come from a Party to the Convention duly supported by at least one third of the Parties.

Finally, Paragraph 6 lays down the guidelines to determine the participation of the observers not party to the Convention. The United Nations, its specialised agencies and the International Atomic Energy Agency, as well as any State Member thereof or observers thereto may be represented at sessions of the Conference of Parties as observers. Any other body or agency whether National or international, governmental or non-governmental which is qualified in matters covered by the Convention and desires to be represented, may be so admitted unless at least one-third of the Parties present, object.

It is not clear whether the 'observer' will be admitted to participate at the meetings of the subsidiary bodies as well. Keeping in view the reluctance on part of many Governments to support the open participation especially by the non-governmental organizations in the sensitive meetings, it may be necessary to put some restrictions. This matter might be taken up by the Conference of Parties when it meets at its first session to consider adoption

of its own rules of procedure and the rules of procedure of its subsidiary bodies.

Article 8

Article 8 paragraph 1 provides for the establishement of a Secretariat. Apart from the administrative functions such as the arrangements for the sessions of the Conference of Parties and its subsidiary bodies, and co-ordination with the Secretariats of other relevant international bodies, it is envisaged that the Secretariat shall compile and transmit reports submitted to it and facilitate assistance to the Parties, particularly the developing countries parties, in the compilation and communication of information required to be submitted by them. The Secretariat would function under the overall guidance of the Conference of Parties and submit reports on its activities to that body.

It may be observed that the functions of the Secretariat as stipulated in Article 8 will need to be further elaborated by the Conference of Parties. During the INC negotiations some consideration was given to the idea of the constitution of an Executive Committee. This however was dropped at the last stage of negotiations. Since the Conference of Parties would normally meet once a year, there will be the need to create a system for expeditious decisions on executive matters. How far these powers could be delegated to the Secretariat would have to be explored. It is also not clear what would be the designation of the head of the Secretariat and how he will be elected or appointed.

It is interesting to note that as stipulated in paragraph 3, the Conference of the Parties at its first session will designate a Permanent Secretariat and make arrangements for its functioning. The establishment of a separate Secretariat perhaps it could be decided at that time or the Secretariat of any existing International Organization might be designated to assume that function.

Article 9

Article 9 envisages establishment of a subsidiary body for scientific and technological advice, which would provide the Conference of the Parties and its other subsidiary bodies with timely information and appropriate advice on scientific and technological matters relating to the Convention. This body would be multidisciplinary and open to participation by the representatives designated by each State party to the Convention. It would carry out its activities under the guidance of the Conference of Parties drawing upon the existing competent international bodies. It would report

regularly to the Conference of Parties about its work. Paragraph 2 of the same Article enumerates some of the functions of this body which will include the following:-

a) Provide assessments of the State of scientific knowledge relating to climate change and its effects;

b) Prepare scientific assessments on the effects of measures taken in the implementation of the Convention;

c) Identify innovative, efficient and state-of-the-art technologies and know-how and advise on the ways and means of promoting development and/or transferring such technologies;

d) Provide advice on scientific programmes, international co-operation in research and development related to climate change, as well as on ways and means of supporting endogenous capacity-building in developing countries; and

e) Respond to scientific, technological and methodological questions that the Conference of the Parties and its subsidiary bodies may put to the body.

Article 10

Article 10 provides for the establishment of a subsidiary body for implementation with a view to assisting the Conference of Parties in the assessment and review of the implementation of the Convention. This body would be open to participation by all parties and comprise experts nominated by the Governments. Apart from making regular reports to the Conference of Parties, this body would also consider the information communicated by the parties to assess the overall aggregate effect of the steps taken by the parties and carry out reviews as required by Article 4, paragraph 2(d) of the Convention. Last, but not the least, it would provide appropriate assistance to the Conference of parties in the preparation and implementation of its decisions.

This article has to be read in conjunction with article 12 on communication of information related to implementation. Both the articles together provide for a mechanism on reporting and reviewing. It is a diluted form of 'Pledge and Review' mechanism introduced at the third session of the INC held in Nairobi in September 1991. In view of the strong opposition from the developing countries, an attempt has been made to soften the objective to be pursued in this context and instead of providing a sort of "compliance mechanism", the idea is to advocate and promote co-operative arrangement to ensure effective implementation of the provisions of the Convention.

Article 11

Article 11 deals another core issue concerning financial mechanism. Instead of establishing any separate and independent financial institution or body the Convention only defines the mechanism which would govern the implementation of the Framework Convention. The financial resources, as envisaged in the mechanism would be on a grant or concessional basis. The mechanism would function under the guidance of and be accountable to the Conference of Parties, which would also decide the policies, programmes, priorities and eligibility criteria related to the Convention. There is no scope to create any new institution in future to deal with the financial matters. It is categorically stated that the operation of the financial mechanism "shall be entrusted to one or more existing international entities". The authors of this text did not mention specifically the "Global Environmental Facility" as the entity responsible for the operation of the financial mechanism envisaged in the Convention. However, Article 21 dealing with the interim arrangements, in its paragraph 3 provides that:—

"The Global Environment Facility of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development shall be the international entity entrusted with the operation of the financial mechanism referred to in Article 11 on an interim basis. In this connection, the Global Enviroinment Facility should be appropriately re-structured and its membership made universal to enable it to fulfil the requirements of Article 11."

Speculation on whether this interim arrangement would become 'final' when the first session of the Conference of Parties meets is not a matter of academic exercise. Much would depend upon the genuine restructuring and democratization of operation of the GEF. Any cosmetic changes in the GEF would further disillusion the developing countries which clamoured so hard during the negotiations in the INC to establish an international climate fund within the Framework Convention.

It is worth recalling that the basic premise on which the GEF was launched three years back was a sort of an *ad hoc* arrangement. This continues to be reflected in the operation of its Pilot Phase which ends in 1994. In view of the great responsibility which has been thrust upon the GEF as the key financial authority to initiate and accelerate the financial support to the implementation of the Framework Convention on Climate Change, the Biodiversity Convention and the Agenda 21 programme, it would be desirable to evaluate its organisational structure, functions and the capacity to play this crucial role. The following observations are made

principally in the context of the Framework Convention on Climate Change.

i) In order to encourage wider participation of the developing countries and to assist them in the implementation of the commitments envisaged in the Framework Convention on Climate Change, the availability of financial resources is of crucial importance. While the Convention also provides for such financial assistance from other sources such as bilateral and regional, the GEF will play the key role.

ii) It may not be practical to draw an exhaustive list of areas where the GEF will be expected to meet the financial requirements of the developing countries. However, broadly, these may include:

a) to build and strengthen the national infrastructure and the capacity to monitor the climate change;

b) to establish administrative and legislative framework to implement the Convention;

c) to prepare national report based on comparative methodologies as agreed;

d) to take up the measures to mitigate the adverse effects of the Climate Change and to meet costs of adaptation to those adverse effects; and

e) to reimburse agreed incremental cost incurred in relation to technology and other implementation measures.

Climate Change is one of the Programme areas which the GEF is currently financing. However, the success of the implementation of the Framework Convention on Climate Change would very much depend on how the GEF will be able to allocate substantial financial resources to meet the new requirements envisaged in the Convention.

It is encouraging to note that most of the OECD countries have indicated their willingness to commit further financial support to the GEF. In additioon, it is expected that various United Nations Agencies and other Inter-governmental and Non-governmental organisations will extend financial and material support to implement the Framework Convention either directly or through the GEF. It would be more realistic and fruitful if an effort could be made to co-ordinate especially in the programme areas of various United Nations Agencies.

As it is structured today, the operating arm of the GEF is confined to UNDP, UNEP and the World Bank. The WMO has done commendable work in the meteorological and climate related areas. It might be worthwhile to examine how WMO could be usefully involved in the operative role of

the GEF, particularly in relation to the implementation of the Framework Convention on Climate Change. The WMO's World Weather Watch, the Global Atmosphere Watch, the World Climate Programme provide a solid base which could be used to launch new co-operative programmes. The national and regional monitoring networks to study climate change established by the WMO could be utilized and further strengthened, Such measures would reduce the financial burden of the GEF and avoid unnecessary duplication.

Article 12

Article 12 entitled "Communication of Information related to Implementation" is one of the late additions to the text of the Convention. During INC Meetings, there was considerable reluctance from the developing countries to support the mechanism of "pledge and review" process. It appears that in order to make it acceptable this 'mechanism' was placed in a diluted form and renamed "communication of information". The article contains differentiated commitments and time-table for different categories of State parties to the Convention.

Under Paragraph 1 each party is required to communicate to the Conference of Parties, through the Secretariat, information on its national strategy to deal with abatement of greenhouse gas emissions. In order to formulate its national inventory, it would use comparable methodologies as promoted and agreed by the Conference of Parties. In addition, the information for communication would include a general description of steps taken or envisaged to implement the Convention and any other relevant information to achieve that objective.

Paragraphs 2 and 3 stipulate specific commitments of developed countries parties included in Annex I and II respectively. The communication by the developed Country Party and each other Party included in Annex I would also contain a detailed description of its policies and measures on the mitigation of climate change and a specific estimate of effects those policies and measures would have by the end of the present decade. Paragraph 3 incorporates additional commitments for State Parties included in annex II. Their communication would also incorporate details of measures taken in respect of their financial commitments and assistance to the developing country parties.

Paragraph 4 makes provision for financial and technical assistance to the developing country parties who wish to seek such assistance. For that, they would submit detailed information on the financing of such a project,

specific technologies, equipment, techniques needed to implement that project and, if possible, an estimate of all incremental costs and an estimate of the consequent benefits.

Paragraph 5 sets a differentiated time-table for the developed and developing country parties for the first communication to be sent after the entry into force of the Convention. Each developed country Party and each other Party included in Annex I would transit such communication within six months. For parties, which are not so listed the period is three years and that too subject to the availability of financial assistance as envisaged in Article 4, paragraph 3. There is further relaxation in case of parties that are least developed countries. There is no such commitment for them. They would make such communication at their discretion. As regards the frequency of subsequent communications, it is left to be determined by the Conference of Parties, which would take into account the differentiated time-table set out in this paragraph. Paragraph 6 deals with the procedural aspects. The Parties to the Convention would communicate the information to the Secretariat, which in turn would as soon as possible, transmit it to the Conference of Parties and the concerned subsidiary bodies. The Conference of the Parties may consider further streamlining this procedure.

Paragraph 7, contemplates an important role for the Conference of Parties in this Connection. From the very first Session, its endeavour will be to arrange to provide financial and technical support to the developing Country Parties seeking such assistance for compilation and communication of the required information, as well as in identifying technical and financial assistance to carry out related, projects. Further, such support may be extended by other parties, competent international organisations and by the Secretariat itself.

Paragraph 8 envisages joint communication by a group of parties provided prior notification has been made to the Conference of Parties and such a communication includes information on the fulfilment by each of these parties of its individual obligations as party to the Convention. Further detailed guidelines in this respect would be adopted by the Conference of Parties.

Paragraph 9 protects the confidentiality of information communicated to the Secretariat by a Party to the Convention. Based on the criteria established by the Conference of Parties, a party may designate any information communicated by it as confidential. The Secretariat would aggregate such information to 'protect its confidentiality before making it available to any of the bodies involved in the communication and review of such information.

Lastly, paragraph 10 provides that any party desirous of making its communication public could do so at any time. The Secretariat is also entitled to make communications by the parties publicly available provided such communications have not been designated as confidential in accordance with the provision laid down in paragraph 9.

In our view article 12 follows a practical approach and its faithful implementation would enhance the credibility of the Convention. So long as it safeguards the national interests of the developing countries and prevents the backdoor entry of the 'pledge and review' mechanism, there is no fear of any intrusion on their national sovereignty. The flexibility, differentiated time-frame and the measures to provide technical and financial support go a long way in meeting the concerns of the developing countries. It is envisaged that the Conference of Parties would lay down further guidelines for subsequent communications, joint communication by a group of countries and the criteria for safeguarding the confidentiality of the information. However, it would be desirable that the Conference of Parties would also lay down the detailed guidelines to provide technical and financial support to the developing country parties. This would avoid undue scrutiny of a State party individually and strengthen the commitments by the developed country parties. A review of national strategy should be confined only to assessment of programmes and measures. If such a review takes a shape of 'control' or 'monitoring', it would create resentment and frustration among the developing country Parties to the Convention.

Article 13

Article 13 entitled "Resolution of questions regarding implementation" is a novel provision. The basic purpose is to provide some measures to deal with a situation where disagreement might arise between the two or more parties on any matter related to the Convention in an amicable way. During the course of the discussion in the INC on this article, most of the developing countries were reluctant to support the idea. The sponsors of this proposal, however, could not substantiat whether it is an alternative to the provision on settlement of disputes or it would be a supplemment to the procedure envisaged in Article 14. it is expected that the Conference of Parties at its first session would give consideration to the establishment of a multilateral consultative process which would be available to the parties on their request for the resolution of questions regarding the implementation of the Convention.

Article 14

Article 14 deals with the settlement of disputes. Basically, it is modelled

on the Vienna Convention on the Protection of Ozone Layer. Unfortunately, very little discussion was held on this important article during the INC meetings. The text, as incorporated, envisages that in the event of a dispute between two or more State parties concerning the interpretation or application of the Convention, first an attempt could be made to seek a settlement of the dispute through negotiation or any other peaceful means as determined by the parties in question. Alternatively, it provides for submission of such a dispute to the International Court of Justice or to a specially created Conciliation Commission. It is also envisaged that the Conference of Parties would adopt procedures for arbitration as soon as practicable which could be included as an annex to the Convention.

Final Clauses

As for the final clauses, the Convention follows the established provision in other international Conventions such as the 1985 Vienna Convention on Protection of Ozone Layer or the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal. During the INC meetings, there was hardly any controversy on these provisions. The only issue on which there was disagreement was the requisite number of ratifications to bring the Convention into force.

Article 15

Article 15 sets out the procedure for amendments to the Convention. Any party may propose amendments to the Convention. The Secretariat would inform of such a proposal to all other parties at least six month prior to their consideration by the Conference of Parties at its ordinary session. The Conference of Parties would make every effort to adopt the amendment by consensus failing which by a three-fourths majority vote of the Parties present and voting at that meeting. The adopted amendment would be communicated by the Secretariat to the Depository, who in turn would circulate to all Parties for their acceptance. The amendment would enter into force for those parties having accepted it on the ninetieth day after the receipt of acceptance by at least three-fourths of the Parties to the Convention.

Article 16

Article 16 deals with the adoption and amendments of annexes to the Convention. Annexes would form an integral part of the Convention comprising lists, forms and other material of a descriptive nature covering scientific, technical, procedural or administrative matters. The procedure for adoption and entry into force of annex is similar to that of procedure for amendments. However, a party may notify the Depository, in writing, of its non-acceptance of the annex. Subsequently upon the withdrawal of such notification, on the ninetieth day, the annex would enter into force for that Party. Lastly, if the adoption of an annex or an amendment to an annex involves an amendment to the Convention, that annex or amendment to an annex would not enter into force until such time as the amendment to the Convention enters into force.

Article 17

Article 17 is concerned with adoption of Protocols. The text of any Protocol submitted within six months would be adopted by the Conference of Parties at any ordinary session. Each Protocol would prescribe the requirements for its entry into force. Only parties to the Convention would be parties to a Protocol and only they would take decisions concerning that Protocol.

Article 18

Article 18 provides that each Party would have one vote except in case of regional economic integration organisations which would exercise their right to vote with a number of votes equal to the number of their member States that are parties to the Convention, provided any of their member States have not exercised such right to vote.

Article 19

Under Article 19, the Secretary-General of the Untied Nations has been designated as the Depository of the Convention and any Protocols adopted subsequently.

Article 20

Article 20 states that the Convention would be open for signature by States Members of the United Nations or any of its Specialised agencies or that are parties to the Statute of the International Court of Justice and by the regional economic integration organisations at Rio, during the UNCED, and thereafter at United Nations Headquarters in New York, from 20 June 1992 to 19 June 1993. It will be recalled that an impressive number of 155 States and the EEC signed the Convention in Rio. An additional State on

29th June signed the Convention. Following is a list of States which have signed the Convention:—

Afghanistan, Algeria, Angola, Antigua and barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Democratic People's Republic of Korea, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finaland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Papua New Guinea, paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Samoa, SaoTome and Principe, San Marino, Senegal , Seychelles, Singapore, Slovenia, Solomon Islands, Spain, Sri Lanka, Sudan, Surinam, Swaziland, Switzerland, Sweden, Thailand, Togo, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe and EEC.

Article 21

Article 21 provides for the interim arrangements prior to entry into force of the Convention. The INC Secretariat which was established pursuant to General Assembly Resolution 45/212 of 21 December 1990 would continue to provide secretarial functions as envisaged in Article 8 of the Convention. The Intergovernmental Panel for Climate Change (IPCC) has been requested to respond to the need for objective scientific and technical advice. Other relevant scientific bodies could also be consulted for such advice and informtion. Lastly, the Global Environment Facility (GEF) has been designated on an interim basis as the international entity entrusted with the operation of financial mechanism referred to in Article 11. It has

however, been suggested that GEF should be appropriately restructured and its membership made universal to fulfil the requirements of Article 11.

Article 22

Article 22, paragraph 1 provides that the Convention would be subject to ratification, acceptance, approval or accession by States and regional economic integration orgnisations. It would be open for accession from 20 June 1993. i.e. the day after the date the Convention is closed for signature. Paragraphs (2) and (3) deal with the matters relevant to regional economic integration organisations in this context.

Article 23

Under Article 23, the Convention would enter into force on the ninetieth day after the deposit of fiftieth instrument of ratification, acceptance, approval or accession. During the INC meetings the views differed in regard to the number of ratifications required for the entry into force of the Convention. The figure 50 was considered by *some* too high and while few delegates suggested that besides the criteria of number, other considerations such as per capita gas emissions should be taken into account.

Article 24

Article 24 rules out making of any reservations to the Convention.

Article 25.

Under Article 25 any party may withdraw from the Convention at any time after three years of its entry into force. A written notification would be effective one year after such notification or on such later date as specified in the notification. Any party wihich withdraws from the Convention would be deemed to have withdrawn from any Protocol to which it is a Party.

Article 26

Provides that the texts of the Convention deposited with the secretary-General of the United Nations in Arabic, Chinese, Enligh, Frensh, Russian, Spanish are equally authentic.

III. General Observation

The successful completion of the work of the Intergovernmental Committee on Framework Convention on Climate Change was undoubtedly a significant achievement.

Although the final text represents only a 'package deal' and the Convention as a whole fell short of expectation of several delegations on many counts, nevertheless it is a significant first step. It provides a basis on which other measures have to be built.

Global warming poses environmental threat of unprecedented nature. However, the uncertainties in predictions in regard to the timing and magnitude due to lack of adequate understanding of the phenomenon and other material evidence have to be taken into account. The IPCC has made tremendous contribution in establishing the scientic basis of the Convention. It is hoped that the six tasks agreed on at the Fifth Session of the IPCC (Geneva, March 1991) would be completed in time. Such information would be useful in adopting of further measures to implement the provisions of the Convention.

Due to the generous financial assistance provided by the INC, representatives of a large number of developing countries were able to participate at the INC Session. This helped them immensely to increase their awareness and get first hand information about the problems of climate change and the measures to tackle them.

It is heartening to note that as many as 155 States including the EEC have signed the Convention at Rio during the UNCED in June 1992. Some of the States which have not yet signed the Convention have however expressed concern and dissatisfaction over certain provisions in the Convention. Some States have expressed serious reservations regarding the provisions on specific commitments. The fossil-fuel producing countries are concerned that in the implementation of the Convention they might have to pay a price higher than others due to repercussions inherent in the implementation process. Although the provisions dealing with special situations take into consideration this aspect, however, it is not quite satisfactory to them. Much more has to be done to allay their concern and to bring them in the Convention's fold. The first and foremost important thing, therefore, is to win their confidence and make the Convention universally acceptable. It is not the intention to suggest that the Convention should be amended at the very first instance. The present text is flexible enough to accommodate the genuine concerns of many of nonsignatories.

In the present text of the Convention the provisions concerning financial

mechanism and transfer of technology to the developing countries need to be strengthened. The developing countries have lost the battle to secure any firm commitments from the developed countries in respect of these two matters. The vague assurance and feable attempts would not soothen their feelings.

It is a matter of satisfaction that the resolution on interim arrangements adopted by the INC along with the text of the Framework Convention considered it essential to involve in future negotiations all participants in the INC irrespective of whether they are signatories to the Convention or not. This would avoid any discrimination and leave the doors open for constructive negotiations in the crucial phase of future of negotiations. It is expected that the General Assembly at its forty-seventh Session will endorse the Report of the INC fifth Session and recommend the convening of INC Sixth Session probably in early December this year to intiate necessary arrangements to be made for the preparation of the first Session of the Conference of the Parties as specified in the Convention.

The Convention would come into force on the nineteenth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession. Further as provided in Article 7 the first session of the Conference of Parties would be held not later than one year after the date of entry into force of the Convention. The first session of the Conference of Parties would have an exhaustive agenda for consideretion. A tentative list of items as deduced form various provisions of the Convention might include :

(i) Adoption of the rules of procedure of the Conference of Parties as well as those of the subsidiary bodies established by the Convention. These procedures will include decision making procedures for matters not covered in the Convention (Atricle 7.3)

(ii) Designation of a Permanent Secretariat and necessary arrangements for its functioning. (Article 8.3)

(iii) A review of the adequacy of the specific commitments undertaken by the developed country parties

(iv) Review of the information communicated by the developed countries parties on their policies and measures related to mitigation of climate change (Article 4.2(b)

(v) Approval of methodologies for calculation of emissions by sources and removals by sinks of greenhouse gases (Article 4.2(c)

The success of the first session of the Conference of the Parties would very much depend on the preparatory work undertaken during the inerim

period until the Convention comes into force. It is good that the INC and the IPCC are actively involved in this process. It would ensure continuity and avoid the hassles involved in establishing a new set-up.

The General Assembly at its Forty-seventh Session will consider the nesessary arrangements required for continuation of the functioning of the INC, including the financial aspects. It would be desirable if the expenses during the interim period could be met by the resources generated by the implementation mechanism of the convention itself. The United Nations is already facing serious financial crisis. Such a move would lessen the burden on the United Nations.

The Global Convention on Biological Diversity

I. Background

Bio-diversity or biological diversity can be defined as the total sum of life's variety on this planet, expressed at the genetic, species and ecosystem levels.[1] According to scientists, this variety is now declining at an unprecedented rate as a result of man's activities. Estimates of the rate of loss are uncertain, but in the case of certain species of animals, recent projections indicate a loss of between 20 and 50 per cent of species by the year 2025 if the present trends continue.[2]

The reasons for growing international concern about this loss include : (1) the recognition of the moral imperative for the other species to co-exist with man as in no case man can exist in isolation from the rest of the natural world: (ii) bio-diversity is perceived as having an enormous value, both actual and potential: (iii) the rate and extent of loss is uncertain, but appears to be very rapid: and (iv) the loss is irremediable. As a result, there is mounting public awareness and pressure in the developed contries about the need to conserve bio-diversity which is reflected in higher political priority being attached to conservation issues. Insofar as developing countries, who happen to be the repository of bulk of the biological resources, their chief concern is that the commercial exploitation of their biological resources is proceeding without corresponding monetary compensation. They lack capacity as well as economic incentives to conserve biological diversity for

1. U.K. Department of Environment. *Conserving the world's Biological Diversity : How can Britain Contribute?* (June 1991)
2. U.K. Department of Environment and the Department of Trade and Industry. *Conservation of Biological Diversity-The Role of Technology Transfer* (London, Touche Ross, July 1991)

future generations, but are forced to incur costs including foregone revenues from alternative uses where conservation is attempted. It is ironic that the areas of greatest biological diversity or importance are located in the developing countries and in areas threatened by population pressure or instability.

The developed countries can help themselves, but the developing countries need substantial help in the form of financial and technical assistance if they are to be able to conserve their biodiversity. Moreover, the resources needed to tackle such a stupendous task are concertrated in Europe and North America, which together have roughly 78 per cent of the world's ecologists and 78 per cent of the world's insect taxonomists. Only 5 per cent of active researchers are found in Africa and South America and around 5 per cent in the Oriental tropics-all areas of great terrestrial biodiversity [3]. In view of this situation, the conservation of biodiversity has become a key planetary responsibility.

It was in recognition of this international concern that the UNEP Governing Council, in its decisions 14/26 and 15/34, stressed the need for concerted international action to conserve biodiversity by *inter alia* formulation of a comprehensive international legal instrument, possibly in the form of a framework Convention. The Governing Council, accordingly, established an *ad hoc* Group of Experts on Biological Diversity which held its first session in Geneva in November 1988. The second session of the *ad hoc* Group was convened in Geneva in February 1990 to advise further on the content of a new international legal instrument, with particular emphasis on its socio-economic context. The Group requested the Executive Director to begin a number of studies as a means of responding to specific issues in the process of developing the new legal instrument. These studies covered: biodiversity conservation needs and costs: current multilateral, bilateral and national financial support for biological diversity conservation: and analysis of possible financial mechanisms; the relationship between intellectual property rights and access to geneticresources; and biotechnology issues. The results of these studies were presented to the *ad hoc* Group at its third session which was held in Geneva in July 1990. At that session. the *ad hoc* Group advised further on, *inter alia*, the contents of elements for a global framework legal instrument on biological diversity. The Group agreed that in dealing with the issues of costs, financial mechanisms and technology transfer, the broad estimates of costs involved should be accepted. However, the Group maintained that the complex issues involved in biotechnology

3. Clark and Juma. *Biotechnology for Sustainable Development-Policy Options for Developing Countries* (African Centre for Technology Studies, Nairobi, 1991)

transfer required further expert examination before the set of elements covering the issues could be agreed. Accordingly, an expert meeting of the open-ended Sub-working Group on Biotechnology, which was held in Nairobi in November 1990, discussed issues relavant to biotechnology transfer, mainly the scope of biotechnologies to be included in the proposed Convention and ways and means for their transfer to developing countries.

The outcome of the three sessions of the expert group and the Sub-Group on Biotechnology showed that there was an urgent need for an international instrument for the conservation of biological diversity encompassing it at three levels: intra-species, inter-species and ecosystems, including both *in situ* and *ex situ* conservation. It was clarified that certain issues might need to be considered in separate protocols and that, if possible, these protocols should be negotiated concurrently with the Framework Convention. It was agreed that the proposed Convention should contain firm funding commitments. Biotechology transfer was recognized as an important element in the planned instrument, with a potential to contribute to improved conservation and sustainable utilization of genetic diversity. The experts also agreed that the access to genetic resources should be based on mutual agreement and full respect for the permanent sovereignty of States over their natural resources and that an innovative mechanism that facilitated access to resources and new technologies should be included in the legal instrument.

Subsequently, the UNEP Governing Council by its decisions 15/34 and SS. II.5 appointed an *ad hoc* Working Group of Legal and Technical Experts with a mandate to negotiate an international legal instrument for the conservation of biological diversity. At its first session held in Nairobi from 19 to 23 November 1990, the group focussed on the elements for possible inclusion in a global farmework Convention on Biological Diversity. On the basis of its consideration of these elements the session reguested the UNEP Secretariat to prepare a draft Convention on Biological Diversity which was presented to the second session of the *ad hoc* Working Group held in Nairobi from 25 February to 6 March 1991 (UNEP/Bio. Div./WG/2/2/2). The second session discussed parts of the draft Convention and identified a number of issues for further clarification with the help of notes to be prepared by the UNEP Secretariat. It made recommendations to the Secreteriat on the revision of the draft Convention. The Session also requested the Executive Director to convene a meeting of a regionally balanced group of lawyers (Lawyers' Meeting) to review the draft Convention as revised by the Secretariat. The session also made important decisions on procedural and organizational matters; adopted its rules of proceddures; and

elected its officers; established two sub-working groups assigning each group with specific parts of the draft Convention.

The UNEP Govening Council, at its sixteenth session, by decision 16/42 renamed the *ad hoc* Woriking Group of Legal and Technical Experts on Biological Diversity as the *Intergovernmental Negotiating Committee (INC) for a Convention on Biological Diversity* clarifying that the change of name did not mean a new negotiating body nor affect the continuity of the process of elaborating the Convention. The INC was split into two working groups. Working Group I was assigned almost two-third part of the Draft Convention. Working Group II was allotted specific draft articles which consitituted the heart of the Draft Convention. The successful elaboration of the Convention depended upon agreement being reached on the issues which were being tackled by Working Group II. Those included access to genetic resources; access to and transfer of technology including biotechnology; and financial resources and funding mechanisms.

The first session of the INC was held in Madrid from 24 June to 3 July 1991; the second session in Nairobi from 23 September to 2 October 1991; the third session in Geneva from 25 November to 4 December 1991; the fourth session in Nairobi for 6 to 15 February 1992, and the fifth and final session in Nairobi from 11 to 19 May 1992 at which the text of the Convention on Biological Diversity was eventually finalized. Subsequently, the Convention was put up for signatures at the United Nations Conference on Environment and Development (UNCED) held in Rio (Brazil) where it was opened for signatures from 5 to 14 June 1992. The Convention is now open for signatures at the United Nations headquarters in New York until 4 June 1993.

As of 29 June 1992, the Convention had received 157 signatures. From amongst the Member States of the AALCC, 35 States have signed the Convention. These are as follows:

> Arab Republic of Egypt, Bangladesh; China; Cyprus; Gambia; Ghana; India; Indonesia; Iran; Japan; Jordan Kenya; DPR Korea; Republic of Korea; Kuwait; Malaysia; Mauritius; Mongolia; Nepal; Nigeria; Oman; Pakistan; Philippines; Qatar; Senegal; Sri Lanka; State of Palestine; Sudan; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates; Yemen; and Botswana.

The non-signatory AALCC member States are Iraq; Libya; Saudi Arabia; Sierra Leone; Singapore; Somalia; and Syrian Arab Republic. Significantly, the USA, the largest economy in the world, did not sign the Convention. Lack of patent protection is stated to be the main reason for which the USA

refused to sign the Convention. The US delegation also claimed that the Convention would take away American jobs though how this would happen was never explained.

II. An Overview of the Convention

The conservation and sustainable use of biological diversity and the problems relating to climate change and global warming are among the most important issues facing the world at the present juncture. The destruction of habitats is causing thousands of species to become extinct every year and the consequent loss of biological diversity has emerged as a major factor in what might become an irreversible climate change. Biological diversity, therefore, needs to be conserved and used in a sustainable manner so that mankind can derive optimum benefit from the world's genetic resources.

The international community has already enacted several instruments to protect biological diversity, but they have proved to be inadequate. It is, therefore, essential to supplement such action by a global Convention which would enable the present generation to discharge its responsibility to future ones by preserving their heritage.

Responding to these concerns, the Convention on Biological Diversity evolves a broad legal framework pooling together a wide range of actions at national and international levels for conservation and sound use of biological diversity that have hitherto been teken on a piecemeal basis. The Convention consists of a Preamble, 42 articles and two annexes. Annex I sets out an indicative list of categories of biological resources which are relatively more important for conservation and sustainable use. The Contracting Parties are required to identify and monitor these resources for purposes of *in situ* and *ex situ* conservation and sustainable use. Part one of Annex II lays down the procedure for arbitration of disputes which may arise between the Contracting Parties over the interpretation and application of the Convention. part two of Annex III sets out the procedure for settling such disputes through conciliation.

Fundamental norms and principles

The Preamble provides the *raison d'etre* for laying down a comprehensive legal regime for the conservation and sound use of biological diversity at national and international levels. This it proceeds to do, firstly, by recognizing certain fundamental premises and then by developing norms and principles based on those premises which are later spelt out in the substantive provisions

of the Convention. The fundamental premises recognized in the Preamble are that:

- biological diversity, the sum total of life's variety on this planet, is important for evolution and for maintaining life-sustaining systems of the biosphere;
- Conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population;
- biological diversity is being significantly reduced by certain human activities;
- since loss of biological diversity is irremediable, it is vital to anticipate, prevent and attack the causes of significant loss or reduction of biological diversity;
- lack of scientific certainty should not be used as a reason for deferring action aimed at minimizing or avoiding the threat of damage to or loss of biological diversity;
- substantial investments are required to conserve biological diversity;
- and special provision is needed to meet the needs of the developing countries including the provision of new and additional financial resources and appropriate access to relevant technologies.

The basic principles and norms formulated in the Preamble are:

- that conservation of biological diversity is a common concern of making;
- that although States have sovereign rights over their biological resources, they are nevertheless responsible for conserving and using them in a sustainable manner;
- that the fundamental requirement for the conservation of biological diversity is the *in situ* and *ex situ* conservation of ecosystems and natural habitats;
- that the provision of new and additional financial resources and appropriate access to relevant technologies is vital to meet the needs of the developing countries;
- and that biological diversity should be conserved and sustainably used not only for the benefit of the present generation but also for future generations.

In the light of the foregoing, the objectives set forth in Article 1 of the Convention are:

(i) the conservation of biological diversity for the present and future generations;

(ii) the sustainable use of its components;

(iii) fair and equitable sharing of the benefits of research in biotechnology,

(iv) appropriate transfer of relevant technologies taking into account the intellectual property rights; and

(v) appropriate funding.

The mode and manner in which these objectives are to be pursued are spelled out in the relevant provisions of the Convention.

Definitions

Article 2 enumerates the definitions of the terms used in the Convention. This is essential to impart clarity and avoid any ambiguity in the Convention regime. The terms defined include 'biological diversity', 'biological resources', 'biotechnology', 'country of origin of genetic resources', 'country providing genetic resources', '*in situ* conservation', *ex situ* conservation', 'habitat', '*in situ* conditions', 'protected areas', 'regional economic integral organization' and 'sustainable'. It is also clarified that the term 'technology' in the context of this Convention includes biotechnology. It should be pointed out that these definitions are a result of very painstaking efforts of the Working Group entrusted with the task of elaborating the definitions. While not perfect, the definitions offer an adequate basis for the Convention.

General Obligations

Articles 3 through 14, 22 and 26 frame the general obligations of the Contracting Parties. Article 3 explicitly recognizes the sovereign right of States to exploit their resources pursuant to their environmental policies, but invests them with the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The use of the term 'control' connotes that even if such an activity is pursued outside a national jurisdiction, but is one over which a State has control, that State would be responsible if the activity causes damage to the environment of areas beyond its national jurisdiction.

Article 4 on Jurisdictional Scope was inserted in the Convention at the fifth and final session of the INC. It provides that subject to the rights of other States (which may or may not be the Contracting Parties) each Contracting Party shall apply the provisions of the Convention (i) in the case of its biological resources, within the limits of its national jurisdication; and (ii) in the case of processes and activities carried out under its jurisidiction or control, within the areas of its national jurisdication as well as beyond the limits of its national jurisdiction. The Contracting States are thus obligated to exercise territorial as well as extra territorial jurisdiction.

Article 5 obligates the Contracting Parties to cooperate with each other either directly, or where appropriate, through competent international organizations in areas beyond their national jurisdiction or on other matters of mutual interest in the context of conservation and sustainable use of biological diversity.

Article 6 obligates the Contracting Parties to develop their national strategies, plans or programmes or adapt their existing strategies, plans or programmes for the conservation and sustainable use of their biological diversity. It also obligates them to integrate the conservation of biological diversity with their relevant programmes or policies.

Article 7 requires the Contracting Parties to identify and monitor through sampling or other techniques components of biological diversity important for conservation and sustainable use and processes and categories of activities likely to have a significant adverse impact on the conservation and sustainable use of biological diversity and to deduce data therefrom for purposes of *in situ* and *ex situ* conservation. An indicative list of categories of biological resources which are relatively more important for conservation and sustainable use is set out in Annex I of the Convention.

Article 8 lays down the fundamental obligation of the Contracting Parties to conserve their biological resources *in situ*. The various modalities suggested for this purpose include:

(i) establishment of a system of protected areas;

(ii) regulation or management of biological resources important for conservation within or outside the protected areas;

(iii) protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(iv) development of areas adjacent to the protected areas with a view to enhancing the protection of those areas;

(v) rehabilitation and restoration of degraded ecosystems and recovery of threatened species;

(vi) management and regulation of risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts;

(vii) Control or eradication of those alien species which threaten ecosystems;

(viii) promoting the wider application of the knowledge, innovations and practices of indegenous and local communities relevant for the conservation and sustainable use of biological diversity;

(ix) enactment of necessary legislation or administrative regulations for the protection of threatened species;

(x) regulation and management of those processes and activities which are likely to have a significant adverse impact on biological diversity and;

(xi) coopertion amongst the Contracting Parties for providing financial support to developing countries to enable them to carry out *in situ* conservation.

Article 9 requires the Contracting Parties to adopt measrure for the *ex situ* conservation of components of biological diversity for the primary purpose of complementing *in situ* measures. *Ex situ* conservation consists in the conservation of components of biological diversity outside their natural habitats. The measures enumerated include:

(i) *ex situ* conservation of components of biological diversity, preferably in the country of origin of such components;

(ii) establishment and maintenance of facilities for *ex situ* conservation of and research on plants, animals and micro-organisms, preferably in the country of genetic resources;

(iii) recovery and rehabilitiation of threatened species and their re-introduction into their natural habitats; and

(iv) surveillance over biological resources from natural habitats from *ex situ* conservation purposes so as not to threaten ecosystems and *in situ* populations of species.

The Contracting Parties are required to cooperate with each other in order to provide financial and other support for the establishment and maintenance of *ex situ* conservation facilities in developing countries.

Article 10 requires the Contracting Parties to integrate the conservation and sustainable use of their biological resources into their national decision-making processes; to adopt measures aimed at checking or minimizing adverse impacts on their biological diversity; to protect and encourage customary use of the biological resources in accordance with traditional cultural practices; to support local populations to take remedial action in degraded areas; and to encourage cooperation between governmental authorities and private sector for promoting sustainable use of biological resources.

Article 11 obligates the Contracting Parties to adopt effective social and economic measures to encourage conservation and sustainable use of biological diversity. The article enjoins the Contracting Parties, taking into account the special needs of the developing countries, to establish research and training programmes for the identification, conservation, management and sustainable use and development of biological diversity and its components. Article 13 requires the Contracting Parties to promote general awareness about the importance of and the measures required for the conservation and sustainable use of biological diversity and to cooperate with other States and international organizations in developing public awareness programmes with respect to conservation and sustainable use of biological diversity.

Article 14 obligates the Contracting Parties to monitor environmental impact assessment of their proposed projects or programmes that are likely to have significant adverse effects on biological diversity, whether within or outside the limits of their national jurisdiction and to take appropriate measures to avoid or minimize the adverse effects. Where such projects or programmes are likely to significantly affect adversely the biological diversity of other States, the concerned Contracting States is required to avoid or minimize the adverse effects through conclusion of bilateral or multilateral arrangements with the affected State or States., However, where the danger or damage to the environment of other States is imminent or grave, the Contracting State concerned is required to notify immediately the potentially affected State or States and to initiate the necessary action to prevent such danger or damage. Significantly, the Article has left the question of liability and compensation for damage to the biodiversity of other States to be decided on by the Conference of the Parties, the apex body designed to administer the Convention.

Article 22 deals with the question of relationship of this Convention with other existing international conventions in the field of conservation of biological diversity. It states that the convention does not affect the rights and obligations of any Contracting Party under existing Conventions except where those rights and obligations would cause a serious damage or threat to biological diversity.

Article 26 requires the Contracting Parties to submit reports to the Conference of the Parties on the actions taken by them for the implementation of the Convention and their effectiveness in meeting the objectives of the Convention.

Access to Genetic Resources and Transfer of Technology

The provisions of the Convention which address these crucial issues are contained in Articles 15 to 19. Article 15 regulates access to genetic resources of which the developing countries are the main repository and which had hitherto been relatively free. Recognizing the principle of sovereignty of States over their natural resources, this article invests the national governments with the authority to determine access to their genetic resources. It also frames the complementary rule that access, where granted, shall be on mutually agreed terms and subject to the prior informed consent of the Contracting Party providing the genetic resources unless otherwise determined by that Party. Subject to these overriding principles, the Contracting Parties are required to create conditions to facilitate access to genetic resources by the other Contracting Parties and not to impose restrictions that run counter to the objectives of the Convention. It also obligates the Contracting Parties to carry out scientific research based on genetic resources provided by other Contracting Parties with their full participation, and where possible in those countries; it also requires the Contracting Parties to share in a fair and equitable way the results of such scientific research and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing those resources. Such sharing is required to be on mutually agreed terms.

Article 16 is another key provision of this Convention. It, first of all, recognizes that both access to and transfer of technology among the Contracting Parties are essential elements for the attainment of the objectives of the Convention. With this premise, it frames a number of obligations for the Contracting Parties in the context of access to and transfer of technology. It obligates each Contracting Party to undertake to provide and/or facilitate access for and transfer to other Contracting Parties technologies relevent to the conservation and sustainable use of biological diversity. Such access and transfer are to be effected under fair and most favourable terms, including on concessional and preferential terms where mutually agreed, and where necessary, in accordance with the financial mechanism envisaged by Articles 20 and 21 of this Convention. However, in the case of technology protected by patents and other intellctual property rights, such access and transfer are to be provided on terms which are consistent with those rights. But for Contracting Parties, which are developing countries, and which provide genetic resources, the access to and transfer of relevant technologies is to be facilitated on mutually agreed terms, notwithstanding the protection of the intellectual property rights. It also obligates the Contracting Parties to encourage their private sector to facilitate access to, joint development and

transfer of technology for the benefit of both governmental institutions and the private sector of developing countries. It also requires the Contracting parties to cooperate with a view to ensuring that patents and other intellectual property rights which have an influence on the implementation of the Convention do not run counter to the objectives of the Convention.

Article 17 which is closely connected with both Articles 15 and 16, enjoins the Contracting Parties to facilitate continuing exchange of information from all publicly available sources relevant to conservation and sustainable use of biological diversity taking into account the special needs of the developing countries. Article 18 obligates the Contracting Parties to promote international technical and scientific cooperation in the context of conservation of biological diversity, and where necessary, through appropriate international and national institutions. In particular, it enjoins the developed country Parties to promote such cooperation with the developing country Parties so as to enable the latter to implement the Convention *inter alia*, through the development and implementation of their national policies. It also mandates the Conference of the Parties, at its first meeting, to consider establishment of a clearing-house mechanism to promote and facilitate such cooperation.

Article 19 is addressed to the handling of biotechnology and distribution of its benefits. It requires the Contracting Parties to take appropriate measures to provide for the participation of other Contracting Parties, especially the developing countries, in biotechnological research activities, which provide the genetic resources for such research, and where feasible, in those countries. It also obligates the Contracting Parties to provide access on mutually agreed terms to developing country Parties to the results and benefits arising from biotechnologies based on genetic resources provided by them. The Contracting Parties are further obligated to ensure that any natural or legal person under their jurisdiction or control who intends to introduce in another Contracting State genetically modified organisms which may have an adverse impact on the biological diversity or environment in that country, to obtain an advanced informed agreement of that Contracting State and to make available to the latter all information about the safety regulations.

Financial Resources and Funding Mechanisms

Article 20, 21 and 39 are the key provisions of the Convention related to financial resources and the funding mechanisms. Article 20 deals with the question of financial resources to be provided by each of the Contrating Parties; Article 21 lays down the procedure for establishing a financial facility able to provide financial assistance to the developing country Parties

on a grant or concessional basis. Article 39 provides for interim financial arrangements for the period between the entry into force of the Convention and the first meeting of the Conference of the Parties or until the Conference decided the designation of a financial facility.

Paragraph (1) of Article 20 requires each Contracting Party to provide financial support and incentives for the national activities aimed at conservation of biological diversity in accordance with its national plans, priorities and programmes. Paragraph (2) obligates the developed country parties to provide new and additional financial resources to enable the developing country parties to meet the agreed incremental costs to them for fulfilling their obligations under the Convention. The term 'agreed' signifies that the incremental costs will be *agreed* between the concerned developing Party and the financial mechanism contemplated by Article 21 taking into account the policies, strategies and priorities and the eligibility criteria of each developing country party. An indicative list of such incremental costs is to be established by the Conference of the Parties at its first meeting. Further, a list of developed country Parties and other Parties which would voluntarily assume the obligations of the developed country Parties (presumbaly countries in Eastern Eroupe undergoing transition to a market economy) is also to be established at the first meeting of the Conference of the Parties. Paragraph (3) envisages a framework for direct financial cooperation between the developed country and developing country Parties related to the implementation of the Convention. Paragraph (4) makes the extent of compliance by the developing country Parties of their obligations under the Convention contingent upon the extent of implementation of the commitments of the developed country Parties related to financial resources and transfer of technology. It is further clarified that compliance by the developing country Parties of their obligations under the Convention will also depend upon the state of their economic and social development and eradication of poverty which are recognized as their first and overriding priorities. Paragraphs (5), (6) and (7) require the Contracting Parties to give special consideration to the special needs and peculiar situation of the least developed countries, small island States and other developing countries such as those with arid and semi-arid zones, coastal and mountainous areas.

Article 21 contemplates the establishment of a financial mechanism to provide financial support to developing country Parties on a grant or concessional basis to enable them to meet their obligations under the Convention. While the proposed mechanism will function under the supervision of and be accountable to the Conference of the Parties, its operations will be carried out by an institutional structure as may be decided upon by the Conference of the Parties at its first meeting. The proposed mechanism is required to operate within a democratic and transparent system of governance. The Conference of the parties has also been empowered to decide on the eligibility criteria and guidelines relating to access to and utilization of the financial resources at its first meeting. The scale of contributions to the proposed fund will also be worked out by the Conference of the parties after taking into account the need for predictability, adequacy and timely flow of funds in accordance with the amount of resources needed and the importance of burden-sharing among the contributing Parties. The Conference of the Parties is also authorized to review the effectiveness of the proposed mechanism including the criteria and guidelines after two years of the entry into force of the Convention and thereafter on a regular basis. The Contracting parties are enjoined to consider strengthening existing financial institutions to provide financial assistance for the conservation and sustainable use of biological diversity.

Since the proposed arrangements for financial resources and funding mechanism contemplated in Articles 20 and 21 are expected to take shape only after the first meeting of the Conference of the Parties, Article 39 institutes interim financial arrangements for the period between the entry into force of the convention and the first meeting of the Conference of the parties which is to take place not later than one year after the entry into force of the Convention or until the Conference of the Parties designates an institutional structure. Article 39 designates the Global Environmental Facility of the UNDP, UNEP and the World Bank to function as the financial facility for the interim period provided it is fully restructured in accordance with the requirements laid down in Article 21

Institutional Measures

Articles 23 through 32 and 40 deal with the institutional measures for the Convention itself. These provide for the establishment of the Conference of the parties as the apex body to administer the Convention with the help of a subsidiary body on scientific, technical and technologicial advice and a secretariat. Article 23 establishes the Conference of the parties as an apex body to keep under constant review the implementation of the Convention. The first meeting of the Conference is to be convened by the Executive Director of the UNEP not later than one year after the coming into force of the Convention. Thereafter, the ordinary meetings of the Conference will be held at regular intervals as determined by the Conference at its first meeting. The Conference will adopt by consensus rules of procedure for itself and for any subsidiary body it may establish as well as financial rules for the

funding of the Secretariat. At each ordinary meeting, it shall adopt a budget for the financial period until the next ordinary meeting.

Article 24 establishes a secretariat to service the Conference of the Parties. It will be designated by the Conference of the Parties at its first meeting from amongst the existing competent international organizations. Under Article 40, an interim secretariat is to be provided by the Executive Director of the UNEP for the period between the entry into force of the Convention and the first meeting of the Conference of the Parties.

Article 25 provides for the establishment of a subsidiary body for the provision of scientific, technical and technological advice to the Conference of the Parties and its other subsidiary bodies which may be created in the future. This body, which is open to participation by all Contracting Parties, will comprise government representatives competent in the relevant fields of expertise. It shall report regularly to the Conference of the Parties on all aspects of its work. Its functions, terms of reference, organization and operations can be further elaborated by the Conference of the Parties.

Article 27 lays down the dispute settlement mechanism in relation to the Convention. In the event of a dispute arising between the Contracting Parties concerning the application or interpretation of the Convention, the concerned parties are required to seek solution of the dispute through negotiation, and failing that, through mediation by a third party. In case the dispute is not resolved by these methods, the Contracting parties are then given the option to either agree on arbitration or reference to the International Court of Justice. However, if the Contracting Parties do not so opt, the dispute is required to be submitted to conciliation. The rules of procedure for arbitration and conciliation are set out in Annex II of the Convention.

Article 28 relates to the adoption of Protocols to the Convention. Article 29 lays down the procedure for amending the Convention and its Protocols. Article 30 deals with the adoption and amendment of the Annexes to the Convention. The Annexes are restricted to procedural, scientific, technical and administrative matters. Article 31 invests each contracting Party to the Convention or any Protocol with one vote. Regional economic integration organizations are permitted to be parties to the Convention with a number of votes equal to the number of their constituent member States which are themselves Contracting Parties to the Convention or any Protocol. Such organizations are precluded from voting if their Member States excuse their voting and *vice versa*. Article 32 deals with the relationship between the Convention and its Protocols. States and regional economic integration organizations can only become parties to a Protocol if they become Contracting Parties to the Convention.

Final Provisions

Articles 33 to 38 and 41 and 42 are in the nature of Final Provisions dealing with signature; ratification, acceptance or approval; accession; entry into force; reservations; withdrawals; depository; and authentic texts which are fairly standard. The Convention requires 30 ratifications/accessions for its entry into force. Reservations to the Convention are not permitted.

III. General Observations

Although the Convention on Biological Diversity seems to have received worldwide affirmation as is evident from the fact that it has been signed by 157 countries, its success and effectiveness will depend on the actual implementation of the crucial provisions of the Convention such as those related to access to genetic resources (Article 15), access to and transfer of technology (Article 16) and financial resources and a funding mechanism (Articles 20 and 21).

There is an intrinsic interlinkage between access to genetic resources, transfer of technology and financial assistance to the developing countries to enable them to carry out their obligations under the Convention. The value of genetic resources depends on the technology to use them. Although genetic resources, for the most part, are concentrated in the developing countries, the technologies to exploit them are mainly with the industrialized countries which are protected by intellectual property rights. In view of the obstacles posed by the intellectual property regimes to the diffusion of technology, which in the context of this Convention, would mainly be biotechnology, a suspicion lurking in the minds of the developing countries has been that the developed countries wanted them to conserve their genetic resources without giving them any corresponding financial or other compensation. It is for this reason that the developing countries insisted during the negotiations on a trade-off with the developed countries in the INC negotiations so that in return for providing access to this resource, they are able to secure access to relevant technologies. This would enable them to build their own capability to maintain *in situ* collections, including the use of technologies such as cyrogenics (freezind techniques) and biotechnology. Biotechnology is a fast-growing research-intensive industry born of scientific advances in genetic engineering dating from 1973. These advances have made it possible to create in a laboratory new organisms that can be used to make commercial products ranging from improved medicines, to better strains of crops, and to bacteria for use in pest control. Biotechnology has immense potential for contributing to improved health

care, food production, environmental problems and industry in developing countries.

It was in response to these concerns of the developing countries that the text of Articles 15 and 16 were revised to reflect those concerns. Thus, Article 15 invests the national governments with the authority to determine access to their genetic resources and to provide access only on mutually agreed terms and with their prior informed consent, unless waived by them. It also requires the Contracting parties to carry out scienctific research based on the genetic resources provided by the other Contracting Parties with their full participation and where, feasible, in their own countries. It also requires the Contracting Parties to share in a fair and equitable way the results of such scientific research and the benefits accruing from the commercial exploitation of genetic resources with the Contracting Parties providing those resources. This sharing has to be on mutually agreed terms.

What causes some concern, however, are some of the provisions in Article 16 on transfer of technology. Those provisions, *inter alia*, provide that in the case of technology protected by patents and other intellectual property rights, the transfer of technology is to be effected in conformity with those rights. This has been modified somewhat in the case of the Contracting Parties providing the genetic materials by the provision that such transfers will be effected on mutually agreed terms notwithstanding the protection of intellectual property rights. This would necessarily imply that even in the case of Contracting Parties supplying the genetic materials, only those technologies would be transferred over which the Governments would be having ownership rights or control, but this would not be possible in case of those technologies which are in the hands of private owners and are protected by intellectual property rights [4].

According to the *Global Biodiversity Report* prepared by the World Resources Institute and other world conservation organizations, finding patentable products is not a quick process. A rule of the thumb in screening samples is that only one out of 10,000 actually leads to a marketable product. The right to own and license genetic materials developed from discoveries is imperative since without the guarantee of exclusive use, nobody would commit the amount of money-on an average about US $ 100 million-required to bring each biotechnologically created drug in the market.

Against this, it can be contended that the experience of the developing countries, which have been the main repository of the genetic materials, has

4. It may be pointed out that U.S. Biotechnology industry has grown from 1 firm in 1976 to more than 1,100 today with revenues reaching US $ 5,800 million (Economic News from USA, June 1992).

been that most of them have been unfairly denied compensation for genetic substances found within their territory. A frequently cited example is *Vincristine*, a cancer drug with a multi-million dollar market developed from rosy periwinkle of Madagascar which received none of its profits. It is, therefore, justly argued by these countries that without some right to the profits from products developed from their genetic resources they will have few incentives to continue protecting biologically diverse areas.

Since biotechnology industry continually needs samples of genetic materials found in biologically diverse developing countries, which provide the basis for genetically engineered products, it has been suggested that the biotechnology firms in the industrialized countries would find it advantageous to join with biodiverse countries for a regular source of new genetic samples. In this context, the World Resource Institute has recommended the two-year agreement between Costa Rica's National Biodiversity Institute (INBio) and the US pharmaceutical giant *Merck and Company* as the model for similar agreements with other developing countries. INBio was established in 1989 to catalogue and manage Costa Rica's remarkable biodiversity. Under the Agreement, Merck is paying US $ 1 million during the next two years for the opportunity to examine the plants and other species that INBio is collecting. INBio prepares from the samples chemical abstracts that are sent to Merck's laboratories. INBio is reported to receive an unspecified amount of royalties (1 to 3 per cent) from the sales of any products developed from the genetic materials of these samples. Merck is also donating equipment to INBio and training the Institute's scientists.

Even if INBio receives only 2 per cent of royalties from the pharmaceuticals developed from Costa Rica's biodiversity, it would tke only 20 drugs for INBio to be able to earn more funds than Costa Rica currently gets from coffee and banana, its two major exports. The INBio-Merck Agreement the only one of its kind in the developing world, and because of its success it is likely to be followed in other developing countries. Mexico has already set up its own Commission on biodiversity and both India and Kenya are examining the possibilities. (U.S. Information Service, New Delhi *Economic News from USA* August 1992). Thus, for a share of reasonable profits and access to technologies, it would be in the interest of developing countries to seek such agreements with the biotechnology firms in the industrialized countries.

Although in the Biodiversity Convention, developing countries have somewhat succeeded in limiting the impact of intellectual property rights on the transfer of technology including biotechnology, they should equally be cautious and concerned about the developments taking place in the

ongoing Uruguay Round negotiations under the GATT auspices related to Trade Related Intellectual Property Rights (TRIPs). GATT is strictly speaking not the forum for discussing the question of intellectual property for which there are separate fora such as WIPO. The reason why the US was nevertheless interested in bringing intellectual property into GATT is because by linking it with trade, it gives the US the possibility of retaliatory action which would not have been possible in other fora.

Patenting, the most familiar form of IPR, until very recently only applied to inventions which were applicable in industry. Earlier even in the western countries, society had prevented this kind of monopolization of knowledge being extended to important areas such as treatment of diseases and agriculture. But over the years, the idea of intellectual property has started being extended to plants also. A special type of property right adapted to plants was created which is known as plant breeders' rights (PBRs). With the takeover of the seed companies by the multinational corporations and the coming of biotechnology, there is now a demand for a stronger monopoly of Plant Breeder Rights. Under these rights the farmers will be prevented from using the variety to develop new varieties for 20 years for which the right might be granted. Since patents give the possibility of making unlimited number of claims, it gives the multinationals the opportunity to claim not only individual varieties but also charactertstics and even species and genera. Already patents have been given for plants in the US and Europe; in 1985 in the US and 1989 in Europe. The home countries of these multinationals have taken a stand supporting the Plant Breeders Rights in various fora. In the TRIPs negotiations as well as in the WIPO, the US has been arguing for the stronger form of monopolies represented by PBRs to be made applicable to plants and animals.[5] Developing countries should take a concerted stand against these developments lest agricultural development is allowed to take place in a particular direction which will be principally in the interest of multinational corporations.

Another issue of vital importance relates to the question of financial resources and the financing mechanism for the application of the Convention nationally and internationally. The basic principles of each Contracting State providing financial support for its national activities related to conservation and sustainable use of biodiversity and the commitment of the developed country Parties to provide new and additional resources for meeting the agreed incremental costs to the developing country Parties in

5. Usha Menon "Intellectual Property Rights and Agriculture Development", *Economic and Political Weekly* (New Delhi) July 6-13, 1991;
UPOV. Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, Geneva, March 4 to 19, 1991.

fulfilling their obligations under the Convention have been enshrined in the Convention. However, the incremental costs and a list of developed countries have and their scale of contributions have as yet to be established by the Conference of the Parties.

Similarly, the financial facility which will administer the funds to the developing countries has still to be agreed on by the Conference of the Parties. Pending the finalization of these arrangements, the Global Financial Facility (GEF) of the UNDP, UNEP and the World Bank has been instituted as the financial facility for the interim period. The GEF was established in 1990 with a funding of US $ 1300 million to provide grants on highly concessional resources to developing countries to meet the costs of well appraised conservation projects in four sectors; global warming, biological diversity, pollution of international waters and depletion of the protective ozone layer. Subsequently, at the insistence of the developing countries, land degradation problems, primarily in desertification and deforestation, that are tied to one of the four other problem, areas were made eligible for funding.

At present, the industrialised countries that have made contributions to the GEF control approval of projects. The UNDP and the UNEP supply the technical and scientific expertise to evaluate projects and the World Bank manages them when approved. The Convention, however, insists that before the GEF becomes the funding mechanism for the interim period it would be necessary to make it more transparent and democratic in its functioning. Recently, 15 developing countries including China, India and Brazil negotiated with the United States, West European nations and Japan at a two-day meeting in Washington in May 1992.[6] It has been agreed to expand the membership and to share power in the GEF. Revised procedures are being prepared, under which decisions will be taken by consensus and if a vote is called for, developing countries as a group or industrialized countries as a block can veto a project.

6. US Information Sevice, New Delhi. *Economic News from USA* (June 1992).

IX. International Trade Law Legal Aspects of Privatization

(i) Introduction

It was noted by the standing Sub-Committee on International Trade Law Matters at the thirtieth session of the AALCC (Cairo, 1991) that in the economies of most of the Member States of the AALCC, public sector enterprises or undertakings (PSEs or PSUs) played an important role and that their econimies were dominated by such enterprises. It was further noted that in recent years, various multilateral financial and monetary institutions had put pressures on developing countries tc go in for privatization of these undertakings, making it virtually a precondition for the grant of financial assistance and the extent thereof. The Sub-Committee, taking note of these developments, requested the AALCC Secretariat to commence a study on the legal issues involved in the matter of privatization with the final objective of preparation of a guide on legal aspects of privatization in Asia and Africa. The principal aim of such a guide would be to assist the Member Governments in carrying out their privatization programmes in a manner which would be consistent with their national economic interests.

Since the preconditions, basic methods and procedures for privatization and the legal issues involved would vary from one country to another, the view was expressed that it would be necessary for the Secretariat first to collect the relevant information from the Meamber Governments so that it is able to identify the policy and legal issues involved before commencing a study on the topic. Consequently, the Secretariat prepared a questionnaire requesting the Member Governments to furnish the required information. That questionnaire was circulated by the Secretary-General vide his letter dated the 39th of July 1991 requesting the relevant authorities in the Member Governments to respond to the questionnaire as early as possible.

The Thirty-first Session of the AALCC was held in Islamabad (Pakistan) in January-February 1992. Before the Islamabad Session only the Governments of Singapore and Thailand had responded to the questionnaire. Consequently, only a preliminary study was presented at the Islamabad Session. At that session, the topic was discussed in the Trade Law Sub-Committee. The Sub-Committee noting that the topic of privatization had acquired immense importance for the developing countries in view of the far reaching structural changes taking place in the global economy having impact on national economies, adopted a recommendation that the Plenary urge the Member Governments which had not responded to the Secretariat questionnaire to do so and/or furnish relevant documentation to the Secretatiat at the earliest.

The Governments of Indonesia, Turkey and Kuwait have recently sent in useful information in response to the Secretariat Questionnaire. The Government of Cyprus has communicated that since "The driving force in the economy of Cyprus is the private sector which owns or controls almost the totality of business and enterprises in Cyprus, the issue of privatization has not arisen in Cyprus". The Government of Indonesia has sent in comprehensive information, but Secretariat was unable to make use of it as it is in their national language. In addition to this, the Secretariat has been able to collect some useful information from other sources such as the World Bank, UNIDROIT and the Economic Commission for Europe (ECE).

In view of the lack of adequate information from several Member Governments about their privatization programmes, underway or contemplated, it is difficult for the Secretariat to prepare any comprehensive study on the topic. However, in view of the topical importance of this matter for the developing countries in general and with a view to facilitating discussion at the Kampala session, the Secretariat submitted a preliminary study revised in the light of the information received.

The information sent in by the Governments of Kuwait, Singapore, Thailand and Turkey are reproduced as Annexes I, II, III and IV of the following study on 'Privatization.

Thirty-second Session: Discussions

The Assistant Secretary-General Mr. Essam A.R. Moh'd introduced the Secretariat Study on this topic and pointed out that this study was prepared by the Secretariat in the light of the information provided by some Member Governments such as Indonesia, Kuwait, Singapore, Thailand and Turkey and International Institutions like the World Bank, the Economic Commission

for Europe (ECE) and the UNIDROIT. He clarified that unless more Member Governments responded to the questionnaire of the Secretariat, it would be extremely difficult to undertake the task of preparing a guide on legal aspects of privatization in Asia and Africa. He therefore requested the Committee to urge the Member Governments who had not done so, to resopnd to the Secretariat's questionnaire at their earliest.

He thanked the Government of Japan and Uganda for providing comprehensive information through the Secretariat's questionnaire, at the current Session.

The Committee, recognising the significance and importance of this topic, particularly for the developing countries, adopted the following Decisions.

(ii) Decision on 'Privatization'

Adopted on 5.2.1993

The Asian-African Legal Consultative Committee

Having considered the Secretariat brief on the 'Legal Issues involved in the matter of Privatization of State-owned Enterprises' contained in document No. AALCC\XXXII\Kampala\93\13;

1. *Expresses* its appreciation to the Secretary-General for the lucid and comprehensive study;
2. *Thanks* the Member Governments which have, in response to the Secretariat's questionnaire, furnished the requisite information;
3. *Requests* the Member Governments which have not so far responded to the Secretariat's questionnaire to do so at their earliest convenience;
4. *Urges* all Member States and Observer Delegations to make available to the Secretariat information relating to privatization plans or programmes, underway or contemplated, in their countries and the legal framework under which such plans or programmes are being implemented or are to be implemented, to enable the Secretariat to complete its task of formulation of a Guide on Legal Aspects of Privatization in Asia and Africa with particular reference to Member States of the AALCC; and
5. *Decides* to place this item on the agenda of its Thirty-third session.

(iii) Secretariat Study : Legal Issues Involved in the matter of Privatization of State-Owned Enterprises

Background

Most of the developing countries in Asia and Africa achieved their political independence in the 1950s and 1960s as a culmination of the process of decolonisation set in motion by the United Nations soon after its inception in 1945. After attaining political emancipation, one major challenge before the newly independent States was to select a development model which could revitalize their depressed economies since little, if any, meaningful development had taken place in these countries during the colonial era. The development model that was chosen by most of these countries was that of a mixed economy consisting of the public sector and the private sector. Primacy was given almost invariably to the public sector. All basic strategic and infrastructural industries were entrusted to the public sector while the private sector was intended to play a complementary role. The rationale for giving primacy to the public sector was that the State should have a definite say in shaping economic policies and that welfare of the masses could be achieved only through socialism.

India became the chief proponent of this development model and it inspired a number of other developing nations in the region to adopt economic systems based on this model. To begin with, India, in 1951, had only five central public sector enterprises (PSEs) with an investment of Rs. 290 million.[1] Since then the public sector has registered a phenomenal

1. Venkateswaran, R.J. "Aspects of Privatization – The Public Sector" the *Hindustan Times*, New Delhi, dated 23 November 1991.

growth. By March 1988, the number of PSEs had risen to 231 with an investment of Rs. 712,990 million.[2] At present, nearly 55 per cent of the PSE investment is in steel, coal, minerals and metals, electricity and petroleum.[3]

Althouth this model of development had the advantage of industrializing the country and making it largely self-reliant, it is now being realized that the overall performance of the public sector has been far from satisfactory. In 1990, India had a total of 248 central public enterprises, out of which 103 had incurred losses to the tune of Rs. 17, 450 million during 1989-90. Out of these loss-making units, 40 were chronically sick and their revamping required writing off losses worth Rs. 62,000 million while fresh investments in only 28 units (which were to be rehabilitated) were expected to involve additional outlays of Rs. 33,000 million.[4] In addition thereto, compensation in the event of closure was to involve a similar amount.

How badly the Indian public performed in the fiscal year 1991-1992 is brought out in a study of Government-owned industrial corporations prepared by the Central Statistical Organisation (CSO) recently. The CSO Study of 81 selected Central PSUs indicates that the overall index of industrial production for these enterprises went up by 2.13 per cent in 1991-92 over the previous year; large segments performed poorly with output and capacity utilisation coming down sharply. The output of National Textile Corporation (NTC) and its subsidiaries slumped by nearly 10 per cent; production of medium and light engineering goods came down by 7.5 per cent; petroleum production declined by 3.8 per cent; and the output of heavy engineering goods shrunk by 3.6 per cent. The manufacture of consumer goods also declined by over 2 per cent.

The segments of the public sector which performed well, according to the CSO, were : chemicals and pharmaceuticals; saleable steel and alloy steel; coal; minerals and metals and transport equipment. Despite the creditable record of these sectors, the overall scenario was quite bleak; a detailed analysis of 170 production lines of these selected 81 PSUs shows that only in the case of 92 production lines did production and capacity utilisation record positive rates of growth. Put another way, in 88 out of 170 production lines output and capacity utilisation declined.

The Government of India is attempting to follow a two-pronged strategy

2. Prabhu, A.N. "Privatization – How to make it work here," the *Hindustan Times*, New Delhi, 2nd June 1991.
3. Dutt, R.C. *"State Enterprises in a Developing Country - The Indian Experience 1950-90"* (New Delhi 1991).
4. Mitra Chenoy, Kamal A. "Privatizing India," *Mainstream* (New Delhi) Vol. XXIX No. 41 dated 3 August 1991.

to tackle the problems of the public sector-One, by setting up the National Renewal Fund to retire, retrain and relocate workers of terminally ill units; and two, by referring cases of sick PSUs to the Board for Industrial Reconstruction (BIFR) for formulating rehabilitation packages. Both these moves have, however, got bogged down in uncertainty. The National Renewal Fund, for all intents and purposes, is a non-starter since no sick PSU has actually downed shutters and retrenched its workers. And the BIFR has said that no proper rehabilitation package can be worked out unless the concerned PSUs provide their audited accounts for the last financial year. This is because the legislation enabling the BIFR to review cases of PSUs came into effect only from December 28, 1991.

Against this backdrop, the CSO study indicates how sickness spread across many public sector units during a year of recession which saw industrial production in the country coming down for the first time after a gap of 12 years.[5]

In other countries of the region, the experience has not been dissimilar. By early 1980s, PSEs accounted an average of 17 percent of GDP in sub-Saharan Africa; 12 per cent in Latin America and a modest 3 per cent in Asia (excluding India, China and Myanmar) compared to 10% of GDP in mixed economies worldwide. Subsequently, between 1989 and 1991, PSE losses as a percentage of GDP reached 9 percent in Argentina and over 5 per cent, on average in a sample of sub-Saharan African countries. In the 1980s about half of Tanzania's more than 350 PSEs made losses, and in at least one year the losses were of such a magnitude that the entire sector was in deficit. In 1991, about 30 per cent of all PSEs in China were loss-making. In Turkey, the operating surplus of the sector has been deteriorating since 1985, and the marginal efficiency of PSE capital is half that of the private sector.[6]

In many countries, PSEs have become an unsustainable burden on the national budgets and the banking system, absorbing scarce public resources. Government transfers and subsidies to PSEs amounted to more than 3 per cent of GDP in Mexico in 1982, 4 per cent of GNP in Turkey in 1990. In Ghana, in the last half of the 1980s, the average outflow from the Government to 14 core PSEs constantly exceeded the mearge flows-in the form of dividends and taxes-from the PSEs to the State.[7]

The reasons that have been advanced for the overall failure of the

5. Thakurta, Paranjoy Guha, "CSO Study of 81 PSUs' Performance in 1991-92", *The Indian Express*, New Delhi, 8th Novermber, 1992.
6. World Bank, *Privatization : The Lessons of Experience* (Washington, 1992).
7. *Ibid.*

public sector are along the following lines :

(i) Some of the PSEs have virtually become social welfare organisations with no accent on efficiency and productivity. They have become breeding grounds for corruption, patronage, inefficiency and bureaucracy, guzzling huge resources from the larger economy.

(ii) The PSEs are incurring continuous and stagerring losses on account of their producing goods and services at high cost and of indifferent quality.

(iii) Their freedom of operation is severely curtailed due to excessive interference by Government bureaucrats.

(iv) They have bred a culture of no work and no accountability.

Since the PSEs have become a drain on the exchequer, of late pressures are being brought to bear on the governments to diminish the role of the public sector and increase the role of the private sector through restructuring and privatization. Since most of the governments in the region have been suffering from increasing budgerary gaps year after year while at the same time facing mounting external indebtedness, pressures are being exerted on them, in particular, by the international financial and monetary institutions to close down the chronically sick PSEs and reorganize or privatize the remaining ones if they wish to be favourably considered for developmental assistance. Since governments would face the prospects of industrial unrest in ordering closure of sick units, they are being promised by these agencies financial assistance to enable them to meet the cost of retrenchment and other monetary benefits to to be given to the workers of such units.

It is in reponse to these pressures coupled with the overall unsatisfactory performance of the public sector that in the last two decades virtually all developing countries have adopted reform programmes-short of ownership transfer-to remedy the causes of poor PSE performance. These reforms are aimed at (i) removing PSE pretection from domestic and external competition and ending preferential treatment: (ii) eliminating easy PSE access to credit from the budget and the banking system and instituting a hard budget constraint: (iii) increasing PSE autonomy and freeing managers from government interference in day-to-day operational decision-making and from non-commercial goals : and (iv) developing institutional mechanisms such as contract plans (memoranda of understanding) and performance evaluation systems to hold managers accountable for results.

Pursuant to these reform programmes, some performance improvements did indeed take place, but it has been found to be difficult to sustain performance improvement over time.

8. The Goverment of India has been promised $ 1 billion on this score by the World Bank.

A number or PSEs that were judged in the *World Development Report of 1983* to be well on way to performance improvement, for example, the Sengalese bus company, fertilizer PSEs in Turkey and manufacturing PSEs in Pakistan, have either not improved in performance or suffered deterioration.[9]

In many Asian countries, too, PSE reforms have not been sustained. For three years after the introduction of a performance evaluation system and other reforms in the Republic of Korea in 1986, no PSE in the system recorded loss. But losses have now reoccurred and in 1990 had reached 26, 570 million *won*. Between 1981 and 1988, Bangladesh carried out a reform pregramme for industrial PSEs aiming at increased managerial autonomy, financial restructuring of PSEs and employment and wage changes. Despite these reforms, PSEs' performance deteriorated throughout 1980s. In China, a restructuing programme was launched in 1980s to stem PSE losses and improve their efficiency by enacting a legislation and introducing competition from private enterprise. The reforms led to a rapidly growing private sector (the share of PSEs in industrial production dropped from nearly 70% in 1986 to 53% in 1990) and the introduction of a 'responsibility system' led to performance improvements in at least some PSEs. However, close to 30 per cent of all PSEs still incur losses that absorb a sixth of the government's budgetary expenditures. In Japan, despite five separate attempts at full-scale reform, the performance of the Japanese National Railway, Japan's largest PSEs, had continually deteriorated prior to its privatization in 1987 [10].

Frustrated with the high cost and poor performance of the public sector and faced with the modest and unenduring nature of reforms not involving ownership change, many governments have turned to privatization in the hope that new private owners will increase the efficiency of the resources employed and decrease the financial demands made by PSEs on strained government budgets. Governments have also privatized to increase the size and dynamism of the private sector; distribute ownership more widely in the population at large; encourage and facilitate private sector investment for modernization and rehabilitation from both domestic and foreign sources; generate revenue for the State; and reduce the administrative burden of the State.

There have been other factors which have spurred this development. Firstly, the successful British experience. Mrs. Thatcher, former Prime Minister, privatized over the dozen PSEs including giants in steel, air and telecom services and showed that there was no panacea save for trusting the

9. World Bank. *The World Development Report 1983*. (Washington, 1984).
10. World Bank. *Privatization : The Lessons of Experience* (Washington, 1992).

people. The second is the crumbling of the concept of public sector in the Soviet Union and East European bloc which are now fast switching over to market-oriented systems and contemplating mass privatization. Thirdly, most of the developing countries have now come out of the time-honoured managing agency system fostered by the British. Large private sector companies are now in the hands of professional managers and a new entrepreneurial class has come up. Fourthly, in several developing countries, there is now in place an industrial and technological base and a fairly good infrastructure and heavy industry have been well set in a number of countries. Fifthly, the capital market, is gradually growing in a number of countries of the region including China. Sixthly, the growing recognition that withdrawal of the State from economic process is one of the keys to further development since new industries such as micro-electronics, computers, auto-revolution, information technology, automation of textiles and several other industries needless interference from the State.

As a result, privatization is now wide spread and growing. The trend has affected all countries, both those considered capitalists, like the USA and Britain and those governed by socialists majorities, such as Sweden and Italy. Since the mid-eighties, privatization operations have been carried out or are on the drawing board in some 60 countries of all kinds-both the most industrially advanced countries like the U.K., France, Canada and Sweden, and such Third World countries as Mexico, Brazil, Morocco, Algeria, the Congo, Niger, Chile and Argentina. Asia is no exception, moreover, with India, Turkey, South Korea-which has privatized its entire banking sector-Malaysia and Singapore and so on. Even the two countries which epitomise capitalism and have only a symbolic public sector, namely, USA and Japan, have embarked on privatization schemes.

The crucial question that arises in the context of the developing countries is in what manner and at what pace can the public sector be privatized since the private sector even now has neither the resources nor the competence to take over all public enterprises. If privatization is taken to mean selling away the assets of the public sector partially or fully to some individuals or to some private companies including foreign enterprises, however, efficient or financially sound, that may not be in the interest of the developing economies since no country or government would be willing to risk the political fallout that will be generated if any such step is contemplated. Privatization in the sense of ownership transfer at the moment should mean only disinvestment of PSE's shares to the public at large including workers-partially, substantially or fully. Even in this restricted sense, full privatization given the present state of economies in the countries of the region, would

be neither feasible nor desirable. The reasons are obvious. Neither governments nor the public sector would be in a position to absorb the shock of full privatization without a fundamental restructuring of national economies. Moreover, taking into account the experiences of the privatization in Latin America and U. K. it appears that privatization works only to the extent that the rest of the economy works. If the general economy suffers from an overdose of bureaucratic controls, rules and regulations, permits and licences, or sluggish growth, it would make only a nominal difference whether an enterprise is in private or public sector.

It is contended that four preconditions have to be satisfied before privatization in the sense of ownership transfer can be successful :

"(i) The economy should be globalised. Intranational and international competition should be fully encouraged. Otherwise privatization will result in the replacement of inefficient monopolies by exploitative private monopolies.

(ii) Subsidies will have to be abolished. Full privatization in a regime of subsidies will be an absurdity.

(iii) Administered prices and privatization is an equally glaring contradiction. No privatization with simultaneous price controls can ever work.

(iv) Internal and external protection through non tariff measures will have to be abolished. Whatever tariffs are needed have to be fully retionalized, otherwise efficiencises will deteriorate and the consumer and tax payer will become the victims. Privatization, in essence, means competition.[11]

These are macroeconomic issues and involve restructuring of the national economies and fundamental change in the overall historical perspective. Alleviation of poverty, equitable distribution of goods and services and maintenance of regional balances continue to be the major demands on the States of the region needing subsidies through the mechanism of administered and retention prices. Since Governments are likely to take time in taking a position on these major issues, full privatization of the public sector at the moment should ramain a long-term objective.

However, within the present framework a partial divestment is possible and desirable if the objectives are to : (a) improve the efficiency and performance of the PSEs; (b) make available funds to PSEs for modernization expansion and corporate growth and (c) distance the government from day-

11. Meena Raza. " Exploding the Efficiency Myth." *The Economy* vol. I - *Crisis and Adjustment* (New Delhi, 1991)

to-day function of the PSEs. A partial divestment is possible without affecting major policy changes and without waiting for a total restructuring of the economy. A divestment of upto 49% should pose no problem as the Governments would still be able to retain effective policy control. This is essential because experience indicates that the success of recent industrialisers like Japan or the Republic of Korea was based, not on indiscriminate investment by private investors pursuing market signals, but industrialization guided by the state that influenced the number of units, the size of each, and the technology and marketing strategy adopted in each country. At a later stage divestment even up to 60 per cent can be tried provided the equity is distributed amongst a larger number of shareholders including the workers of the enterprises. In Britain and France, the Government retains one non-voting special share that gives it the power to reject subsequent sale or major capital or physical restructuring of the firm.New Zealand has also used a similar arrangement in some of its privatizations, with the Government retaining a ' Kiwi share'.

However, it will not be possible to divest the shares of all PSEs particularly those which are industrially sick as nobody would be interested to invest in them. The remedy for the sick units should be the same as for sick private enterprises. First, give an opportunity to the workers to run the units. If they cannot, one must face the unpleasant task of closing them down, with appropriate measures for relocation and rehabilitation of workers. The capital raised by disinvestment of selected PSUs should not go into the exchequer but should go into a separate fund with the following objectives : (i) for investment in the public sector for modernisation, expansion and corporate growth; (ii) for assisting ailing PSEs and turning them around; (iii) to create a social security scheme to safeguard the rights of workers; and (iv) for intervention in the market to sustain public confidence in this equity. Such a fund should be governed by a select body consisting of government nominees, public sector chiefs, chiefs of financial institutions and eminent economists from the public and private sectors, who would have all the authority to manage the fund for the objectives listed.

From the foregoing account, the inescapable conclusion that can be derived is that Governments in the region in their transition from the mixed economy to that of a market-oriented economy will have to sequence their privatization programmes in a phased manner keeping in mind the national interests as well the need to align their economies with the global economy.

Objectives of Privatization

Governments privatize PSEs for many reasons. These include efficiency

and productivity enhancement, revenue generation, ownership dispersion and capital market development. These goals may often conflict. Attempts to accomplish numerous objectives in one go can result in a failure to achieve any. Government's strategy should be to balance the conflicting objectives. Privatization has its great impact on economic welfare when the efficiency and productivity is kept in the forefront. It should be used to increase competition and ensure against monopolistic behaviour.

Privatization Strategy

Once objectives are clarified, strategic decisions need to be taken about the scope and pace of privatization. Traditionally, airlines, petrochemicals plants and cement and steel mills were defined as 'Strategic' and thus considered unfit for privatization. Today, the government thinking has changed and virtually all PSEs are being opened for privatization. This is borne out by the privatization of British Aerospace, British Rail Hotels, British Telecom and British Gas. The British have had no hesitation in interfering with the monopolies on natural resources. On the other hand, France has never considered denationalising all or part of EDF (French Electricity Board) of GDF (French Gas Board) on Air France which is in a competitive sector.[12]

Most divesting governments-including Mexico, Chile, Jamaica, Poland, the Philippines, Togo and the U. K. began by giving priority to small and medium-sized firms in competitive sectors. Such sales are simple and quick. They require little prior restructuring, entail minimal political risk and since they are more easily absorbed by local private investors, reduce the thorny issue of ownership. Experience with small sales prepares governments for subsequent sales of larger, more complex PSEs.

A few governments, including Argentina and Brazil, have nonetheless given priority to privatization of large undertakings. Such sales are more complex and time-consuming, requiring development of a competitive environment and regulatory framework, sophisticated financial engineering and sensitive labour restructuring. Privatizing a few large loss making PSEs can have enormous budgetary impact; in Argentina, for example, the three PSEs on which Government focussed first (including telephones and railways) accounted for 50 per cent of the PSE operating deficit.[13]

Privatization priorities are country specific. In the end, the choice depends

12. Council of Europe. 'Privatization and the Law' -Report by Mr. Jacques Robert submitted to XXIst Colloquy on European Law held in Budapest from 15 to 17 October 1991.
13. *World Bank Privatization. The Lessons of Experience*. (Washington, 1992)

on investor interest, government capacity and on which sectors and enterprises are in need of new investments and efficiency improvements.

Methods and Procedures for Privatization

The basic methods and procedures for privatization are as follows :

(i) *Private sale of shares*-In this, the State sells all or part of its shareholding in a wholly or partly-owned state enterprise to a pre-identified single purchaser or group of purchasers.

(ii) *Public offering of shares*-In this the State sells to the general public or to a limited class of purchasers all or large blocks of stocks it holds in a wholly or partly-owned State enterprises.

(iii) *Management/Employees Buy-out*-This refers to the acquisition of controlling shareholding in a company by a small group of management and/or employees.

(iv) *Sale of assets*-This involves sale of particular assets (trademarks, plants etc.) rather than shares in a going concern.

(v) *Restructuring*-This involves the breaking-up of a State-owned enterprise into several subsdiaries.

(vi) *New private investments*-In this modality, the State does not dispose of its existing equity in a public undertaking, but increases overall equity and causes a dilution of the Government equity.

(vii) *Leases, management contracts and concessions*-These are arrangements whereby private sector management, technology and/or skills are provided under contract to a State-owned undertaking or in respect of State/owned assets for an agreed period and compensation.

Outright sales have a big advantage over non-ownership methods of privatization since they transfer property rights to profit-oriented owners who push their companies to perform better and at lower costs. The techniques used can be broadly divided into two processes : The first, occurs outside the market, through transfer by mutual agreement or through the takeover of the PSE by the employees, The second, which is by far most commonly used, entails placing the shares of the PSE to be transferred on the stock exchange in the form of a public offer of sale, a public offer of exchange or an increase in capital. Any PSE sale on stock exchange immediately raises the crucial problem of setting the price at which the shares will be sold. Is the PSE to be sold at the highest possible price or is it to be sold at a moderate price ? The reasons for selling a PSE for less than its value are two-fold : (i) The Government may wish to ensure that it

is sold, whatever the cost. Setting a fairly low price helps to ensure that the operation will be a commercial success. The U. K. Government initially set a particularly low price in the case of the partial privatization of the Britixh Telecom. (ii) By setting a low price a Government enables a very large number of shareholders to experience the joy of popular capitalism. In contrast, setting a proper price may discourage a number of potential buyers, particularly small shareholders. The price should be governed by principles designed to harm neither the State which is selling the PSE nor the new shareholders who are buying it so that the interests of the State are safeguarded. If the PSE shares are offered on the stock exchange, the guiding principle should be the concept of a fair price.

Quite apart from the price of the transfer, there is the problem of the people to whom the shares of a privatized PSE should be sold. Sensitivity about foreign ownership exists in all countries, developed or developing. For political and social reasons, governments generally are reluctant to give up control over their assets, especially those considered to be of strategic importance to foreign investors. They have restricted participation of foreign investors in privatization. In France, the Act of 6 August 1986 lays down a threshold of 20% of the company capital which foreign holdings must not exceed.

Mention may also be made of the practice whereby Governments assume the power to intervene in certain particularly important decisions concerning the privatization of PSEs. By virtue of the special system of 'golden shares' the Governments retain a veto which they use in connection with particular takeover bids. The term comes from the British privatization practice and refers to a stipulation in a general privatization law or in a particular sales agreement that gives it the power to reject subsequent sale or major capital or physical restructuring of the firm. The French law has also such a provision which enables the French Government, if the protection of the national interests so require, to have a share which it holds converted into a special share carrying special rights. Thus, the Minister for Economic affais may oppose holdings exceeding 10 per cent of the capital, whether by an individual or a group of individual investors acting together. In Indonesia, Togo and New Zealend also, PSEs have been sold to foreign investors with the stipulation that a certain amount of shares be gradually floated to small shareholders through the stock exchange.[14]

Small and medium-sized PSEs in the competitive sectors can easily be sold through competitive biddings. The choice of sale techniques depends on the enterprise circumstances and government objectives. In larger

14. World Bank, *Privatization : The Lessons of Experience* (Washington, 1992).

enterprises and monopolies, however, restructuring-legal, organisational, and managerial changes, financial workouts and labour shedding, is a necessary prelude to sale.

Although outright sales have an advantage over non-ownership methods of privatization, such sales may not be financially or politically feasible in some countries and enterprise circumstances, and therefore alternative ways to improve PSE efficiency and productivity and bring in the private sector would need to be explored. One such way is the minority sales. Sales of minority shares can have positive efficiency effects provided managerial control is transferred to competitive investors and limitations placed on government's voting rights to curtail day-to-day interference. Some countries have started out by selling minority shares. In Chile, shares of large and 'sensitive' enterprises were sold gradually to investors until the State retained just over 5% per cent. This was followed by an offer of 2 or 3 per cent which left the Government in a minority position and the remaining shares were thus sold quickly. Minority sales are particularly beneficial when (i) Competition is introduced; (ii) Management is stranghthened; and (iii) Autonomy is ensured because the minority share offering is often a prelude to a major share offering at a later stage.

Even if the ownership of assets is not transferred, significant gains can be had by inducting private managers and allowing the PSE to operate like a private firm. To this end, management contracts, leases or concessions are particularly useful and can help facilitate later sale in activities where it is difficult to attract private investors and in low-income countries where capital markets and domestic private sectors are weak, and where an unfavourable policy framework makes private investors reluctant to take on the ownership of large assets in need of modernization (such as railways, water and power) and where capacity to regulate is poor.

In management contracts, the government pays a fee to a private company for managing the affairs of a PSE. Management contracts are quite common in hotels, airlines, and agriculture. Management contracts are usually less politically contentious than outright sales. They avoid the risk of asset concentration and can enhance productivity. The only negative feature about the management contracts is that the contractors do not assume risk; operating losses must be borne by the State even though it has relinquished day-to-day control of the operations. This risk can be reduced by a properly drawn up contract.

Leases overcome this drawback with the management contracts. In leases, the private party, which pays a fee to the government to use the assets, assumes the commercial risk of operation and maintenance and thus has greater incentives to reduce costs and maintain the long-term value of assets. The fee is usually linked to performance and revenues. Lease arrangements have largely been used in Africa, particularly in sectors where it is difficult to attract private investors. Examples include industries in Togo (Steel, oil refinery); water supply in Guinea and Ivory Coast; electricity in Ivory Coasts; road transport in Niger; port management in Nigeria; and mining operations in Guinea.[15]

Concessions go further than the leases. The holder is responsible for capital expenditures and investments (unlike a lessee). Concessions have been successfully used in the recent privatizations of telecommunications and railways in Argentina. Venezuela plans to grant private firms concessions to operate and finance investments in ports and water supply.[16]

Private management arragnements have their utility where immediate privatization is not chosen. They work best when they are a step toward full privatization. Its main drawback is that it does not bring the increased investment unless the ownership changes.

Legal Aspects

In any programme of privatization, four stages can be contemplated. The first stage is 'Partial privatization' which consists in the initial sale of shares of a PSE to the public at large including the workers. The initial divestment is generally limited at 20 to 25 per cent. The second stage consists in the sale of shares of a partially privatized PSE in which such divestment is limited to 49%. The third stage, which may be called 'effective privatization' consists in the sale of shares to the extent of giving away control of a PSE to the private companies. The last stage is "Total privatization" which means complete withdrawal of the State from the enterprise. In stages I and II, the State control relatively remains intact but in stages III and IV, it is either minoritised or completely eliminated.

For implementing stages I and II of privatization, which can be characterized as partial privatization, there is already in place in most of the countries of the region the requisite legal framework, although a few changes will be required in certain legislation and a few fresh legislations may have to be enacted to create the new autonomous bodies to be entrusted with the task of facilitating and overseeing the process of partial privatization. At present, the equity of PSEs is not quoted at stock exchanges and therefore arrangements will have to be made to determine the sale and purchase price

15 *Ibid*
16 *Ibid*

of their shares. For this appropriate changes and devices will have to be worked out in the companies and securities laws, Moreover, while embarking on a programme of progressive privatization, industrially sick units will have to be closed down which will result in massive retrenchment and unemployment of workers. Suitable amendments will have to be effected in the relevant industrial/labour laws to ease the cost of human adjustment.

For implementing stages III and IV of privatization, since the character of the PSE undergoes a transformation, considerable restructuring will be involved. Such restructuring will need a suitable legal framwork. This legal framework generally includes constitutional guarantees and/or a law creating and respecting property rights, in which the term 'property' is given the widest connotation; a law setting forth provisions for the transfer of property; a law regulating industrial development; a law relating to pollution prevention and environmental protection; a companies law; a contract law; an insolvency law ; a securities law ; a law of taxation on corporate incomes and dividends; an excise law (*ad valorum* and a value-added taxes); a competition law; and a set of industrial/labour laws regulating, *inter alia* the treatment of employees in privatized enterprises.

Constitutional guarantees and/or a law creating and respecting property rights is a prerequisite because clearly defined property rights are an essential precondition of privatization. The law regulating transfer of ownership of land and businesses is required because almost all businesses to be privatized will involve the transfer of, or the right of use, land from the State to the enterprises concerned. Such a law will provide whether companies with a certain percentage of foreign ownership can hold real property, and if so under what conditions. The law relating to industrial development will specify the sectors which are reserved to the public sector and those which are open to the private enterprise. The prevention of pollution law, apart from checking pollution, will fix the liabilities for pollution damage caused by industrial accidents. The company law will specify the forms of business organisations (joint stock companies, both public and private, partnerships etc.), confer separate legal personality on the business organizations and provide the extent of protection to investors from liabilities incurred by the business organisations in which they invest. The contract law is a *sine qua non* for commercial exchanges as it makes the contractual obligations binding on the parties to a contract. The insolvency law is necessary to deal with those businesses which fail to make a profit or are unable to continue to pay to their creditors. This will apply to private individuals as well as to businesses and will deal with the way in which outstanding creditors are paid from the pool of remaining assets. The securities law is required to

create the necessary lagal and regulatory framework within which the market for trading securities is established and made functional and to protect the interests of investors. Such a law will also lay down rules governing the operations of a stock exchange and the information that must be disclosed by companies to obtain a listing on the exchange. The tax law, apart from taxing corporate incomes and dividends, will provide fiscal incentives for the establishment of new industrial enterprises. The competition law, an essential precondition for privatization, is intended to promote a healthy competitive environment and to ensure that PSEs, once privatised do not maintain their monopolistic position. Side by side with the competition law, an independent *quasi* judicial body (such as the Monopolies and Restricted Trade Practices Commission in India) will have to be created to investigate and to implement the said legislation.

This body of laws may have to be complemented by a transformation law and a privatization law. The transformation law will be needed to facilitate the transfer of title to businesses from the State to the private sector. Such a law will provide that a PSE may be transformed either by the Government itself or by the management and/or workers with the permission of the Government. It might adopt either of the following two approaches : (i) The PSE may be transformed into a company, and once this has taken place the State will be the sole shareholder of the company and the shares may then be sold in the privatization process; and (ii) a new company will be formed and the government will contribute various assets together with the business as a going concern as its contribution to the capital. The remaining shares in the new enterprises may then be sold to raise finance for the running of the business.

A specific law on privatization will be necessary to empower the government to carry out the privatization programme. This is because under the consistitutions of many a State, a trade or industry can be nationalised by legislation and that too for a public purpose. From that it necessarily follows that a trade or industry can be privatised only by a specific enactment for that purpose and that such legislation must disclose the grounds on which public or community interest is better served by privatization. In France and Britain, it is the Government itself which takes the decision to sell off a PSE. In these countries, specific ministerial machinery has been set up with responsibility for privatization. In France, it is the Ministry for Economic Affairs, Finance and Privatization, and in Britain, it is the Public Enterprises Group which is part of the Treasury. Moreover, in both those countries parliamentary authorisation is needed for a sale of PSE. There is a law in France which lists companies to be privatised by name (Act No.

793 of 2 July 1986). In Britain, special Acts of Parliament have determined the establishments to be privatised.

Moreover, in the case of those countries whose Constitutions ordain the State to function as a welfare State and vest the ownership of all means of production and natural resources in the State, a constitutional amendment may be necessary specifically providing that privatization is justified in public interest only when it leads to greater productivity, efficiency and development.[17]

17 Upendra Baxi, "Constitutional Perspectives on Privatization", *Mainstream* (Indian), Jul. 6, 1991

Singapore

Answer to Question 1 :

The rationale for our privatisation programme is as follows :

(a) To withdraw from commercial activities which no longer need to be undertaken by the public sector;

(b) To add breadth and depth to the Singapore stock market by the floatation of government linked companies and statutory boards and through secondary distribution of government-owned shares; and

(c) To avoid or reduce competition with the private sector.

Answer to Question 2 :

The initial sale of shares of a subsidiary that has hitherto been wholly-owned by the Government is "Partial privatization". The sale of shares of partially privatised company is "further privatisation", sale to the extent of giving away control of a company is "effective privatisation" and complete withdrawal from a company is " Total privatisation".

Answer to Question 3 :

Please see answer to Question 1.

Answer to Question 4 :

The Government has shareholdings in a very diversified group of companies. Our policy is to privatise as many companies as possible.

Answer to Question 5 :

Companies which are privatised through public floatation must satisfy the listing requirements laid down by the Stock Exchange of Singapore. Please see attachment.

Answer to Question 6 :

We do not restrict ourselves to any one particular method, as we have to look at the situations and circumstances of each case of privatisation. We have not encountered any major legal problems so far.

Answer to Question 7 : No.

Part–I
Original Listing Requirement

A. CRITERIA FOR ORIGINAL LISTING

101 General

The approval of an application for the listing of securities on the Stock Exchange of Singapore Limited is a matter solely within the discretion of the Exchange.

The Exchange has established certain numerical standards, set out below, which will be considered in evaluating potential listing applicants. Aside from the numerical standards set out below, there are of course, other factors which must necessarily be taken into consideration in determining whether a company qualifies for listing. A company must be a going concern or be the successor of a going concern. While the amount of assets and earnings and the aggregate market value are considerations, greater emphasis is placed on such questions as the degree of national interest in the Company, the character of the market for its products, its relative stability and position in its industry, and whether or not it is engaged in an expanding industry with prospects of and/or maintaining its position.

102 Orodinary Shares

Companies applying for quotation of ordinary shares are, as a general rule, expected to meet the following criteria:-

(1) It has a paid-up capital of at least $ 4,000,000.

(2) At least $ 1,500,000 or 25 per cent of the issued and paid-up capital (whichever is greater) is in the hands of not less than 500 shareholders.

(3) A minimum percentage of the issued and paid-up capital is in the hands of shareholders each holding not less than 500 shares and not more than 10,000 shares:-

Nominal value of issued and paid-up capital	*Minimum percentage*
less than $ 50 million	20%
$ 50 million and above and less than $ 100 million	15% or $ 10 million whichever is greater
$100 million and above	10% or $15 million whichever is greater

In complying with this distribution, the following are to be excluded :-

(a) Holdings by parent, or companies deemed to be related by virtue of Section 6 of the Companies Act.

(b) Holdings by directors (including those of persons designated directors under the companies Act).

(4) Except in very exceptional circumstances, the Exchange will refuse a quotation to partly paid shares and even, should such a quotation be granted to such partly paid shares, the Exchange may impose such restrictions on the dealings in such shares.

103 Bonds, Debentrues and Loan Stock

A Limited Liability Company seeking official quotation of Loan Securities may be considered for admission to the official List if:-

(1) It has at least $750,000 of issued loan securities of the class to be quoted;

(2) There are at least 100 holders of such securities;

(3) The securities are created and issued pursuant to a Trust Deed, which must comply with the Trust Deed requirements of the Exchange as set out in Part X, the trustee of which is:-

(a) A Company authorised by the law of Singapore to take in its own name a grant of Probate or Letters of Administration of the estate of a deceased person;

(b) A Company registered under any law of Singapore relating to Life Insurance;

(c) A banking company;

(d) A Company of which the whole of the issued shares are beneficially owned by one or more companies referred to in (a), (b) and (c) above;

(e) A Company approved for this purpose by the Government of Singapore as trustee for the holders of such securities.

104 Securities of Foreign Companies

The requirements for submission to the official List of foreign companies shall be prescribed by the Exchange from time to time and such requirements shall be published as " Guidelines for the listing of foreign companies".

105 Exploration and Development Companies

An application for listing form a Company whose current activities

consist solely of exploration will not normally be considered, unless the company is able to establish:-

(1) The existence of adequate reserves of natural resources which must be substantiated by the opinion of an expert in a defined area over which the company has exploration and exploitation rights and

(2) An estimate of the capital cost of bringing the company into a productive position, and

(3) An estimate of the time and working capital required to bring the company into a position to earn revenue.

106 Property Investment/Property Development Companies

The Exchange generally will not list a property Company unless a valuation of the freehold and leasehold property of the company or the Group (such as the case may be) has been conducted by an independent professional valuer on a date which should be not more than six months from the date of the company's application to the Exchange for quotation.

107 Special type of companies

(1) Companies with good prospects for growth and are in need of raising capital may be considered for listing notwithstanding that they have yet to establish any track record or otherwise unable to comply with any of the listing requirements of the Exchange. The Exchange will take into consideration all pertinent factors, particularly with regard to the quality and expertise of the management and/or board of directors of the companies.

(2) If, in the opinion of the Exchange, a company seeking admission to the Official List is engaged in a business or activity which is peculiar to a particular trade and for which the requirements of the Exchange may not be totally applicable, the Continuing Listing Requirements of the Exchange in general and the Directorate Requirements in particular may be amended to bring the requirements more in line with the nature or acitvity of the company.

B. POLICIES

111 Conflicts of Interest

The existence of material conflicts of interest between companies and their officers, directors or substantial shareholders (or members of their

families or concerns controlled by them) will be reviewed by the Exchange on an individual basis in considering the eligibility of companies for original listing. In many cases, companies may be able to eliminate conflicts situation prior to listing within a reasonable period after the listing and may be asked to do so. Where a conflict cannot be resolved promptly for some business reasons, the Exchange will consider all pertinent factors.

The most common types of conflict situation to which this policy applies include personal interests of officers, directores or principal shareholders in any business, arrangements involving the Company, such as the leasing of property to or from the Company, interests in subsidiaries, interests in business that are competitors, supplies or customers of the company, loans to or from the compnay etc.

In considering the eligibility of Companies applying for original listing under its conflicts of interest policy, the Exchange considers, among other factors:-

(1) persons involved in conflict and relationship to the company;

(2) significance of conflict in relationship to the size and operations of the company;

(3) any special advantage for management involved in the colflict;

(4) Whether the conflict can be terminated and if so, how soon and on what basis, and, if the conflict cannot be promptly terminated, whether:-

  (a) the arragement is necessary or beneficial to the operations of the company;

  (b) the terms of the arrangement are the same or better than those that can be obtained from unaffiliated concerns;

  (c) the arrangement has been approved by independent directors or shareholders;

  (d) the arrangement has been adequately disclosed to shareholders through prospectus, proxy, statements or any reports.

In some cases, the Exchange will require a Company to enter into a special arrangement with the Exchange, designed to reduce the possibility of a conflict situation that could not be terminated immediately.

112 Memorandum and Articles of Association

Companies seeking admisison to the Official List of the Exchange are required to incorporate into their Memorandum and Articles of Association various provisions which are set out in Part IX of this Manual.

C. ADDITIONAL REQUIREMENTS

121 Original Listing Application

Companies seeking admissions to the Official List must submit an application for original listing in accordance with Part II of this Manual. Application for original listing is designed to serve the purpose of placing before the Exchange the information essential to its determination as to the suitability of the securities for public trading on the Exchange.

122 Propectus

All Companies seeking admission to the official List of the Exchange, whether through a public lissue, offer for sale or an Introduction must issue a prospectus which must, in addition to complying with the prospectus requirements of the Companies Act, comply with the prospectus requirements of the Exchange as set out in Part VII.

123 Additional Listings

Following listing, Companies and their registrars are not permitted to issue any securities in excess of those authorised for listing until the Exchange has approved an additional listing covering the additional securities as described in Part IV.

124 Listing Undertaking

Companies applying for listing on the Exchange are required to enter into an Undertaking with the Exchange to comply with all the listing requirements and policies of the Exchange. (see Appendix I).

125 Allotment of shares reserved for employee etc.

Companies seeking admission to the Official List may be permitted by the Exchange to reserve up to 10% of the offered shares for allotment to their employees, executive directors, customers, suppliers etc, provided that the companies lodge with the Exchange a statement giving number of shares to be allotted to the following categories of persons and the basis of allotment:-

(a) employees;
(b) executive directors;
(c) customers;
(d) suppliers; and
(e) others (state relationship with issuer).

Thailand

Reply to the Asian-African Legal Consultative Committee's Questionaire

1. What have been the social, economic and political factors which have led your Government to go in for privatization ?
   - Economy is the main factor which has led the Thai Government to adopt the policy of privatizaiton. Thailand's high rate of economic expansion has led to the problem of the lack of basic infrastructure and the consequential bottle-neck problems. In order to support the country's rapid economic expansion, it is, therefore, necessary for the Thai State enterprises to expand their services in co-operation with the private sector.
2. How is the term 'privatization' defined in your country ?
   - In Thailand. the term 'privatization' connotes the increase in the private sector's role in the management of State enterprises.
3. What aims has your country set for privatization ?
   - The objectives set by Thailand in the case of privatization are as follows:
   1. to maintain Thailand's financial stability by reducing foreign loans;
   2. to reduce the burden of government subsidies;
   3. to improve the efficiency in the management of state enterprises; and
   4. to mobilize the private sector to use more of their savings to invest in State enterprises by means of increasing the potential of the domestic capital market.
4. What is the precise sphere of privatization (sectors and industries) ?
   - The sphere of privatization mainly covers the following infrastructure:
   1. transportation;
   2. communication; and
   3. energy.
5. What are the economic, financial, fiscal and legal preconditions for privatization in your country ?
   - The preconditions for privatization in Thailand are as follows :
   1. A clear plan of action;

2. Legal preparation including amendment of the existing legislation which impedes privatization, and enactment of new legislation to facilitate privatization;
3. Public relations compaigns with a view to making the objectives of privatization clear and acceptable to the public; and
4. Development of capital market to support privatization.

6. The patterns/procedures for privatization applied in Thailand appear to be as follows:

i) *Private sale of shares* was introduced in the case of the Chonburi Sugar Industry Co. Ltd., whereby all of its shares were sold to the private sector;

ii) *Public offering of shares* was introduced in the case of the North East Jute Mill Co. Ltd., whereby its shares were sold in the stock Exchange in Thailand;

iii) *New private investments* were introduced in the case of the Thai Airways International Co. Ltd., whereby its capital was increased and its shares will be listed in the Stock Exchange of Thailand;

iv) *Joint venture* as in the case of the NARAYANA Phand Co. Ltd., and the Erawan Hotel, of which the Government is now a minority shareholder;

v) *Concessions* as in the cases of the Bangkok Mass Transit Authority and the Transport Company Limited whereby part of their bus routes were conceded to the private sector (a similar method is used in the case of the second phase of the Express Ways Project); and

vi) *Liquidation* as in the case of the Jute Mill of Ministry of Finance.

- Legal problems concerning privatization arise when some State enterprises want to sell their shares to the public. Since these State enterprises were not established in the form of limited companies, they, therefore, have no share capital. However legislation allowing the division of the capital of these State enterprises into shares to being contemplated.
- In some cases, investment and competition by the private sector have not yet been possible since certain existing legislation, such as the laws on telegraphic and telephone services still prohibit the private sector from providing such services.
- So far, Thailand has not enacted any legislation specifically to protect the interests of either the State or the private sector in case of privatization.

7. Has your Government set up a statutory body to supervise privatization process ? If so, what is its role, rights and obligations.

- At present two government agencies have been assigned to look after and supervise privatization process. The Office of the National Economic and Social Development Board is responsible for policy matters, while the Ministry of Finance looks after the actual implementation of the privatization schemes.

ANNEX-III

Kuwait

1. What have been the social, economic and political factors which have led your Government to go in for privatization ?
   - Reduce dependence on Government.
   - Develop the domestic capital market.
   - Improve the efficiency and performance of services and activities.
   - Promote wider share ownership among the public services.
   - Rationalize the utilization of public service.

2. How the term privatization is defined in your country ?
   - Transferring most of activities and services provided by Government and public sector to private sector with a view to develop, upgrade and enhance the effifiency of services provided to the consumer.

3. What are the aims your country has set for privatization ?
   - Decrease migration of capital and stimulated resource of Mobilization.
   - Improve the performance of national economy.
   - Ensure the continued involvement and development of private sector.

4. What are the economic, financial, fiscal and legal preconditions for privatization in your country ?
   - Privatization is still in very early stages by our country, the process is still under study by local and international institutions, therefore such preconditions are not defined yet.

5. What is the precise sphere of privatization (sector and industries) ?
   - Not defined yet.

6. Those details are still understudy.

7. Whether your Government has set up a statutory body to supervise privatization process ? If so, what is its role, rights and obligations.
   - The Government has still not set up a statutory body to supervise privatization process.

ANNEX-IV

Turkey

1. What have been the social, economic and political factors which have led your Government to go in for privatization ?

   1. The privatization programme,which is being implemented by the Prime Minister, Public Participation Administration (PPA) at present was initiated in 1984 as an integral part of the liberal economic policies of the last decade. Making the economy more responsive to the market forces was the main goal of these policies. The role of the government in the economy was decided to be confined to the areas where private sector could not and would not enter due to the considerations of profitability, scale and nature of public services such as defence, health, education and infrastructure. It was also emphasized that the major objective would be the governance of the economy by market mechanisms. Within this perspective the SEE's and their subsidiaries and equity participations were decided to be privatised by opening them to domestic and foreign capital.

2. How the term "privatization" is defined in your country ?

   2. The privatization, as it is implemented in Turkey by the Public Participation Administration is understood to be transfer of state ownership in State Economic Enterprises (SEE's) their subsidiaries and equity participations through sale to the private sector. The sale methods include block sale of shares to domestic and private investors, and public offering of shares on the domestic stock market. Also, one divisional unit's management rights have been transferred to the private sector.

3. What aims has your country set for privatization ?

   3. Until now, 8 SEE's 28 subsidiaries, 4 banks and the state shares in 71 participations have been transferred to the PPA for privatization. In addition to these, 27 incomplete and non-operating units of various SEE's were also turned over to the PPA for privatization. 25 privatized companies are currently being traded on the Istanbul Stock Exchange.

      Since 1986, 27 companies were fully privatized, whereas 23 firms were privatised partially. The state shares are less then 1% in 7 of these 23 firms.

      The total revenue generated since the initiation of the programme

amounts to, appoximately, US $980 million as of May 26, 1992, of which US $951.7 million has been raised through privatizations realized between 1989 and May, 1992.

With PETKIM, SUMERBANK, THY, POAS and TUPRAS, which were all former SEE's and affiliates previously operating under Decree 233, the preliminary work has encompassed preparation of new articles of association in compliance with the Commercial Code and the abolishment of Advisory Boards. By the initial public offerings (with the exception of SUMERBANK) these companies acquired the status of Joint Stock Companies and were put under the supervision of the Capital Market Board.

Under the privatization programme, which is being implemented since 1986, 19 companies were privatized through public offerings, 28 companies through block sales and, 3 companies through a combination of both methods.

During the same period 18 incomplete and non-operating units were sold and the management rights of an entity was transferred.

The shares of PPA in 25 companies are being traded on the Istanbul Stock Exchange. 22 of these were publiclty offered previously within the frame of the programme. The market capitalization of the remaining shares in the PPA portfolio of companies equals to TL 13, 765 billion ($ 2 712 million) as of December 31, 1991.

The privatization proceeds in 1991 amount to approx. TL 798 billion ($ 223 million) and the planned revenue for 1992 is TL 5.5 trillion ($ 869 million). As the Turkish stock market is rather new and developing the PPA is careful not to oversupply the market with the privatization issues in order to leave room for private floatation as well.

The preparations for the public and global offerings and block sales to foreign and domestic investors of shares in companies under the privatization programme, like ERDEMIR and Cukurova Elektirk A. S., within 1992, are in progress (ADR and IDR offerings may also be considered). Discussions for formation of joint ventures that will result from spin-offs or asset sales in companies like PETKIM, the petrochemicals complex, is also under consideration.

Total expected revenue from 1992 privatization activities is projected as US $868.6 million (TL 5.5 trillion), 15% of the amount is likely to come in the form of dividend yields and

85% in the form of state share sale proceeds.

Within next five years, PPA projects to earn US $10 billion from privatization activities.

4. What is the precise sphere of privatization (sectors and industries)?

4. The following sectors of activity are included in the privatization program :

- Cement
- Petroleum and Petrochemical
- Iron and Steel
- Electric and Electronic
- Banking and Insrurance
- Agriculture, Forestry and Livestock
- Animal Feeds
- Food
- Transport and Services
- Automotive

5. What are the economic, financial, fiscal and legal preconditions for privatization in your country ?

5. The procedures, authority and responsibilities concerning the privatization process are set forward by Laws 2983 and 3291. Law 2983 has been modified and lately Public Participation High Council (PPHC) was founded on January 6, 1992, by Law Empowered Decree 473 as the decision-making body of PPA. PPHC is comprised of Minister of State and Deputy Prime Minister, Minister of State, Minister of Public Works and Housing, Undersecretary of State Planning Organisation, Undersecretary of Treasury and Foreign Trade, Chariman of Public Participation Administration and chaired by Mr. Suleyman Demirel, the Prime Minsiter.

A Privatization Master Plan has been prepared by the PPA in the light of the knowledge accumulated through the application of the global privatization policy and the individual company studies prepared by internationally accredited domestic and foreign investment bankers. Within this framework the necessary legal and financial measures to be taken for the acceleration of the privatisation programme has been defined and a sale agenda for the companies under the privatization programme has been prepared. State Economic Enterprises were further classified according to the related privatization strategies. The steps that should be followed in the privatization of state monopolies are

aslo included within the Master Plan, the related regulation plan and the legal propositions have been prepared by the PPA.

6. The basic methods and procedures for privatisation appear to be as follows :

- Private sale of shares,
- Public offering of shares,
- Management/Employees Buy-out,
- Sale of assets,
- Restructuring,
- New private investments
- Leases and Management Contracts,

6. In February 1988, the first public offering example was realized by the sale of 22% of the shares in TELETAS, the 40% state-owned telecommunications company. During the TELETAS sale 19 underwriters and 30 dealers were employed. The shares were offered to the public through 4,822 bank branches across Turkey and 42.000 people purchased the shares during the offering.

The second important case in the privatization programme was the block sale of the 88.3% state-owned shares in ANSAN to a subsidiary of Coca Cola on November 18, 1988. The purchaser is to offer to the public 15% of the shares by the end of the fifth year following the sale.

70% of USAS, Airport Catering Services, Company shares were sold in block to SAS Service Partners (SSP) in August 1989. PPA retained 30% of the shares which are to be offered to the public at a later date. The buyer, SSP has also undertaken to invest US $ 8.5 million to Turkish airports for catering services within five years following the sale.

The five cement factories of CITOSAN were sold to a French group, Ciments Francais, in October 1989. All of the state-owned shares in the Ankara, Balikesir, Soke and Trakya cement companies and 51% of the state-owned shares in Afyon Cimento Sanayii were sold. Simonts Francais has undertaken to offer to the public at least 40% of the total shares of these companies within five years following the sale and, at the same time to invest a minimum amount of US $ 60 million capital in the companies.

USAS and CITOSAN sales were challenged in administrative courts and two decisions have been issued to cancel the sales. Both the Prime Minister and the PPA have appealed the decisions to the Council of State requesting withdrawal. The Government has pronounced its willingness to continue the privatization programme at an increased pace and to remove all the related legal obstacles in due course.

The six out of the eight equity participations which are quoted in the Istanbul Stock Exchange namely Eregli Demir ve Celik Fabrikalari T.A.S. (ERDEMIR), largest flat steel producer in the country, Cukurova Elektrik A.S. and Kepez Elektrik A.S. (two electric utilities), Arcelik A.S. (electrical appliances producer), Bolu Cimento Sanayii A.S. (cement) and Celik Halat ve Tel Sanayii A.S. (steel cable manufacturer) shares were offered to public across Turkey through the branches of a major Turkish Bank, in April 1990. By these three groups of public offerings, widespread share ownership throughout the country has gained an important momentum.

78% of PETKIM shares was privatized by a public offering, which included an employee share ownership scheme held in June 1990. In this first example of SEE privatization in Turkey 75, 933 applications were made and sales proceeds of 384 billion TL's was obtained.

Between October, 1990 and June, 1991 shares in 6 cement factories (namely Konya, Unye, Mardin, Adana, Afyon, Nigdc), 2 chain stores (Migros and GIMA), a major automobile manufacturer and its marketing company (TOFAS, Turk and TOFAS Oto), Turkish Airlines, Turkish Petroleum Refineries (TUPRAS), a petroleum products distributor (Petrol Ofisi) and spare parts manufacturor (DITAS) were offered to the public.

60% of the state shares in Adana Kagit Torba Sanayi T.A.S. were sold to the CITOSAN Employee Pension Fund in March, 1991, 38% state shares in TURKKABLO A.O. were sold to its core investor Nokia and Finn Fund in April 1991, and 30% of state shares in Gunes Sigorta A.S. (insurance company) was sold to a French Company GAN International in June 1991.

During January-July 1992, state shares in CAYBANK, TAT KONSERVE, IPRAGAZ, CAMSAN, NIGDE, CIMENTO, RAY SIGORTA, POLINAS, GUNEYSU, SEKER SIGORTA, MEYSU were sold in block, generating a revenue of approximately TL 687.5 billion ($ 199.2 million), of which TL 350 million ($ 65 million) resulted from the Ipragaz sale.

7. Whether your Government has set up a statutory body to supervise

privatization process ? If so, what is its role, rights and obligations.

7. The Prime Minister, Housing Development and Public Participation Administration (HDPPA) was founded in February, 1984, the objectives of which could be summarized as financing mass housing projects, implementing the privatization programme together with the financing of major infrastructure projects such as highways and dams. The Administration was split into two separate bodies, namely, Public Praticipation Administration and Housing Development Administration in April 1990. Now the PPA is vested with the authority of conducting the privatization programme, managing the Public Participation Fund and financing major infrastructure projects. The Administration currently employs 170 people, the majority of which is working at the main Ankara quarters, and has an office in Istanbul.

   The sources of the Public Participation Fund (PPF) are comprised of a certain share of the fuel consumption tax; toll revenues generated by bridges and highways operating renvenues coming from the generation of electricity from dams financed by the PPA, drinking water facilities, free trade zones, funds generated by privatization and, revenue sharing notes issued and are infrastructure financing, financing of projects in those regions with a priority in development, privatization expenses, capital requirements of firms under the privatization programmes, revenue sharing notes, principal and interest payments, various expenses related with those infrastructure projects financed by PPF and, the servicing of foreign loans obtained.

   Currently a total of 1,426 kilometers long highways is expected to be completed by the end of 1994, are being financed by the PPF. Of this, 225 km has been completed and is presently in operation. As of the end of 1991 us Dollars 6,131 million has been transferred to highway construction from the Fund. The necessary financing for the completion of the undertaken highway construction is planned to be approximately US $ 4 million. PPF also provided financing for 21 dams, of which 13 have been completed and are operational. The total financing provided from the Fund for the dams amounts to US Dollar, 1,723 million as at the end of 1991. Also 14 major drinking water projects are being financed together with Mersin and Antalya Free Trade Xones for which a total of US $ 151 million has been spent by the PPA so far.